

Essay

WHAT IS REALLY WRONG WITH COMPELLED ASSOCIATION?

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I. INTRODUCTION

*Roberts v. United States Jaycees*¹ held that it was constitutionally permissible for Minnesota to require the Jaycees, as a public accommodation, to desegregate and to admit women. Sixteen years later, *Boy Scouts of America v. Dale*² held that it was constitutionally impermissible for New Jersey to require the Boy Scouts, as a public accommodation, to remain partly desegregated and to retain an openly gay Scoutmaster. It is no sur-

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¹ 468 U.S. 609 (1984).

² 530 U.S. 640 (2000).

prise that *Dale* caused gnashing of teeth by those who applauded *Roberts v. Jaycees*: the Court's commitment to integration seemed all too limited. Women counted; gays and lesbians did not. This analysis may be a partly accurate diagnosis of *Dale*'s resolution, but it does not fully capture what is troubling about *Dale*. From a First Amendment perspective, both *Jaycees* and *Dale* should have occasioned even greater dental damage.

Those who support *Roberts v. Jaycees*, especially liberals, should have been disturbed by *Dale*, not entirely because of its outcome, but because the reasoning of *Dale* and the debate between the justices was foreshadowed by Justice Brennan's majority opinion in *Jaycees*. The opinions in *Dale*, and in particular the dissenting opinions of the liberal justices, follow the lead of Justice Brennan. In so doing, they reflect and forward a message-centered view of freedom of association that, while familiar, is importantly and unpalatably incomplete.

In this Essay, I will argue that *Jaycees* was correctly decided but that Justice Brennan's majority opinion reflects and has reinforced a message-centered approach to freedom of association that denigrates its value and implicitly distorts and underplays its intimate connection to freedom of speech. A parallel mistake occurs in a common articulation of the objection to certain forms of compelled speech. Drawing upon a core, but underemphasized, aspect of liberalism, I will re-fashion the case against compelled speech in a way that concomitantly provides a stronger foundation for freedom of association. Specifically, the fundamental wrong of compelled speech in cases such as *West Virginia State Board of Education v. Barnette*,³ which found the compulsory recitation of the Pledge of Allegiance unconstitutional, does not depend on any external effect, in particular on outsiders possibly misunderstanding a person's compelled speech as his own. It has more to do with the illicit influence compelled speech may have on the character and autonomous thinking process of the compelled speaker, and with illicit and disrespectful governmental efforts, however fruitless, to exert such influence.⁴

Similarly, the wrong of compelled association is not fully captured by analyses that concentrate upon the risk that outsiders will misunderstand the association's message or that the association's message will somehow become garbled and less intelligible either to outsiders or insiders. Associations have an intimate connection to freedom of speech values not solely because they can be mechanisms for message dissemination or sites for the pursuit of shared aims. Associations have an intimate connection to freedom of speech values in large part because they are special sites for the

³ 319 U.S. 624 (1943).

⁴ The approach I take is a hybrid one, looking either at the risk of such illicit influence occurring or at a governmental purpose to bring about such effects. I defend the need for a hybrid approach that is sensitive to consequences as well as to governmental purpose in *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1168–71 & *passim* (2003).

generation and germination of thoughts and ideas. As with compelled speech, our concern should be turned inward onto the internal thinking process of group members, rather than predominantly on whether there is confusion in the transmission of a group's message.

I aim to provide a philosophical argument to provide a stronger free speech foundation for a robust right to freedom of social and expressive association (including the freedom to exclude unwanted members) than that provided by standard message-based accounts such as Justice Brennan's. The philosophical account I articulate also motivates the more functional approach suggested by Justice O'Connor in her concurrence in *Jaycees*. But my advocacy of strong freedom of association rights does not settle the question of whether *Dale* in particular was correctly decided. In the final section of the Essay, I advance a second claim about *Dale*, namely that the most interesting questions about the case were not addressed. What ought to have been mooted in *Dale* was not the issue of whether the group's retention of Dale, a gay Boy Scout leader, would distort its message, but instead whether an association primarily of children and for children should enjoy the same form of freedom of association as is properly afforded to groups of adults.

II. RETHINKING THE DISVALUE OF COMPELLED ASSOCIATION

A. *The Narrow Model of the Free Speech Value of Associations*

1. *Dale and Jaycees*.—To start: what's wrong, on the surface, with the reasoning in *Dale*? *Boy Scouts v. Dale* considered a First Amendment challenge against the application of a New Jersey public accommodations law to block the expulsion of a gay troop leader from the Boy Scouts. By a five-to-four majority, the Court found that the compelled retention of Dale violated the Boy Scouts' First Amendment rights of association. The main issues dividing the majority and the dissent were first, whether the compelled retention of Dale would alter the message of the Boy Scouts, and second, whether the Boy Scouts really did have a message that rejected homosexuality.

The Court's framing of the issues grew straight out of Justice Brennan's opinion in *Roberts v. Jaycees*.⁵ *Jaycees* involved a First Amendment challenge by the Jaycees against the application of a Minnesota public accommodations law to require the admission of women into the decidedly all-male Jaycees. The Court unanimously rejected the Jaycees' challenge (although two members of the Court did not participate). Justice Brennan wrote the majority opinion, Justice O'Connor wrote a solitary concurrence,⁶ and Justice Rehnquist concurred in judgment only. Justice Brennan began

⁵ 468 U.S. 609 (1984).

⁶ See *infra* Part II.C (discussing O'Connor's concurrence).

his analysis by distinguishing between intimate association rights that are protected “as a fundamental element of personal liberty” and those association rights protected by the First Amendment. The latter garner constitutional protection not as a fundamental element of liberty but “as a . . . means” of preserving other liberties.⁷ While he acknowledged overlap between the categories and a spectrum between the extremes, Justice Brennan located the boundary between intrinsically valuable associations and instrumentally valuable associations as that between intimate and expressive associations.⁸ Intimate associations, such as the family, friendships, and other close personal relationships, are sites for the formation and transfer of culture and the emotional attachments that are crucial to one’s identity.⁹ On the other hand, expressive associations serve as venues for the pursuit of shared social, political, cultural, and religious ends and provide effective and safe means for voicing shared views.¹⁰ As Justice Brennan articulated it, the right of expressive association derives from the “individual’s freedom to speak, to worship, and to petition” for redress;¹¹ specifically, the right of association facilitates activities that enhance the effectiveness of the individual’s First Amendment rights and that provide a protective buffer against potential state efforts at suppression.

Justice Brennan characterized the boundary between intimate and expressive associations in terms of the properties of intimate associations—their small size, selectivity, and seclusion. The Jaycees did not have these features, being a large, national, decentralized, and “basically unselective”¹² group that excluded only on the bases of age and sex.¹³ Hence, the Jaycees did not qualify for the substantive due process protections afforded intimate (and in Justice Brennan’s view, intrinsically valuable) associations.

The question, therefore, was whether the compelled inclusion of women infringed the Jaycees’ instrumentally valuable freedom of expressive association. If so, then a regulation compelling inclusion would only be permissible if the infringement served a compelling state interest unrelated to the suppression of ideas and if that interest could not be achieved through significantly less restrictive means.¹⁴

Justice Brennan assessed whether a burden on expressive association was imposed by looking to whether the regulation directly affected the association’s ability to engage in outward endeavors, such as civic or charita-

⁷ *Jaycees*, 468 U.S. at 617.

⁸ *Id.* at 618, 620. The notion of a “right to intimate association” as such was first introduced and developed in Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

⁹ *Jaycees*, 468 U.S. at 618–19.

¹⁰ *Id.* at 622.

¹¹ *Id.*

¹² *Id.* at 621.

¹³ *Id.* at 620–21.

¹⁴ *Id.* at 623.

ble lobbying and fundraising activities or “to disseminate its preferred views.”¹⁵ The regulation at issue in *Jaycees*, Justice Brennan reasoned, advanced the interest of equality “through the least restrictive means,” for no demonstration was made that the inclusion of women “impose[d] any serious burdens on the male members’ freedom of expressive association.”¹⁶ Minnesota’s purpose was not to suppress ideas “or to hamper the organization’s ability to express its views,” but to eliminate discrimination.¹⁷ The Court concluded that the regulation would not require the Jaycees to alter their creed to promote men’s interests nor would it prevent their adopting selection criteria that excluded people with views adverse to their own.

The structure of Justice Brennan’s analysis was ambiguous, and perhaps deliberately so. On the one hand, he seemed to *apply* the test for permissible infringement and to find that it was met: Minnesota’s interest was compelling and non-suppressive in purpose. Further, the regulation was not unnecessarily restrictive of the relevant associational interests because it did not disrupt the outward expressive activities of the group or prevent the group from excluding those whose views conflicted with the association’s message.¹⁸ On the other hand, Justice Brennan seemed also to suggest that the test did not apply in the first place because the regulation did not require any change in message and thus did not seriously burden the Jaycees’ associational interests.¹⁹ While Justice Brennan did articulate the view that the regulation would stand even if there were “some incidental abridgement” of the Jaycees’ speech interest,²⁰ the emphasis of the opinion was on the innocuousness of the regulation with respect to the instrumental constitutional associational interest. Justice Brennan left unclear whether this sort of regulation is permissible only if the intrusion does not amount to a serious burden, but rather poses “some incidental abridgement”; whether he adopted the much stronger view that “acts of invidious discrimination . . . are entitled to no constitutional protection” at all, so long as their regulation is not unnecessarily restrictive of speech interests; or whether he favored some intermediate approach that balances the degree and seriousness of the

¹⁵ *Id.* at 627.

¹⁶ *Id.* at 626.

¹⁷ While the aim to eliminate discrimination is not directly an effort to suppress ideas or expression, there is an important non-accidental connection between regulating association membership and efforts to influence the thoughts and ideas of the membership. See *infra* Part II.B.2.

¹⁸ See also *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1 (1988) (holding that New York’s anti-discrimination law, as applied to clubs, would not infringe associational interests because it would not significantly affect associations’ ability to engage in viewpoint advocacy); *Bd. of Directors v. Rotary Club*, 481 U.S. 537, 549 (1987) (finding the admission of women into the Rotary Club would not affect the group’s ability to carry out its purposes or change its values).

¹⁹ *Jaycees*, 468 U.S. at 626–28.

²⁰ *Id.* at 628.

intrusion on association against the seriousness of the interest at stake and the extent to which it is advanced.²¹

Justice Rehnquist's majority opinion in *Dale* did not attempt to disentangle this ambiguity. It gave lip service to the idea that upon finding a serious burden on expressive association, the test would be whether the regulation advanced a compelling state interest in a manner no more restrictive than necessary.²² But at another point, the opinion described a more fluid, balancing interpretation.²³ And at yet other points (and arguably in practice), the opinion seemed to take the position that a serious burden on expressive association was per se constitutionally deadly, and that *Jaycees* and its peers depended on the putatively only minor burden on expressive association that those regulations imposed.²⁴ It is thus difficult to know exactly what criteria the Court was applying. In a single sentence, it declared without argument that New Jersey's state interest in preventing discrimination on the basis of sexual orientation was not strong enough to justify "a severe intrusion" on the Boy Scouts' association rights.²⁵ The bulk of the

²¹ *Id.*

²² *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

²³ *Id.* at 658.

²⁴ *Id.* at 657.

²⁵ *Id.* at 659. Through its summary declaration, the Court bypassed interesting questions about what constitutes a sufficient state interest, specifically whether the "state" in "state interest" refers generically to an interest all government entities do or could share, or whether it refers, abstractly or concretely, to the interest of the particular governmental entity on whose behalf it is being asserted. These questions intersect with issues concerning federalism: whether "state" is interpreted generically or permits parochial application may impact the degree of freedom states enjoy to experiment and pursue distinctive modes of regulation. One lurking issue was whether states may declare certain goals to be state interests, even compelling interests, when the federal government and federal courts declined to find such interests themselves. At the time, the federal government and the federal courts had taken an equivocal view on discrimination against gay people as exemplified by the tension between *Bowers v. Hardwick*, 478 U.S. 186, 219 (1986), the Defense of Marriage Act, 28 U.S.C. § 1738 (2000), the "Don't Ask, Don't Tell" policy, 10 U.S.C. § 654 (2000), and *Romer v. Evans*, 517 U.S. 620, 635 (1996). The federal equivocation remains. Compare President George W. Bush's endorsement of an amendment banning same-sex marriage, on the one hand, with *Lawrence v. Texas*, 539 U.S. 558 (2003), on the other.

I do not mean to suggest that New Jersey did not have the power to declare that preventing discrimination on the basis of sexual orientation is a compelling state interest. Rather, I call attention to the difficult issues connected to a test that renders the contours of a federal constitutional right subject to determination, in part, by the declaration of a state that it has a particular goal that it regards as compelling but that is not necessarily shared by the federal government. This problem did not arise in *Jaycees* because Minnesota's declared interest in preventing sex discrimination was officially shared by the federal government. But it is an issue that lurks in cases with both constitutional and local dimensions. For example, the current obscenity standard identifies a boundary of First Amendment protection by reference to what can be geographically local community standards. *Miller v. California*, 413 U.S. 1524 (1973); see also *Ashcroft v. ACLU*, 535 U.S. 564, 573–76 (2002). Family law cases that engage substantive due process values may also involve the interplay of non-federal state interests and constitutional values. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989).

The contours of being a state interest, much less a compelling one, merit further exploration. Similar difficulties may arise in cases involving the various interests in controlling or preventing the ability to

opinion defended the view that the regulation would infringe the association rights of the Boy Scouts by potentially clouding or undermining the Boy Scouts' asserted anti-gay message. This issue captured the attention of the dissent as well. The two camps traded arguments about whether the Boy Scouts indeed had a publicly promulgated message that was critical of homosexuality and whether the ability to exclude openly gay people was necessary to maintain that message.

2. *The Flaws of a Message-Based Approach.*—Although the question of which test applies is intriguing, I do not wish to dwell on it. Rather, I focus on an underlying notion that all the various interpretations share: whether a regulation seriously burdens association rights depends upon whether it interferes with the *message* promulgated by the association. This conception, derived from *Jaycees*, launched the dispute between the *Dale* majority and dissent about how strong the Boy Scouts' opposition to homosexuality need be for the Boy Scouts to be taken to have a message critical of homosexuality. This sort of dispute is destructive to both free speech aims and progressive aims. The flaw may be traced to a problematic and narrow conception of the connection between freedom of association and freedom of speech.

I begin with reservations about the more extreme pole on the divide: the dissent's position in *Dale* contained in the opinions by Justices Stevens and Souter.²⁶ The dissent took the view that the Boy Scouts did not have a clear message that rejected homosexuality, and, therefore, the application of the New Jersey accommodations law to the Boy Scouts would not threaten their expressive association interests. The mission statement of the Boy Scouts extols its "representative membership" and its inclusionary policies.²⁷ As the majority and the Boy Scouts noted, the Scout Oath and Scout Law do stress moral straightness and being clean. Yet neither of these qualities is inconsistent with being gay. Nor did these Boy Scout materials, prior to litigation, implicitly or explicitly contrast these qualities with a particular sexual orientation.²⁸ The Scoutmasters' handbook urges Scoutmasters to avoid giving detailed advice or proffering specific opinions about

control the means of death. There may be diametric opposition not only between the interests declared by the federal government and some states but also between the interests different states declare. See *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004) (finding for Oregon in a dispute between the state of Oregon and the U.S. Attorney General over whether Oregon's Death with Dignity Act violated the Federal Controlled Substances Act). Compare *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (listing state interests as preventing suicide, preserving life, protecting the vulnerable, preserving medical integrity and preventing involuntary deaths), with *Lee v. Oregon*, 891 F. Supp. 1429, 1434 (D. Or. 1995) (listing state-claimed interests promoted by Oregon's Death with Dignity Act: avoiding unnecessary pain, self-inflicted suicide, and financial hardship, and facilitating autonomy and privacy).

²⁶ Both were joined by each other and by Justices Ginsburg and Breyer. *Dale*, 530 U.S. at 663–700 (Stevens, J., dissenting) and 530 U.S. at 700–02 (Souter, J., dissenting).

²⁷ *Dale*, 530 U.S. at 666–67 (Stevens, J., dissenting).

²⁸ *Id.* at 667–69.

sexuality. It nowhere declares that Scoutmasters should take a position on homosexuality, much less a negative one. In light of these declarations of inclusiveness and the Boy Scouts' silence on the matter in key venues, the dissent claimed that the Boy Scouts' explicit statements of opposition to homosexuality (or more narrowly to the employment of gay leaders) were insufficient to establish that the group took a stand on the matter. Instead, "[a]t a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view."²⁹ Further, that view must have been adopted prior to action; the dissent gave little weight to the Boy Scouts' later, more explicit statements opposing homosexuality because they were adopted after the fact.³⁰

This is a troubling and counterproductive standard of what it is to voice a message—all the more troubling given the dissent's sympathies. First, it suggests that if a group has an interest in retaining control over its membership, it should take strong, unequivocal stances and repeat them loudly and publicly. Groups who tolerate or encourage within their ranks internal dissent, experimentation, or critical re-examination are more likely to lose control over their membership than those who adopt a posture of unyielding stridency.³¹ For on this standard, the presence of alternate voices or periods of experimentation may be cited as evidence that the group's commitment to a particular message is insufficiently sturdy to support an argument for exclusion. Ironically, among groups who care to control the composition of the membership, the dissent's standard would seem to discourage the sorts of gradual, tentative steps associated with genuine intellectual and emotional change and lasting social progress. Such a result cannot really serve

²⁹ *Id.* at 676; *see also id.* at 701 ("[The] BSA has not made out an expressive association claim . . . because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message."). Note that this suggests the dissent rejected the view briefly floated by Brennan in *Jaycees* that discriminatory enterprises may claim no constitutional protection. *Roberts v. Jaycees*, 468 U.S. 609, 628 (1984).

³⁰ *Dale*, 530 U.S. at 674.

³¹ For a sophisticated and nuanced approach to cultural interpretation and the salutary properties of intra-group dissent, see Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 561–67 (2001). Sunder, however, advocates a treatment of compelled association that I believe encourages pre-emptive intolerance. About *Dale*, she remarks that on her approach (which focuses on the more narrow issue of expulsion of pre-existing members and not on exclusion generally), "the state would refuse to reinforce a culture's traditional boundaries where leaders cannot control the norms of the community on their own." *Id.* at 558. This standard would encourage group leaders to impose the sort of discipline the lack of which would permit state regulation and loss of control over membership. Such efforts at control would deter associations who wished to retain control over their membership from allowing and facilitating internal forms of self-questioning and internal evolution and might encourage more drastic forms of retaliation against fledgling efforts at dissent. Independent of the incentives created by such a rule, there are other First Amendment reasons why individuals may have interests in both being able to participate in groups in which they are able to control their exposure and the pace of that exposure to divergent points of view, even when their resistance to such exposure is morally wrong or pragmatically mistaken. *See infra* Part II.B.2.

the goals of those who prize freedom of speech or those who prize inclusive, egalitarian, anti-bigoted values.

Second, not only are the dissent's standards for what it is to voice a message counterproductive from an egalitarian perspective, they are rather peculiar tests of what it is to stand for something and what it is to say something—to have and to impart a message. The requirements of consistency, articulateness, and constancy implied by the dissent's analysis are extremely demanding standards. Consider how peculiar these standards would be in another distinct freedom of speech context. We would not contemplate defending against a claim of viewpoint-discrimination or of prior restraint by challenging whether a censored speaker really, sincerely held the viewpoint or whether his expression was coherently and clearly stated, free from contradiction, hesitation, or the suggestion of doubts.³² It would seem irrelevant to First Amendment analysis that a censored speaker had only recently held a different point of view, had only equivocally voiced support for the disfavored viewpoint, or had later adopted a different point of view. None of these things would establish that the particular message that was censored had not really been voiced at all, that no speech—or no speech inside the protections of the First Amendment—had taken place.

Of course, the dissent's motivations are comprehensible. It was attempting to police the boundary between the exclusion of members in order to reflect and express a group's sincerely held viewpoint and pretextual claims of expressive purpose that disguise discrimination undertaken for reasons that have nothing to do with the association's commitments, policies, and stances. In the former case, the association's composition may contribute to its power to speak effectively or may even be a form of symbolic speech. In the latter case, its composition and policies dictating membership seem unrelated to any protected speech activities. And if the standard of protection turns on whether or not regulations on association distort one's message, the requirements that the association voice its viewpoint clearly and over time are understandable attempts designed to exclude pretextual justifications.

But though these requirements are understandable, they are dangerous. This is partly for the reasons I have already articulated. It is also because their application requires judges to engage in fairly detailed, intrusive forms of interpretative review of what an association *really* stands for, what sorts of dissent and difference would *really* threaten that stance, what is *really* entailed by a policy statement, what it would *really* mean to be opposed to homosexuality, and how volubly, on what grounds, and in what fora some-

³² To forestall confusion, I am not suggesting that the regulations at issue in *Dale* were viewpoint-discriminatory, but rather that our understanding of what constitutes a message should be consistent across these domains.

one who was *really* opposed to homosexuality would speak.³³ Such review involves a form of judicial scriptwriting that is antithetical to a thoroughgoing concern about judicial imposition of content and the free exploration and articulation of ideas.³⁴

This is not to argue that there is a more precise or better way of distinguishing between sincere and pretextual claims in this context. But it seems damning that the dissent's efforts to identify this boundary threaten to yield a large range of false negatives by failing to recognize tentative, equivocal, rarely voiced, yet sincere, claims as in fact sincere.

The majority provides a more plausible analysis of what it takes to stand for something or to articulate a point of view. However, if the test for constitutionality ends at the point that a burden on expression has been levied or if it involves balancing weighted strongly to protect expression, then the permissiveness of its interpretative approach makes it vulnerable to false positives. Pretextual justifications for discrimination will wrongly appear to be exclusion motivated by adherence to a message or point of view. Indeed, it is unclear how an association run by reasonably intelligent people could ever fail this test.³⁵

I doubt that this problem is soluble. The fundamental problem is not that the Court adopted the wrong measure of what distinguishes pretext from message. Rather its idea that the boundaries of freedom of association should turn on this distinction was misguided in the first place.

³³ Not only is it offensive for judges to reinterpret an association's aims and messages; these forms of review are also susceptible to failure. Without being a member of a group, it may be hard to know what really does matter to it, what is bluster for litigation, and what may be poor, but sincere forms of self-representation. See also Sunder, *supra* note 31 (arguing that the Court's approach to cultural interpretation, and in particular its treatment of the Boy Scouts, is overly blunt and insensitive to the dynamic nature of cultures).

³⁴ Compare the apt hostility to governmental script writing in *Cohen v. California*, 403 U.S. 15 (1971) (upholding a protestor's right to wear a jacket emblazoned with the slogan "Fuck the Draft" in the face of arguments that his message could have been conveyed with greater decorum).

³⁵ In conversation, some have suggested that the implicit requirement that one must articulate clearly a bigoted message in order to retain the ability to exclude unwanted members for bigoted reasons may serve as a disincentive to discriminate for those groups who wish to forswear a reputation of bigotry. The choice to either appear intolerant or lose control of their membership may both prompt self-examination and result in the latter choice. Of course, this strategy would backfire where control over membership takes priority for a group. There may be other disadvantages to prompting change in this way for groups who lack this priority and who yield to the pressure not to appear intolerant. See *infra* Part II.B.2.

Jennifer Gerarda Brown makes an interesting, related proposal, namely that organizations be required to register as discriminatory or otherwise out themselves to potential members in order to take advantage of First Amendment exemptions from regulation. See Jennifer Gerarda Brown, *Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute*, 87 MINN. L. REV. 481, 481 (2002). Registration, she argues, would serve the interests of members and potential members in knowing what sort of organization they were joining. This proposal also suffers from the difficulty that it may encourage groups to take stronger positions than reflect their internal sentiments, to retain control over their membership. This may also foster entrenchment and deeper alignment with their publicly declared stance.

In retrospect, that idea did not make much more sense when it was introduced. Let us return to the moderate version of the argument made by Justice Brennan in *Jaycees*: that since inclusion of women would not significantly affect the message of the Jaycees, compelled inclusion of women did not unreasonably threaten their freedom of association interests, served a compelling state interest, and was therefore constitutional. It is hard to articulate an interpretation of this position that seems both plausible and attractive. On the one hand, the Court could have been re-interpreting the meaning of the Jaycees' mission statement—"[t]o promote and foster . . . young men's civic organizations . . . to provide [young men] with opportunity for personal development and achievement . . . and an avenue . . . for participation . . . in [civic and national affairs] . . . and to develop true friendship and understanding among young men of all nations"³⁶—to suggest that the Jaycees did not really mean to be committed to the interests of young men as such.³⁷ But this seems hard to square with their language, practices, and insistence. On the other hand, the Court could have been resting upon the observation that women could easily be dedicated to the promotion of the interests of young men and that their inclusion need not necessitate any deviation from this mission. This is a fine logical point, but, sociologically, it is naïve to put a lot of weight on the idea that there was a group of professional young women champing at the bit to lend a hand and participate equally in furthering the interests of young businessmen. And, whatever its merits, it is a bizarre place, normatively, to take a logical stand and to declare a compelling state interest, one that purportedly is independent from any interest in suppressing or changing the group's ideas.

To be sure, it is generally an indefensible insult to be excluded on the basis of sex as such, even if the association from which one is excluded would not especially serve one's interests. But the more complete and compelling rendering of the state interest in desegregation would focus not

³⁶ *Roberts v. Jaycees*, 468 U.S. 609, 612–13 (1984).

³⁷ Might they have used "men" as the generic for "people" or have been emphasizing "young," taking "men" to be a given in light of the demographics of the marketplace? These hypotheses are inconsistent with their practices and their conscious consideration of the issue throughout the 1970s and 1980s. First, for years, there were separate auxiliary associations for women that seem to have been comprised of the wives of male Jaycees. In 1974, a national association for women, the Jaycettes (later called the US Jaycee Women), was founded. The Jaycettes supported the exclusion of women from the Jaycees. JOHN W. CLARK, *A LEGACY OF LEADERSHIP: THE U.S. JUNIOR CHAMBER OF COMMERCE CELEBRATES 75 YEARS 100*, 121 (1995). Second, in 1972, the Jaycees made clear that women could not become members and subsequently the Jaycees' Board of Directors rejected an executive committee recommendation to launch pilot programs to accept women as associate members who would lack the right to vote or to hold office. *Id.* at 95, 97, 108. The refusal to allow local chapters to decide whether to admit women as members was reaffirmed in 1975, 1978, and 1981; though, in 1975–76 the national Jaycees voted to allow chapters to admit women so long as any chapter that did so relinquished its national voting privileges. *Id.* at 102, 106, 118. Third, other Jaycee activities were quite deliberately limited to celebrating men. In 1971, a public relations firm advised the Jaycees to honor women and men in their nationally broadcast "Ten Outstanding Young Men" program, but the Jaycees resisted until 1986, at which point the event was renamed "Ten Outstanding Young Americans." *See id.* at 93, 97.

only on the insult of exclusion and its rationale, but also on the positive effects of desegregation on culture (both local and national) and on the formulation of ideas and views. Comprehensive anti-discrimination and desegregation efforts (as opposed to narrow efforts focused only on ensuring access to particular resources) appeal to the hope that integration of and exposure to excluded groups will affect people's thinking. Interacting with members of different races or genders exposes one more vividly to their points of view, serves to humanize and vivify a group that has been caricatured, stereotyped, or erased, and makes one less likely to ignore or downplay their interests and concerns.³⁸ Surely the real impetus behind the compelled inclusion of women in the Jaycees was not the abstract idea that women as well as men should have an equal opportunity to promote the interests of young men. Wasn't it more likely the notion that the integration of women into this association and ones like it would have a salutary influence on how such associations devoted their energies and conceived of their missions? They would come to include women not only as members but as beneficiaries of their efforts.³⁹ It is hard to deny this point while nevertheless representing the state interest of integration of women here as a compelling one: how could the state really think that there was a *compelling* state interest in ensuring that willing *women* had equal access to promoting the interests of young *men as such*, an interest unrelated to an aim to change the group's message?

This revisitation of *Jaycees* is meant to make vivid how the *Dale* majority's analysis may be overprotective of associations. Although the majority's analysis of what it takes to have a message is more plausible than the dissent's, this analysis coupled with adoption of a message-based test for strong freedom of association threatens to undermine the Court's prior precedents and anti-discrimination efforts.

³⁸ See, e.g., Aronson, *infra* note 61, at 305; Miles Hewstone, *Intergroup Contact: Panacea for Prejudice*, 16 PSYCHOLOGIST 352, 352–55 (2003) (summarizing research supporting contact hypothesis); John B. McConahay, *The Effects of School Desegregation upon Students' Racial Attitudes and Behavior: A Critical Review of the Literature and a Prolegomenon to Future Research*, 42 LAW & CONTEMP. PROBS. 77, 107 (1978) (reviewing studies of contact hypothesis and conditions of success); James Lee Robinson Jr., *Physical Distance and Racial Attitudes: A Further Examination of the Contact Hypothesis*, 41 PHYLON 325, 325 n.1, 331–32 (1980) (summarizing prior findings and confirming that proximity reduces racial prejudice); George Yancey, *An Examination of the Effects of Residential and Church Integration on Racial Attitudes of Whites*, 42 SOC. PERSP. 279, 297–98 (1999) (stating that religious integration is more effective than residential integration in eliminating racial stereotypes).

³⁹ In fact, the inclusion of women in the Jaycees went hand in hand with an alteration of the Jaycees' mission statements. The change, though, was not brought about by a gradual effect on the culture caused by the presence of women. It was a more deliberate and immediate strategic response by the national association of the Jaycees to the Supreme Court's decision. One month after the Supreme Court's decision permitting states to require the Jaycees to integrate, the Jaycees themselves reversed their long opposition to gender integration and voted to eliminate all gender references in their bylaws, membership descriptions, and creed. The next year, the US Jaycee Women disbanded. Within a year, women comprised twelve percent of the membership of the US Jaycees. See Clark, *supra* note 37, at 124–26.

But the majority's approach is also underprotective, in ways that are more subtle but mirror the difficulties of the dissent. While the majority's approach endorses a more permissive and plausible criterion of what it is to have a message, it nonetheless requires associations to have a message to garner First Amendment protection. This criterion suffers many of the same distorting and perverse incentives as the dissent's approach. It may pressure a diverse, unfocused group that nevertheless cares to control its membership to generate artificially a set unified message that rationalizes their pattern of exclusion. Forcing the articulation of a message may both misrepresent the level of consensus in the group and may push some members toward a clearer, more extreme position than they would otherwise embrace. As I discuss in the Essay's next section, once they are pushed to identify themselves with a particular message—perhaps precipitously—this may risk affecting how the members themselves come to think about the issue.

This overview has been brief, but I hope it conveys the flavor of why I believe the most influential readings of Justice Brennan's approach in *Jaycees* are counterproductive to the protection of both freedom of speech and equality. The most plausible understanding of what compelling state interest was at stake is in tension with the idea that its pursuit would not affect the understanding or maintenance of the Jaycees' message if we deploy a plausible view of what it is to have a "message." Further, the message-centered approach is ultimately counter-productive to the simultaneous pursuit of the protection of freedom of expression and equality. *Either* one will take the dissent's path in *Dale*—a path that creates implausibly rigid, intrusive standards in delineating what counts as expression and that simultaneously generates incentives for associations to articulate and to impose intolerant, unyielding attitudes that discourage dissent and experimentation. *Or*, one will take the *Dale* majority's path—a path that adopts a more plausible standard of what it is to articulate a message but in so doing renders association membership resistant to anti-discrimination regulation (and that may still artificially force expression of a message that is inauthentically unequivocal in content). After *Dale*, it is hard to suppress the concern that, on the majority's reasoning, *Jaycees* is in trouble.

B. *Rethinking the Connection Between Associations and Free Speech*

Justice Brennan's approach represented a well-meaning effort to connect freedom of association to freedom of speech. However, his analysis—in particular, his dichotomy between intrinsically and instrumentally valuable associations—rests upon a constrictive understanding of the First Amendment value of freedom of association. He concomitantly imagines an overly narrow range of the dangers of compelled association, one that mainly locates the possible dangers occasioned by compelled association outward, concentrating on the potential alteration or distortion of the relationship between the association and the outside world.

The effects compulsion may exert on the internal cognitive life enjoyed within the association represent significant but neglected dangers. Such effects implicate First Amendment interests, not only the personal and social values served by associational membership. These First Amendment interests, however, are not accurately represented in terms of associations' messages, whether internally or externally promulgated. Thus, I will argue that both *Jaycees* and *Dale* wrongly adopted a conception of associational freedom that is insufficiently appreciative of the sort and strength of the speech interests at stake, but also that, in a different respect, both cases were *overly* speech-protective by focusing just on whether the association had a message rather than on what *sort* of association it was.

Before making out the account of the more intimate connection between associational freedom and the First Amendment, I will discuss compelled speech to prefigure the shift from a predominantly outward-looking, message-centered approach to one that also stresses an inward, thought-centered perspective. The same shift in orientation I advocate for the analysis of free association can provide stronger support for the constitutional protection against compelled speech represented by *West Virginia v. Barnette*, the Pledge of Allegiance case.

1. *The Case Against Compelled Speech*.—Arguments against compelled speech by individuals sometimes take a form analogous to the form of argument voiced in *Jaycees* and then echoed in *Dale*. For example, consider the constitutional protection against compelled recitation of the Pledge of Allegiance recognized in *West Virginia Board of Education v. Barnette*⁴⁰ and the subsequent protection against having to sport state-dictated messages on one's license plate recognized in *Wooley v. Maynard*.⁴¹ These opinions exhibit admirable distaste for government-prescribed orthodoxies "in politics, nationalism, religion, or other matters of opinion."⁴² But interpreting the meaning of the objection to orthodoxy is a delicate matter. The objection, of course, could not be to the government's taking strong, even unequivocal, positions on political topics.⁴³ Rather, it is that the mode of government speech was objectionable and infringed on the compelled

⁴⁰ 319 U.S. 624, 625 (1943).

⁴¹ 430 U.S. 705 (1977). I will focus predominantly on cases where a person is compelled to speak in non-artificial circumstances irrespective of his or her beliefs about the subject of compulsion. Typically, in these cases, the compelled speech occurs regularly and/or is meant (in some way) to have force over time. I have in mind such cases as compelled Pledge of Allegiance, school prayer, loyalty oaths, and labels or messages one must wear for prolonged periods. Compelled testimony in court or legislative hearings, in which an individual is compelled to speak but the content of the utterance is not externally determined, raise different issues I do not aim to address.

⁴² *Barnette*, 319 U.S. at 642; see also *Wooley*, 430 U.S. at 715.

⁴³ This point and the general account of compelled speech offered here extends a position initially introduced in Vincent Blasi & Seana Shiffrin, *The Story of West Virginia State Board of Education v. Barnette*, in *CONSTITUTIONAL LAW STORIES: AN IN-DEPTH LOOK AT TEN LEADING CONSTITUTIONAL CASES* 433, 454–61 (Michael Dorf ed., 2004).

speaker's rights. One way to understand this speaker-based rationale behind cases like *Barnette* and *Wooley* is that they protect individuals from having to mouth government orthodoxies that may misrepresent their views to others.⁴⁴ These rulings protect individuals from having to attest to beliefs that they reject and thus from having others wrongly associate them with those beliefs.

Put this way, the concern, as in *Jaycees* and *Dale*, is whether the regulation disrupted or distorted the regulated party's message. This is not a negligible concern, to be sure, but it is unclear whether this interest was powerfully implicated in cases like *Barnette* and *Wooley*.⁴⁵ If a certain speech act is required of everyone and it is publicly known that it is required, it would be unwarranted for any reasonable observer to infer that any particular utterance reflected the sincere, genuine thoughts of the particular speaker. The reasonable conclusion is that the message is attributable only to the state, not to the particular citizen. If the occasions for compelled speech are clearly delineated, then there is no substantial worry that a citizen's message will be misunderstood or even that she will be taken to be communicating at all.⁴⁶

The worry about misunderstanding seems small—at least where it is clear that the view and the contents of the speech are compelled and the circumstances of compulsion are reasonably well-defined, discrete, and obvious to observers.⁴⁷ And whether or not the risk is small, the explanation

⁴⁴ See, e.g., Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451, 469, 473–75 (1995) (placing emphasis on whether the reasonable observer would take the compelled message to be the speaker's own).

⁴⁵ See *id.* at 473–75, 482–83 (discussing this difficulty and for that reason, shifting from a free speech account to an autonomy analysis to explain the full *Barnette* protection); see also LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-5, at 1317 (2d ed. 1988) (making the criticism of *Wooley*).

⁴⁶ The force of this critique, of course, can be overstated. Outsiders who are unaware of the legal convention may mistake compelled utterances for voluntary ones. As some of my students have insisted, tourists to New Hampshire might not know the license plates' messages were state-dictated and might mistakenly infer a citizenry that was united behind radical civil libertarianism.

Also, the reception of a voluntarily uttered message may be affected when that message is *sometimes* compelled. An audience savvy to the fact that the utterance is compelled in some contexts may not recognize it as voluntarily delivered in others. The voluntary utterance may be mistakenly taken to be a compelled utterance or as an ironic comment on the compelled utterance. Ironically, those who agree with the content of the compelled utterance may have a greater complaint against its compulsion than dissenters. The former's ability to communicate their sincerity may be compromised by its sometimes being compelled. But even when the context is clear, the compelled speaker has the different complaint that I discuss in the text.

⁴⁷ Although, in "The Attribution of Attitudes," Edward Jones and Victor Harris found that some listeners still inferred the speaker believed the content of her speech even when the listener knew the speech was assigned. This attribution effect was, however, significantly less powerful than in cases where the listener believed the speech's content to be chosen. Further, the effect in both situations was more pronounced where the content of the speech was unusual or unpopular. Furthermore, the situation studied differed from the sort of compelled speech I am discussing in that the speech in Jones' study was nonetheless constructed by the speaker (even if the direction of its content was assigned), was not fre-

seems incomplete. There are two superior justifications for the holdings of *Barnette* and *Wooley* that focus entirely on the speaker and her interest in what she comes to think and to say in the first place, prior to her interest in being properly understood in communication. The first locates a threat posed by compelled speech to freedom of thought and the autonomous agent's control over her mind. The second identifies an inconsistency between practices of compelling speech and the endorsement of and support for the virtue of sincerity, a commitment to which, I argue, is presupposed by the First Amendment commitment.

a. Freedom of thought and mental autonomy.—First, let us posit that a speaker, as a rational agent, has an interest in how she comes to produce messages—in her thoughts and more generally in her thought process—in how she thinks about topics, and in being able to reason about them consciously, sincerely, authentically and directly. Specifically, the speaker has an interest in trying and being able to come to conclusions about matters by thinking directly about the relevant considerations that bear on the subjects.⁴⁸ Compelled speech may be reasonably regarded as potentially posing a risk to the pursuit of this interest and so may be reasonably resisted by a thinker.

Take the Pledge of Allegiance as an example. One may worry that compulsory, frequent repetition of the Pledge will have an influence on what and how one thinks, independent of one's direct deliberations on its subject matter. Routine recitation may make its message familiar. Through regularity, it may become a comfort and an internal source of authority for consultation. At a later point, one might instinctively, without further thought and without awareness of the origin of the thought, characterize the polity as a republic, or as a place where there is freedom and justice, or perhaps more plausibly, be more likely assent to another's assertion to that effect.

In what follows, I will explore examples of this phenomenon that may give rise to a reasonable desire to exert control over what one says. The

quent, and was not assigned by the state. Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL PSYCHOL. 1, 23–24 (1967).

⁴⁸ This claim bears a relation to the philosophical discussion about whether rational agents can coherently try to believe a proposition directly on the basis of reasons that do not directly support that proposition but rather merely support the desirability of believing that proposition. See, e.g., BERNARD ARTHUR OWEN WILLIAMS, PROBLEMS OF THE SELF 136–52 (1973); Pamela Hieronymi, *Controlling Attitudes*, PAC. PHIL. Q. (forthcoming). Suppose they are correct that rational agents, qua rational, cannot decide directly to believe a proposition on the grounds of the desirability of that proposition's being believed, but can only come directly to a conclusion by assessing the considerations taken to bear on the proposition and finding them to appear true and to yield the conclusion. Then, it would seem natural to think that they would have an interest, qua rational agents, against being manipulated into beliefs that are not held because the considerations that bear on the proposition were available to them and directly affirmed as yielding the proposition at issue as a conclusion. That is, they would have an interest in not being manipulated into coming to believe in ways inconsistent with their rational agency.

more general concern at issue for protecting freedom of thought is that what one regularly says may have an influence on what and how one thinks. The things one finds oneself regularly doing and saying will have an understandable impact on what subjects one thinks about. The regular presence of specified statements in one's speech and related action may predictably have an influence on which topics seem salient. Further, these statements may have an influence on what one thinks about and how. Commonly heard sentiments may become comfortable sentiments. Commonly voiced sentiments bear an even more intimate relation to the self.⁴⁹ Isn't that a good part of why proponents advocate for the institution of such compelled speech rituals?

The notion and the concern that what one says (as well as what one hears) has a bidirectional relation to one's thought is familiar to feminists, among others—including anti-racists. One's linguistic patterns may serve as a reference when one lacks information—how one tends to talk may serve as mental evidence for how an item about which there is uncertainty is likely to be. For example, the persistent use of the male pronoun for the generic person may make the speaker and listener more inclined to assume that a person whose gender is unknown is a man; one may tend to have men in mind as the generic agent.⁵⁰

The phenomenon is not limited to contexts involving gender or particular patterns of speech. (It is also not entirely an unwelcome phenomenon that ways of speaking and acting may influence one's thought processes.⁵¹)

⁴⁹ See JON ELSTER, *ALCHEMIES OF THE MIND: RATIONALITY AND THE EMOTIONS* 333, 364–65 (1999); see also Eliot Aronson, *Dissonance, Hypocrisy, and the Self-Concept*, in *COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY* 103, 113 (1999).

⁵⁰ See, e.g., Mykol Hamilton, *Using Masculine Generics: Does Generic He Increase Male Bias in the User's Imagery?*, 19 *SEX ROLES* 785, 795, 798 (1988) (conducting an empirical study on the use of the masculine versus gender neutral pronouns and finding that “use of the masculine pronoun per se increases male bias” by the language user (emphasis added)); Fatemeh Khosroshahi, *Penguins Don't Care but Women Do: A Social Identity Analysis of a Whorfian Problem*, 18 *LANGUAGE SOC'Y* 505 (1989) (finding ambiguous results, that women who had adopted non-sexist pronoun practices were less likely to make sexist assumptions about referents of “he” than other women and than men generally); see also Donald Mackay, *Psychology, Prescriptive Grammar, and the Pronoun Problem*, 35 *AM. PSYCHOLOGIST* 444, 449 (1980); Sally McConnell-Ginet, *What's in a Name? Social Labeling and Gender Practices*, in *THE HANDBOOK OF LANGUAGE AND GENDER* 550, 552–54, 566–67 (Janet Holmes & Miriam Meyerhoff eds., 2003); Janice Moulton et al., *Sex Bias in Language Use: Neutral Pronouns that Aren't*, 33 *AM. PSYCHOLOGIST* 1032, 1032 (1978) (finding male terms, even when used in gender neutral form, “caused people to think first of males more often than did ‘his or her’”); Anne Pauwels, *Linguistic Sexism and Feminist Linguistic Activism*, in *THE HANDBOOK OF LANGUAGE AND GENDER* 550 (Janet Holmes & Miriam Meyerhoff eds., 2003).

⁵¹ See Tamar Szabó Gendler, *On the Relation Between Pretense and Belief*, in *IMAGINATION, PHILOSOPHY, AND THE ARTS* 125, 125, 127, 131–36 (Matthew Kiernan & Dominic Lopes eds., 2003) (discussing psychological evidence that pretending can cause belief and affective states among children and adults, even when subjects are “explicitly aware” of the pretense, and discussing the connection between this phenomenon and important cognitive mechanisms); see also WILLIAM IAN MILLER, *FAKING IT* 109–20 (2004).

Take, for instance, the use of intuitions in moral methodology. It is common, when deliberating ethically, to consult our intuitions (or what some call our moral sense). We try to assess how we react to and feel about an action or a situation, to think about how we are inclined to characterize it and to speak about it, and to reflect on how we behave in such situations. Philosophers may be especially prone to consult their speech habits. For example, discussions about the removal of aid in cases of euthanasia or abortion sometimes begin with someone saying “we [would or] wouldn’t call that a *killing*.” Others may reflect more on their patterns of action and their moral reflexes in similar situations or in the very situation at hand. Such intuitions may not be (and in the long run should not be) treated as dispositive, but they often provide starting points for ethical thought,⁵² set the moral agenda for further investigation, confirmation, or disconfirmation, and provide at least *prima facie* considerations about action.

The use of such intuitions in moral theory is still somewhat under-theorized.⁵³ Under a charitable interpretation, though, one does not appeal to such intuitions to try to gain direct sense perception of moral properties or qualities. Rather, the implicit theory behind such appeals is, I believe, that one’s intuitions about, and common characterizations of, actual or posited situations are compressed, inchoate forms of reasoning in which a range of deliberate reactions to a wealth of experience are embedded. Through experience and acculturation, people navigate a wide range of ethical situations, make judgments, and learn from their own and others’ actions and reactions. Their intuitions often reflect their unarticulated yet still deliberative reactions to such situations, as well as rationalizations of their own experience and action. So, it is an important skill of the moral agent that she learns from how she acts and draws lessons from her action both consciously and unconsciously in deliberation. Thus, it should also be important to an agent to maintain control over how she acts and speaks so as to maintain control over the evidentiary pool from which she may later draw in further action and reasoning.

That what one says and how one behaves may have an influence on thought is also the aspiration of some counsels of religious practice. On some understandings of the Jewish faith, practice may precede and cause faith. One is counseled to engage in the ritual expressive of a belief even if

⁵² Compare this with Barbara Herman’s discussion of the role of rules of moral salience within the more formal Kantian moral system. See BARBARA HERMAN, *The Practice of Moral Judgment*, in *THE PRACTICE OF MORAL JUDGMENT* 73, 76–83, 86–88, 90 (1993).

⁵³ But see the discussions in FRANCES KAMM, *MORALITY, MORTALITY* 5–10 (1993) (describing three methodologies making use of case-based reasoning); Shelly Kagan, *Thinking About Cases*, in *MORAL KNOWLEDGE*, 44–64 (Ellen Frankel Paul et al. eds., 2001) (criticizing a different, sense-perceptual model of intuitions than the model sketched here). The most influential, contemporary treatment of the subject appears in JOHN RAWLS, *THEORY OF JUSTICE* § 9 (1971).

one lacks the belief.⁵⁴ The hope is that the practice of the ritual may lead one over time to develop the belief, even when arguments and direct efforts to induce the belief fail.⁵⁵

Similarly, though it may not always be their aspiration, some actors find that they take on (often temporarily) some of the habits, character traits, and perspectives of the characters they play.⁵⁶ Some even report find-

⁵⁴ See generally MOSHE HALBERTAL & AVISHAI MARGALIT, *IDOLATRY* 174–76 (Naomi Goldblum trans., 1992) (discussing the widely shared view that “the adoption of a religious way of life, which embodies the right beliefs, increases the chances that the person who lives this way will come to believe in the true religion, while someone who adopts an idolatrous way of life is much more likely to adopt idolatrous beliefs as well.”); see also NACHUM AMSEL, *THE JEWISH ENCYCLOPEDIA OF MORAL AND ETHICAL ISSUES* 176–81 (1994) (discussing Exodus 24:7, Maimonides, and the idea that performing mitzvot will be followed by and provoke an understanding of the meaning of the practices and not the reverse order); S. SCHECHTER, *SOME ASPECTS OF RABBINIC THEOLOGY* 161 (1969) (arguing that the ideal is to obey law for its own sake but that those unable to do so should still study Torah and fulfill the commandments “for this occupation will lead in the end to the desired ideal of the purer intention”); Edward L. Greenstein, *Dietary Laws*, in *NEW YORK RABBINICAL ASSEMBLY* 1460, 1464 (David Lieber & Etz Hayim eds., 2001) (stating that dietary practices are meant “to instill the idea that life belongs to God”; unlike Christian views, the Torah holds that the physical and spiritual are not separate; “the many meanings that are encoded within [dietary] behaviors are meant to act on and cultivate the ethical and spiritual dimensions of those who observe them” (emphasis added)). Maimonides, an influential adherent of the doctrine, appeared to believe that the effect might occur for false rituals and views, not merely true ones. This infused his understanding of the prohibition on performing acts associated with idolatry. MAIMONIDES, *MISHNEH TORAH, THE BOOK OF KNOWLEDGE* 66a–69b (Moses Hyamson trans., 1974). For an articulation of the view by a Christian, see BLAISE PASCAL, *PENSÉES* 155–56 (Honor Levi trans., 1995) (“You want to find faith and you do not know the way? You want to cure yourself of an unbelief and you ask for the remedies? . . . [B]ehav[e] just as if they believed, taking holy water, having masses said, etc. That will make you believe quite naturally, and according to your animal reactions.”).

⁵⁵ For more general discussion of the idea that pretense of virtue may lead to virtue, see MILLER, *supra* note 51, at 28.

⁵⁶ The idea is a familiar one (which is not to say that its familiarity renders it true). Some examples: Writing about the effect of her immersion into roles, Shakespearean actress Zoe Caldwell remarked, “It takes me usually six months to regain my self, my life.” ZOE CALDWELL, *I WILL BE CLEOPATRA* 241 (2001). Christine Lahti reported that playing a Holocaust-era Jewish gynecologist provoked panic attacks, insomnia, and experiences of anxiety. She recounted that it was difficult to move beyond her character’s experiences, that it took “several months to recover,” and found “when I got back to my life, I could take nothing for granted ever again.” Robin Pogrebin, *A Survivor’s Story: Choosing When There Are No Choices*, N.Y. TIMES, Apr. 13, 2003, at 12. Michael Paul Rogin argues that Ronald Reagan was unable to disentangle his real life from his cinematic roles and that this confusion infected his Presidency. MICHAEL PAUL ROGIN, *RONALD REAGAN, THE MOVIE AND OTHER EPISODES IN POLITICAL DEMONOLOGY* 1–43 (1987). In an interview with a young method actor, he reported that it typically took him a week to recover fully from taking on a character for an audition; that roles he had played influenced his behavior toward his brother and his girlfriend; that he responded emotionally to a commercial he saw as a character he recently played would have; and that playing an emotionally disturbed man influenced how he later viewed and responded to a friend’s emotional problems. Interview with Santiago Ponce, Method Actor, in Los Angeles, Cal. (Feb. 12, 2003).

The phenomenon is not, I think, belied by the method-influenced idea that good actors draw from their own experiences or even re-enact prior emotional episodes. For while an actor’s insight into, and presentation of, a character may be driven by her own direct experience, the composition of the character’s traits—the character’s attitudes, judgments, habits, behaviors—that the actor inhabits may be quite different from the actor’s own. Taking on a role may push one towards a pattern of thoughts and behav-

ing themselves thinking and feeling as their characters would.⁵⁷ Indeed, this effect is part of the motivation for using drama as an educational and therapeutic tool.⁵⁸

Obviously, this is a complex phenomenon that is difficult to interpret with confidence or clarity. It is worth noting three important contrasts between the insincere speech of acting and that of compelled speech. First, in contrast to compelled speech, actors intentionally seek to identify with—even immerse themselves in—their roles and what their characters say, to deliver a convincing performance. Second, this immersion is deliberate. The actor has a high level of awareness and deliberately frames the process; it is fairly transparent (and voluntary). Third, the performance is valued by the actor and others as a performance; it is a special event of non-authentic expression that is not a quotidian element of the actor's life. This may make its status as a performance more salient to the actor than to the compelled speaker. For non-actors, the compulsory nature of the speech may possibly recede into the background of the speaker's awareness because it is not essential to its performance that it be a performance. Quite the contrary,

iors that, while accessible from the actor's personal experience, would not be the actor's own but for the practice of playing the role. Interview with Latima Good, Actress, in New York, N.Y. (Sept. 13, 2004).

Not all actors experience significant leakage between their characters and their outside lives. One actor I interviewed (KK) did not believe he was directly influenced by his roles in this way. Although he reported that playing troubled characters helped him to understand certain sorts of people and their actions better, he connected this deeper understanding to a change in some political views and to coming to an opposition to the death penalty. Some doubts about the spillover effect of acting onto the actor's personal life are expressed in Charles Neuringer & Ronald A. Willis, *The Cognitive Psychodynamics of Acting: Character Invasion and Director Influence*, EMPIRICAL STUD. ARTS 47–53 (1995). Their study, however, was based on a fairly short period of time and a relatively small sample, assessing student actors' responses over only the rehearsal process and a short run of performances. It did not attempt to assess whether the role had an influence on the actor after a long run.

⁵⁷ For a rich discussion of the philosophical issues involved, see RICHARD WOLLHEIM, *Imagination and Identification*, in ON ART AND THE MIND 54, 60–76 (1974).

Other results in cognitive psychological research lend suggestive support. See, e.g., Robin Damrad-Frye & James D. Laird, *The Experience of Boredom: The Role of Self-Perception of Attention*, 57 J. PERSONALITY AND SOC. PSYCHOL. 315, 315 (1989) (reporting “much research” that “people induced to act as though they held particular emotions, attitudes, motives or beliefs” report later having these mental states); Paul Ekman & Richard Davidson, *Voluntary Smiling Changes Regional Brain Activity*, 4 PSYCHOL. SCI. 342, 345 (1993) (distinguishing between the presentation of voluntary and involuntary smiles but finding that deliberately produced smiles generate some of the brain activity associated with positive emotions); Robert Levenson et al., *Voluntary Facial Action Generates Emotion-Specific Autonomic Nervous System Activity*, 27 PSYCHOPHYSIOLOGY 363, 364, 368, 376, 382 (1990) (describing exercises directing actors and non-actors to configure their faces as though they were experiencing emotion as well as those directing subjects to relive a past emotional experience significantly influenced subjects' current mental and emotional states). The studies support the view that actions can influence feelings and beliefs, not just reflect them. Some of these studies conflate more behaviorist views (that the relevant mental states are identical to a set of activities) and epistemological views (that one's mental states are known by observing one's behavior) with the causal thesis that the relevant mental states may be caused by, and not only causes of, the relevant activities. See, e.g., Damrad-Frye & Laird, *supra*, at 315.

⁵⁸ See, e.g., Mallika Henry, *Drama's Ways of Learning*, 5 RES. DRAMA EDUC. 45–62 (2000).

those who compel the speech typically aim for the compelled speech to come to be sincere, or at least for its compulsory nature not to be salient to the agent. However, compelled speech may come to exert an influence on the thoughts (and actions) of the speaker in a way that surreptitiously bypasses the agent's conscious consideration and does not reflect her sincere deliberation about the matter. Autonomous thinkers therefore may have strong objections against a loss of control over what they say.

This line of argument is open to an obvious objection, a version of the one levied against the mistaken "message" rationale for the unconstitutionality of compelled speech. Since the speaker (as well as her audience) knows that the speech is compelled, won't this knowledge have an impact on the extent to which what she says influences what she thinks? Isn't it unlikely that these words, spoken without conviction, will become a source of intuitive reliance in other cases? Won't these sentiments be segregated in the speaker's mind as having a compelled, special origin that will prevent them from exerting influence on the speaker's genuine belief and action?

My replies to this objection are threefold. First, where the compelled speech is frequent and presented as standard, normal conduct, the background compulsion may not be salient. I have in mind cases like the Pledge of Allegiance and school prayer. Second, it is not clear that awareness of the pretense serves as a reliable barrier against the pretense affecting one's belief and affective states.⁵⁹ Third, moral agents who value sincerity and transparency have a general interest in avoiding an analog to (or on some descriptions, a kind of) cognitive dissonance. A moral agent has an interest in controlling and being able to avoid states that I will call "performative dissonance": states of conflict or tension between what one says or appears to say and what one thinks. This interest provides some subtle internal pressure to conform one's thoughts to one's utterances and vice versa. Where the utterances cannot be altered because they are compelled, the impulse to avoid performative dissonance may exert subtle, perhaps unconscious, pressure to alter one's thoughts to conform to the content of those utterances.⁶⁰

Why would this phenomenon be more exaggerated when a person is compelled to voice a claim rather than to listen to it? While I cannot make confident empirical assertions, the evidence cited above, as well as some of the literature on the contributions of rote learning, suggest that the influence on a person of some propositions she herself voices is stronger than those

⁵⁹ See Gendler, *supra* note 51, at 125, 131.

⁶⁰ See, e.g., Bertram Gawronski & Fritz Strack, *On the Propositional Nature of Cognitive Consistency: Dissonance Changes Explicit, but Not Implicit Attitudes*, 40 J. EXPERIMENTAL PSYCHOL. 535 (2004). Gawronski and Strack discuss and confirm prior findings that writing counter-attitudinal essays for moderate but not strong incentives influences the writers' explicit but not implicit attitudes to shift toward the essays' positions. This terminological distinction is not entirely clear but seems to be a distinction between attitudes that are both propositional and conscious and those that are non-propositional and not necessarily or consistently available to consciousness.

she merely hears.⁶¹ The argument I will develop below about sincerity may provide a partial explanation of the phenomenon, in that one's own statements are typically associated with oneself and with moral norms of sincerity. Consequently, connections of identity and pressures of sincerity may be activated.⁶² By contrast, when one listens, there is an intrinsic separation between oneself and what is communicated.

b. Compelled Speech and Sincerity.—This last argument may be reinforced by introducing the second, related argument against compelled speech, namely that compelled speech regulations represent either objectionable indifference or hostility towards character virtues that are reasonably precious to citizens, both as individuals and as First Amendment actors. Of course, the argument just rehearsed also submits to this characterization. The surreptitious influence on one's thoughts that rote recitations may exert over time poses a threat to one's independent and critical deliberative thought processes. Given its First Amendment commitments, the state cannot act (or aim to act) in a way that conflicts with, and may undermine, its citizens' capacities and exercise of independent judgment or in a way that aims to produce this result.

In this section, though, I want to turn our attention to another virtue, that of sincerity. Specifically, compelled speech requirements of the sort at issue in *Barnette* conflict with recognition of and respect for the value of sincerity, a virtue that is integrally related to the well-functioning of a robust First Amendment culture. Compelled utterances like the Pledge of Allegiance force some people to *attest* to things they do not believe. Such attestations at least have the form of an insincere utterance and perhaps have the form of a lie. In the case of the Pledge, students are compelled to pledge to something that they may not believe is worth pledging to, or that

⁶¹ See Blasi & Shiffrin, *supra* note 43, at 463 n.118; see also Aronson, *supra* note 49, 110–23 (stressing the role of self-concept in the pressure to resolve dissonance and stressing pressures of hypocrisy); Eliot Aronson, *The Return of the Repressed: Dissonance Theory Makes a Comeback*, 3 PSYCHOL. INQUIRY 303, 307–08 (1992) (discussing research stressing hypocrisy as a cause of dissonance that alters behavior). While I generally find the explanations of the phenomena given of late by cognitive dissonance theorists more persuasive than those given by some of the critics of that theory, both sides of the dispute identify an influence of speech and behavior on thought. See, e.g., Daryl J. Bem, *Self-Perception: An Alternative Interpretation of Cognitive Dissonance Phenomena*, 74 PSYCHOL. REV. 183, 183–200 (1967).

⁶² Amy Adler drew my attention to Stephen Greenblatt's moving story of his reluctance to mouth the words "I want to die," even in response to a compellingly put request of a father hoping to train himself to recognize what his speechless hospitalized son might be trying to mouth. Greenblatt refused from a concern to protect his identity by choosing what words to speak. STEPHEN GREENBLATT, *RENAISSANCE SELF-FASHIONING: FROM MORE TO SHAKESPEARE* 255–57 (1980); see also Eddie Harman-Jones & Judson Mills, *An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory*, in COGNITIVE DISSONANCE, *supra* note 49, at 3, 13–14 (discussing research on self-consistency models of cognitive dissonance that find dissonance where there is inconsistency between behavior and the self-concept, including one's self conception as a moral person and insincere behavior).

they may believe is unworthy of or an inappropriate object for such commitment.

One may respond that the Pledge isn't really taken seriously as a pledge or an attestation since the speaker and audience know it is compelled. Perhaps, therefore, the state is not, technically, compelling some citizens to *lie*. But, as I argued above, I suspect that maneuvers of this kind posit too much flexibility on the part of the speaker toward her own speech-acts, flexibility it would be reasonable for speakers to resist developing. Such compartmentalization may be difficult to achieve.⁶³ One may reasonably object to having to stand in a relation of distrust to oneself and to having to exert self-vigilance, so as to avoid having the state use one's own activities and speech as a surreptitious mode of access into one's thoughts.

Compartmentalization may also be especially costly with respect to serious utterances that have special gravity or significance, such as oaths, promises, and perhaps even attestations. Their significance to speakers and audiences may be reduced if these utterances are issued insincerely or if usage becomes such that their linguistic meaning does not unequivocally convey the speaker's (contextual) meaning.⁶⁴ It may be important to some religious people, for example, not to "take the Lord's name in vain," even if the utterance is understood by the speaker and the audience not to be serious.⁶⁵ Other kinds of significant performances may be cheapened if people engage in them insincerely or in pretense.⁶⁶

⁶³ Actors often deploy techniques to achieve or to reinforce the distance between their roles and themselves. This may require exercises and degrees of self-consciousness that the everyday citizen would reasonably object to having to engage in to maintain control over her mind. See Neuringer & Willis, *supra* note 56, at 49 (citing unpublished dissertation by D.K. Collum, *The Empathic Ability of Actors: A Behavioral Study* (1976)). In an interview, one actor (KK) reported that to distance himself from a role, he would sometimes need to engage in extremely vigorous exercise. He also connected other actors' use of alcohol, as well as binge eating, to efforts to overcome the influence of a character and to return to oneself.

⁶⁴ This may be especially true of conventional practices. Those who take some practices, like promising or giving an oath, to be linguistically ideal may have special reason for adopting a protective stance toward certain utterances, reserving them only for certain uses. To regard a practice as linguistically ideal is to regard it as a convention begun and maintained by designating certain linguistic performances as making possible certain activities. See generally Andrew Hsu, *On Some Remarks of G.E.M. Anscombe's Concerning Kinds* 1–5, 100–15 (1993) (unpublished dissertation, UCLA, on file with author) (discussing linguistic idealism toward kinds, including practices). On some views, we create the institution of promising and create a set of speech acts that make it possible for us to bind ourselves through speech, e.g., we deem it possible to bind ourselves by declaring "I promise." To use and preserve the practice's special social significance, speakers may have to restrain their uses of it to sincere invocations and treat its terms as though they have special significance. But this reverent attitude need not be restricted to those who subscribe to linguistic idealism. One may believe commitment is possible without special phrases while nonetheless thinking that it is important to showing respect for the practice that one restrict one's practice to sincere utterances.

⁶⁵ See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (remanding for further findings concerning First Amendment challenges growing out of religious college student's refusal to take the "name of God in vain" as part of acting exercises in curriculum). Analogously, some parents object to their children playing with toy guns because they think it may be important to our resistance to killing

Thus, compelled speech requirements may be criticized on the grounds that they are indifferent to citizens' actual beliefs and so may ask citizens to represent themselves through speech insincerely. But sincerity is crucial to preserving the meaning of important speech (and other social) practices. The virtue of sincerity is also closely bound to the power of the justification for First Amendment protections.

While free speech protections in any particular case do not and should not turn upon whether the speaker is actually sincere,⁶⁷ many different values served by the First Amendment depend upon or are enhanced by sincerity on the part of citizens. For instance, take the argument that some substantial part of the value of the First Amendment rests upon our joint interest in approaching and appreciating the truth. Given the vast agenda of false propositions we could contemplate, speakers greatly facilitate this search for truth when they give voice to what they actually believe has merit, may have merit, or is at least worthy of consideration. An ethic of sincerity helps to focus the attention of the populace on the ideas that hold the most promise of meeting various human needs, whether practical or intellectual. An ethic of sincerity also focuses citizens' interest and attention on finding and appreciating the truth, whereas state measures that flaunt an indifference to sincerity encourage cynicism and ambivalence about the value of truth. The same may be said even more forcefully about the importance of sincerity for theories of the First Amendment that lay stress upon its role in realizing the pragmatic ideal of forging political accommodations on the basis of an appreciation of each others' needs and concerns. Genuine understanding and accommodation depends upon citizens voicing their needs sincerely, and abstaining, as a general matter, from grandstanding, manipulation, and other forms of cynical gamesmanship. The virtue of sincerity may be similarly crucial in fairly obvious ways to other values thought to underlie the First Amendment, namely the realization of autonomy and self-expressive values through free speech.⁶⁸

not to pretend to kill. Although some religious counsels advise practicing the ritual before belief, other religious traditions look askance at pretending to pray, even when the pretense is not intended to deceive. In an editorial written just after the inclusion of "under God" in the Pledge of Allegiance, a Christian school teacher voiced his general objections to public pressure to attest to religious belief. Arguing that "the only respectable reason for professing a religion is the conviction that it is true," he expressed concern that efforts to inculcate religious practice or belief through "non-religious pressures" dilute or otherwise have a corrupting influence on religion and religious belief. Hoxie N. Fairchild, *Religious Faith and Loyalty*, NEW REPUBLIC, Oct. 11, 1954, at 12.

⁶⁶ In Blasi and Shiffrin, *supra* note 43, at 458, we also develop the objection that compelling insincere attestations to promote government purposes treats citizens and their speech capacities in objectionably instrumental ways.

⁶⁷ See related discussion *supra* text accompanying notes 32–34.

⁶⁸ See also C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 986, 986 n.15 (1997) (noting that non-coercive, respectful communicative activity presupposes sincerity); C. Edwin Baker, *Property & Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 782, 782 n.80 (1986) (same).

Although the widespread deployment of a general virtue of sincerity is integral to a successful First Amendment culture, this does not mean that sincerity must always be, at every moment, in operation for the culture to flourish or that a lack of sincerity in expression is always a moral flaw. There is, obviously, room for humor, pretense, sarcasm, and exaggeration. And, as Meir Dan-Cohen has explored in depth, there are contexts in which sincerity is not to be expected, such as when a telephone operator thanks us for our business or wishes us a good day.⁶⁹ But statements made as a citizen, unlike those of a telephone operator or a student of a language, do not arise in a bounded context in which insincerity is reasonably expected and transparently associated with a role with which the speaker is not supposed to identify. The pledge-reciter does not occupy such a well-defined role with clear, discrete boundaries (such as that of an employee or a language learner) that justify indifference to his or her sincerity. The state's defense of its practice cannot rely on the idea that it is reasonable to expect disassociation on the part of the citizen from the role of the citizen.

Thus, substantive recitation requirements, such as a compulsory Pledge of Allegiance, at best manifest indifference to character virtues that should be encouraged and supported if the values of the First Amendment are to be well realized. A related, perhaps more important concern is that a recitation requirement places the citizen who strives to be sincere, but who does not believe the contents of the recitation, in a dilemma: the citizen must either disobey the law or compromise the character virtue. In effect, the requirement pits two duties of good citizenship (and good character) against one another. Citizens who read the Pledge to assert that the nation is in fact providing liberty and justice for all, but who doubt that this claim is true, must fail to satisfy either the duty of obedience or the duty of sincerity, the cultivation of which are both essential to the well functioning of a free democratic republic.

In sum, I have made two arguments to support *Barnette*—one appealing to the protection of freedom of thought of the speaker and the other appealing to the requirement to respect the virtue of sincerity, a requirement I argue that is implicit in the commitment to the First Amendment. Both arguments locate the *Barnette* protection on grounds that appeal not to the comprehension by the compelled speaker's audience but rather to the conditions of respect for the character, the autonomous cognitive life, and the mental contents of the compelled party.

Concomitantly, turning our attention inward on the dynamics of interactions and thought within associations, rather than outward on the audience of any message they may have, provides a stronger defense of

⁶⁹ MEIR DAN-COHEN, *HARMFUL THOUGHTS* (2002). The positive role of insincere speech in etiquette and in the protection of privacy are explored in MILLER, *supra* note 51, at 35–42, 77–85, and in THOMAS NAGEL, *CONCEALMENT AND EXPOSURE* chs. 1 & 2 (2002).

protections against compelled association.⁷⁰ But to see this requires some consideration of the value of association, and the shortcomings of Justice Brennan's dichotomy between intimate, intrinsically valuable associations and expressive, instrumentally valuable associations.

2. *The Free Speech Value of Associations.*—What lurks behind the model of freedom of association in *Jaycees* and *Dale* is a conception of freedom of association on which associations are viewed as amplification devices. On this view, associations are valuable from a freedom of speech perspective because they amplify the messages individuals seek to express.⁷¹ By banding together, individual speakers can be louder and more effective in dispersing their message. They can convey more accurately the intensity and depth with which its content is adhered to by a range of members of the public.⁷²

This view was well expressed in *NAACP v. Claiborne*.⁷³ The case recognized, inter alia, the First Amendment right of an association dedicated to anti-racist efforts to engage in a non-violent economic boycott. Drawing together a group of precedents about freedom of association, the Court remarked: “[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process ‘[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost.’”⁷⁴ It located the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues, reiterating Justice Harlan's opinion from *NAACP v. Alabama ex rel. Patterson* that “effective

⁷⁰ The argument just rehearsed already provides further support for the critique of message-based tests for the protection of freedom of association. By requiring that an association that seeks control over its membership articulate a message, it may provide incentives for precipitous and artificial articulation that may in turn have an influence on the members' beliefs by virtue of its expression by them in their name.

⁷¹ See also Amy Gutmann, *Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION 3 (Amy Gutmann ed., 1998).

⁷² Rick Hills independently coined a similar label, labeling this approach the ‘megaphone’ conception; see Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 147 (2003).

⁷³ 458 U.S. 886 (1982); see also *NAACP v. Button*, 371 U.S. 415, 432 (1963) (celebrating the NAACP for vindicating minority rights and for making “a distinctive contribution of a minority group to the ideas and beliefs of our society”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (describing right “to engage in association for the advancement of beliefs and ideas”). I suspect timing has something to do with the salience of the message-based picture. As these early freedom of association cases came to the Court, what understandably had to loom large was the importance of the NAACP's message and that the regulations at issue were part of a campaign to undermine that message.

⁷⁴ *Claiborne*, 458 U.S. at 907–08 (quoting Citizens Against Rent Control Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 294 (1981)); see also *Button*, 371 U.S. at 443, 446 (emphasizing portion of *NAACP v. Alabama* that derived the NAACP's First Amendment protection from the rights of its members); *Patterson*, 357 U.S. at 459 (describing the NAACP as “but the medium through which its individual members seek to make more effective the expression of their own views”).

advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”⁷⁵

This understanding of the value of association makes association *a tool* for the expression of the independently formulated views of its members. A regulation is problematic if its effect is to distort an association’s output so that it no longer closely resembles the individual views of its members.

While broadcasting one’s message outward or alongside one’s peers surely figures prominently among the significant free speech values some associations achieve or aim to achieve, the exclusive focus on this value provides an incomplete picture. Nor is the picture made complete by observing that association membership may have intrinsic value that sounds beyond the register of freedom of speech—that larger social associations may, in part, instantiate some of the social values standardly associated with smaller intimate associations like the family.⁷⁶ Participation in them provides companionship, a sense of belonging, connection to others and social support; it may cultivate interests in politics and in social problems outside of the self.

Though many associations undoubtedly serve these social values, there is another core aspect of associations more directly connected to free speech. An association may have no message at all and nonetheless serve important First Amendment values. To wit, an important function of private associations is that they provide sites in which the thoughts and ideas of members are formed and in which the content of their expressions is generated and germinated (although not necessarily in harmony with other members), not merely concentrated and exported. That is, associations are important from a freedom of speech perspective because of what happens inside of them, not solely or even necessarily by virtue of their relationships to the outside world or even by virtue of any internal shared beliefs.

The most important connection between association and speech is an internal creative and constituting one: associations and social connections are places where ideas are formed, shared, developed, and come to influence character. Ongoing, congenial interaction with others fosters mutual interests, and common *agendas* (though not necessary shared beliefs or ideas). Ideas are tested, developed, and accepted or rejected within social settings. The views one considers and comes to have are heavily influenced by who one interacts with and especially who one trusts and cares for. Investigations into the constitutionality of regulations of associations must be

⁷⁵ *Claiborne*, 458 U.S. at 908 (quoting *Patterson*, 357 U.S. at 460); see also *Citizens Against Rent Control*, 454 U.S. at 294.

⁷⁶ See, e.g., ROBERT PUTNAM, *BOWLING ALONE* (2000); RAWLS, *supra* note 53, § 71; NANCY ROSENBLUM, *MEMBERSHIP AND MORALS* ch. 2 (1998); Gutmann, *supra* note 71, at 3–4 & *passim*; George Kateb, *The Value of Associations*, in *FREEDOM OF ASSOCIATION*, *supra* note 71, at 35–63.

more sensitive to this aspect of their value and its integral connection to freedom of speech. If we think of associations as sites where ideas are developed and take root (instead of just viewing them as devices for exporting ideas to others), then as with *Barnette*, the danger of compelled association is not simply or necessarily that of message distortion but something more akin to interference with freedom of thought. This argument challenges the idea that social associations must be consciously engaged in expressive activity or have a concrete message to garner First Amendment protection. Bowling leagues, drinking clubs, knitting circles, and debating societies, as well as the NAACP, should fall under the umbrella of the First Amendment's protection.⁷⁷ Hence, I will replace Justice Brennan's language of "expressive associations" with the broader language and wider implications of "social associations."

The following sections aim to bring out the intimate, intrinsic connection between freedom of speech and freedom of association by focusing, often implicitly, on a core example involving the voluntary grouping of individuals outside the work sphere who have at least periodic contact and interaction with one another. I have in mind something akin to the model of local chapters of the Boy Scouts (although the Boy Scouts pose a complicated case as I discuss in Part III) as opposed to national associations in which membership involves just a name, a check and a magazine in the mail. As the argument progresses, it will be evident that some associations that do not have this structure may not manifest the values I adduce nor have the potential to do so. As with the Boy Scouts, however, the structure may be complex and a national association may serve to implement and administer some of the conditions important to the functioning of local chapters.⁷⁸

There are two interconnected ways to make out the intimate connection between associations and freedom of speech. The more obvious way is to substantiate the sociological claim that people's ideas and beliefs are influenced by their social relationships.⁷⁹ The other way is to argue that, norma-

⁷⁷ Families and friendships are also central in this conception. See *infra* Part III.

⁷⁸ I will also bracket the further complications posed by state funding of some groups. I discuss some of these complications in *Egalitarianism, Choice-Sensitivity, and Accommodation*, in *REASONS AND VALUES, THEMES FROM JOSEPH RAZ* 270, 296–30 (Philip Pettit et al. eds., 2004).

⁷⁹ Apart from its intuitiveness, there is substantial evidence for such a claim. For a few general discussions, see RANDALL COLLINS, *THE SOCIOLOGY OF PHILOSOPHIES: A GLOBAL THEORY OF INTELLECTUAL CHANGE* (1998); MALCOLM GLADWELL, *THE TIPPING POINT* (2000); EVIATAR ZERUBAVEL, *SOCIAL MINDSCAPES* (1997). Two more in depth but anecdotal treatments of intellectuals' synergy appear in LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001), and JENNY UGLOW, *LUNAR MEN* (2002). See also Anne Ruggles Gere, *Common Properties of Pleasure: Texts in Nineteenth Century Women's Clubs*, 10 *CARDOZO ARTS & ENTER. L.J.* 647 (1992) (describing collaborative projects, joint intellectual influence, and inward focus within women's literary clubs). Cass Sunstein's work on group thought and other forms of group dynamics represents the darker side of this phenomenon. See Cass Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *YALE L.J.* 71 (2000). I am not sure what conclusions to draw from the phenomena Sunstein points to of members of groups solidifying their

tively, it is what we would expect and want from citizens, especially within liberalism. What follows is a sketch of an argument emphasizing the latter strand.⁸⁰ I first identify and develop the intimate connection between some sorts of associations and freedom of speech; in light of these values, I then discuss more briefly what sorts of associations might stand at or outside the periphery and why.

a. Liberalism, social cooperation, and social connection.—

Although liberalism is often criticized for being overly individualistic and insufficiently attentive to intermediate associations,⁸¹ such criticisms depend on shallow articulations of liberal theory. To the contrary, the strongest forms of liberalism start from premises that emphasize the significance and value of social relationships and social cooperation.⁸² To

views and adopting what he characterizes as more extreme, polarized positions. In one sense, it confirms my point that individuals' ideas become clarified and refined through membership and interaction in groups. I am less confident than Sunstein that the phenomena are all-things-considered troubling. Long-term polarization that obstructs social cooperation may indeed be a problem. But it is less obvious, as Sunstein seems to assume, that all extreme positions are wrong or socially unproductive. See Allen Buchanan, *Political Liberalism and Social Epistemology*, 32 PHIL. & PUB. AFF. 95 (2004), for a discussion of the role of other liberal institutions in controlling the hazards of social epistemic dependence.

⁸⁰ Allen Buchanan's discussion of social epistemic dependence stresses that liberal social institutions, including freedom of association, are more likely to generate true beliefs while protecting against false beliefs. See Buchanan, *supra* note 79, 105–06, 121. The argument here pursues a different line, focused on freedom of association—an institution mentioned but not discussed by Buchanan. My argument stresses the character virtues of individuals within liberal society and the connection between these individual virtues and the positive phenomenon of joint idea production. It has less of a consequentialist cast, does not stress the identification and role of experts, and does not place at the center the concern with controlling the negative effects of social influence on belief.

For discussion of the epistemic and moral warrants for relying on others' everyday testimony (where this term ranges wider than its specialized legal meaning), that is to say, their apparently sincere utterances, see Tyler Burge, *Interlocution, Perception, and Memory*, 86 PHIL. STUD. 21 (1997) (developing further the argument for an *a priori* entitlement to accept others' claims); Tyler Burge, *Content Preservation*, 102 PHIL. REV. 457 (1993) (arguing for an *a priori* entitlement to a rebuttable presumption to accept others' apparently sincere claims) [hereinafter Burge, *Content Preservation*]; Karen Jones, *Second Hand Moral Knowledge*, 96 J. PHIL. 55 (1979); Philip Nickel, *Moral Dependence: Reliance on Testimony* ch. 2 (unpublished dissertation, UCLA) (on file with author) (2003). Abe Roth makes a related argument that, to explain joint activity, we must attribute to the participants joint intentions in which parties adopt each others' intentions as their own. See Abraham Sesshu Roth, *Practical Intersubjectivity*, in *SOCIALIZING METAPHYSICS* (Frederick Schmitt ed., 2003).

⁸¹ See, e.g., MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 322–23 (1998); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 62–65, 147–154, 174 (1982).

⁸² For example, John Rawls' *A Theory of Justice* treats social cooperation as the unproblematic beginning point around which the theory revolves, not the hoped for end of the justificatory project. See, e.g., RAWLS, *supra* note 53, § 4. Joseph Raz's work has also emphasized the supportive role and constitutive context for individual autonomy provided by liberal forms of social cooperation. See, e.g., JOSEPH RAZ, *MORALITY OF FREEDOM* (1988); see also JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW & POLITICS* 10, 13, 18, 39, 106–07 (1996). By contrast, see Robert Nozick's more troubled discussion of social cooperation in *ANARCHY, STATE AND UTOPIA* 183–98

the extent that liberalism is a distinctive theory, distinguishable from libertarianism, liberalism is essentially a theory about the value of cooperative activity and the proper role social cooperation plays in shaping the identities and opportunities of autonomous individuals who engage in it.⁸³ The role social cooperation plays in liberal theory is absolutely central. It is the starting place of the theory and infuses its conception of the person. Social cooperation provides opportunities for individuals to develop autonomous capacities, many of which involve capacities concerning interpersonal interaction, and creates sophisticated and unique contexts for its full exercise that would otherwise be impossible. In this way, liberal theories differ dramatically from libertarian theories: libertarian theories begin with the individual and struggle to justify and explain the conditions under which social cooperation might be acceptable to autonomous individuals. For libertarians, the conditions and value of individual autonomy are thought to be prior to and in some tension with the compromises of social cooperation. For liberals, social cooperation is an integral context in which the autonomous capacities of individuals are developed and in which the exercise of individual autonomy is facilitated and may achieve its full value.

Ironically, Justice Brennan's theory of freedom of association in *Jaycees*, and its extension into *Dale*, resembles more of a libertarian theory of association than a liberal theory of association. A liberal theory would take more seriously that associations have formative effects on their members' beliefs and are not merely conglomerations of people with stable identities and pre-formed positions.

Social interactions, like one's activities, influence the subjects and content of one's thought. This effect is not merely a product of familiarity and the tendency to assimilate and integrate that which is close. It is also a product of admirable qualities that serve our moral ends. Social cooperation involves not merely efficient divisions of labor but also the relations of trust, reciprocity, mutual engagement, mutual interests, and mutual enjoyment of each others' company fostered by social cooperation. Our relations of trust do not amount solely to beliefs that people will keep their commitments and refrain from doing one another harm. Trust also involves participation in epistemic relationships in which we often take others' assertions to be true; in other cases, we take them to be likely to be true or at least worth considering. The concerns and beliefs of our fellow cooperators occupy a prominent place on our mental agenda. Such epistemic relationships form partly because they are essential for pursuing complex projects of material labor as well as for intellectual production. Such projects would not be possible were we to regard ourselves as responsible for

(1975), and David Gauthier's positively tortured effort to provide reasons for free individuals, as he conceives them, to act in cooperation with one another in *MORALS BY AGREEMENT* (1987).

⁸³ See also Seana Valentine Shffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 *FORDHAM L. REV.* 1643, 1662–68 (2004).

independently initiating every plan, every belief, or for verifying every claim.⁸⁴

Such epistemic relationships also form because they are outgrowths of proper and natural moral attitudes cooperators take toward one another. Cooperation and mutual dependence involve high levels of emotional and cultural engagement and self-definition among participants. People whose lives are intertwined are reasonably and understandably influenced by one another's thoughts and ideas. They both consciously and unconsciously take an interest in their peers' interests. Mature moral agents engaged in cooperation become sensitive to one another, and aim toward certain forms of consensus, intersecting interests, and mutual understanding. Sustained interaction with others will influence what people think about and what conclusions they draw. Their mental lives will be structured substantially through processes of absorbing and reacting to the ideas and beliefs of their companions. These are built upon and refined to produce ideas and views that differ from those that would be produced by solitary individuals or ones who interact but do not build relationships of cooperation and interdependence. That is, the suggestion is that in liberal societies, in sites of association as well as other locales, ideas are exchanged and built upon; that individuals' mental lives are strongly influenced by these interactions; and that ideas and expressions, whether shared or held only by certain individual members, are the joint product of these forms of association.

On this picture, then, associations are not merely devices for more efficient broadcasting of ideas and views that like-minded individuals have independently but coincidentally formed. Nor is the more sophisticated view that they are sites for the mutual pursuit of shared aims a full characterization of the general value of association.⁸⁵ Though such a view correctly turns away from the amplification theory, it still draws on the idea that associations must involve individuals with independently—and antecedently—formed shared beliefs and aims who band together to pursue these aims. Both of these pictures neglect the core feature of associations, the feature that connects freedom of association with freedom of speech: associations may be and often serve as sites of *idea formation* in which views develop, steep, grow upon each other, and come to influence their members, whether or not they begin with shared ideas or emerge with them.

b. Liberal virtues and the value of free association.—Thus far, I have claimed that liberalism champions social interaction and coordination and regards social cooperation not as a challenge or threat to individual autonomy, but as a context in which autonomy is most fully realizable. I

⁸⁴ See Burge, *Content Preservation*, *supra* note 80, at 466, 485 (noting that most of our knowledge derives from and builds upon others' communications).

⁸⁵ See Stuart White, *Freedom of Association and the Right to Exclude*, 4 J. POL. PHIL. 373, 377, 380 (1997) (characterizing freedom of association and its value as the ability to pursue a shared set of beliefs).

have also claimed that social cooperation involves forms of conscious and unconscious epistemic cooperation and mutual influence, both as a means of pursuing more complex material and intellectual joint endeavors but also as a byproduct of the character virtues associated with social cooperation.

To connect these claims to issues of freedom of association and compelled association involves two further but fairly predictable steps. First, social associations merit strong forms of protection within a liberal society, both to facilitate the non-speech-related benefits of close and regular social connections to other community members and to protect First Amendment interests. Social associations bear a special relationship to speech values partly in light of the instrumental properties emphasized in Justice Brennan's model. They also bear such a relationship because the connection between cooperation and the production, generation, and refinement of ideas is pronounced in associations; they involve continuous and regular interactions between individuals who come to exert intellectual influence upon one another in explicit and implicit ways.

Second, given the influence closely interacting people may have on one another, members of social associations have important freedom of speech interests in strong control over the membership of such associations. We would expect these processes of productive influence on mental content (whether positive or critical) to work more readily in contexts where members feel comfortable and believe that they can trust one another. Further, given the character virtues activated and inculcated by social cooperation and individuals' openness to having their thoughts influenced by others with whom they interact in relations of trust, we might expect individuals to regard it as fairly important to be able to be selective about with whom they interact, especially in contexts in which the interactions and conversations are meant to be relaxed, unfocused, and unguarded. If they feel they will be influenced in ways they may not be able to predict or articulate by those they have close interactions with, and that their character traits and virtues render them open to such influence, they may reasonably want to protect themselves against influence by those they do not trust or do not feel kinship with. While Brennan's imagined horror of compelled association was message disruption, on this picture, as with the recasting of the disvalue of compelled speech, the complementary and perhaps more salient hazard sounds in concerns about freedom of thought. The ability to determine autonomously with whom one associates operates to protect the ability to exercise freely character virtues that play a central role in human flourishing but also in a healthy free speech culture.

I do not mean to suggest that one must affirmatively trust specific people, whether consciously or not, to have some reason to believe what they say. Nor do I claim that all relations of trust contribute directly and immediately to the discovery or appreciation of truth. Nor am I making a prescriptive claim that one should be influenced only by those with whom one is in a comfortable relation of trust. Rather, I claim that, while individuals

may well have *pro tanto* warrants to accept others' seemingly sincere assertions as a default matter, relations of trust can reasonably, and often do empirically, encourage and heighten both the level of engagement with others' claims and ideas as well as the level of their acceptance. The higher degree of acceptance of claims can be justified by epistemic reasons and explained by normative pressures. Epistemically, trust and specific beliefs about others' expertise and reliability may supply reasons that overcome reasons to doubt. Normatively, there are often reasons to try to find consensus and common ground with those with whom one shares activities and space; one also has normative reason to provide and to consider carefully criticism and deviation from those with whom one shares such bonds. Whether or not such reasons justify greater rates of acceptance of others' claims, they certainly justify higher levels of engagement with others' claims. Often, one should at least attend to the beliefs of those with whom one has interactions and relationships, even if only to evaluate them critically.⁸⁶ If, as it turns out, one fails to share common ground with these peers, one may be pushed by these normative considerations of friendship and community to devote time and mental energy to grapple with this issue, rather than others, and to come to a more articulate accounting for one's cross purposes.

These interactive effects, I claim, enrich—in essential ways—the intellectual climate in which the First Amendment operates and has meaning. Some ideas and schools of ideas gain greater development and refinement than they would in isolation, while others are mooted and more closely evaluated within a climate of sympathy; the dissent and criticism they generate may be more effective because of the congenial milieu in which they are aired.⁸⁷ Of course, some trusted people will be unworthy and many of the views fostered and developed will be false and even pernicious. My ar-

⁸⁶ For further philosophical discussion of trust, see ANNETTE BAIER, *MORAL PREJUDICE* 1–18, 95–203 (1995); Karen Jones, *Politics of Credibility*, in *A MIND OF ONE'S OWN* 54–77 (Louise Antony & Charlotte Witt eds., 2d ed. 2002).

⁸⁷ This last point is the focus of Roderick Hills's extremely interesting essay, *The Constitutional Rights of Private Governments*, with which I have much sympathy. See Hills, *supra* note 72. Hills stresses that protecting the institutional autonomy of associations is important to foster contexts in which robust and effective debates and dissent may occur. While I agree and while we largely converge on the flaws of the *Dale* approach, we disagree about the proper positive account. I do not think the freedom of speech value of associations is confined to their being sites for fostering debate, disagreement, and dissent. While I applaud dissent, iconoclasm, and productive clashes as much as another family member, there are convergence as well as divergence values here. The overt, as well as the more subtle, forms of agreement, concurrence, and mutual evolution that occur in social associations, both writ large and more casually between members in comfortable interactions, play as important a freedom of speech role for the culture and for the individuals who may take advantage of these socially formed thoughts and expressions. Thus, I would not concentrate the test for heightened First Amendment protection, as Hills would, on how controversial the speech fostered by the association or how heterogeneous the association's membership is. See Hills, *supra* note 72, at 219. Similar problems, I submit, plague fair use analyses that treat parody (but not non-critical appreciation) as a specially protected category. See also *Amici Brief for Eugene Volokh & Erik S. Jaffe* at 8–10, *McFarlane v. Twist*, 110 S.W.3d 363 (Miss. 2003) (No. 03-615), *cert. denied*, 124 S. Ct. 1058 (2004).

gument thus does not depend on associations in fact bringing us closer to achieving our ideals of truth and mutual understanding. Rather, it emphasizes the important cognitive and character-related opportunities for autonomous individuals that may be provided by associations and interpersonal trust. It also emphasizes their shoals, to which autonomous individuals reasonably seek the opportunities to control their exposure. As with free speech rights generally, and really all rights based on autonomous choice, the opportunities available might not be achievable or fully valuable unless the possibility of squandering them or misusing them is also available. So, of course, the right's exercise may not fully realize its potential.

The two speech concerns complement one another. One might object to the protective rationales—both against compelled speech and compelled association—that individuals should exercise techniques of self-protection. They should be vigilant in ensuring that they do not come to accept views just because they have mouthed them or because they have been in relations of propinquity and dependence with people who may not be worthy of trust. But even if it were realistic to expect people to police their belief formation so strictly and comprehensively, it is not clear that it is normatively desirable to place such a burden on individuals in settings whose function is to promote social interaction and intellectual synergy. Such vigilance requires enacting barriers of resistance, remove, and chary trust. These threaten to interfere with the achievement of an association's function and the full exercise of individuals' intellectual and moral agency.

A different way to put the last point about distance is this. Meir Dan-Cohen has fruitfully distinguished between non-detached and detached roles.⁸⁸ In detached roles, one can fulfill one's obligations successfully without identifying with them and even without performing them sincerely. For example, the AT&T operator can successfully perform her obligations by thanking you for using AT&T even if she is not actually grateful. She has not acted poorly by expressing gratitude insincerely. Not so with non-detached roles. For example, the parent who thanks the stranger for helping his child will not have performed his filial duty well if his expression of gratitude is insincere, and we should think the worse of him if it is.

In my view, the proper analysis of the value of freedom of speech does not take the AT&T operator as the paradigm case around which to build a theory. A constitutional regime's approach to compelled speech and to compelled association should not depend too heavily for its justification on the expectation that its citizens maintain detachment from what they say or from their associates. The approach should instead recognize that some sorts of associations are not associations in Dan-Cohen's sense, namely social unions of detached roles, but rather are communities⁸⁹ in which we expect people to be open and responsive with one another, to not be especially

⁸⁸ DAN-COHEN, *supra* note 69, at 13–22; *see also supra* note 69.

⁸⁹ DAN-COHEN, *supra* note 69, at 14–15.

on their guard and to not play a detached role (at least not too much and not with respect to association participation). Expectations of non-detachment are more realistic than expectations of thoroughgoing detachment—in that people interacting with one another socially and regularly seek non-detachment with each other—and that expectations of widespread detachment are normatively unappealing. It is preferable to create some sites in which people can identify with what they say and who they are surrounded by. The existence of such sites is connected to generating character virtues of sincerity, earnestness, and mutual trust that are essential to successful cooperative and democratic culture and in particular to a thriving, meaningful free speech culture.

C. The Right of Freedom of Association and Its Conditions

1. *The Positive Right.*—The foregoing arguments articulating a core value of freedom of association and its intimate connection to freedom of speech have implications for the form the corresponding right should take. The right of association, if it is to protect the interests that underpin it, suggest a corresponding right to exclude unwanted members. The right to exclude for social associations should be fairly absolute and need not require justification. Specifically, to invoke the right, members of a social association need not show that they have a clear message that they are attempting to communicate to others or to reinforce amongst themselves. Nor need the association articulate a clear common purpose in order to enjoy the freedom to exclude.

From a legal and political point of view, I defend the right to exclude unwanted members without a requirement for justification. Neither articulateness, decisiveness, nor coherence should be preconditions for the successful assertion of free speech rights. Freedom of speech must protect the *process* by which ideas and expressions are generated, nurtured, and mooted, both in individuals and within groups. Any plausible theory of the development and evaluation of ideas should recognize that this process may involve dispute, dissension, substantive missteps, and unclarity (especially within a social setting), that these stages may be temporary or ongoing, and that these features are not necessarily a sign of failure. Dispute or dissension within a group of people who are comfortable with one another and willing to associate may be a productive catalyst in the formation and understanding of the beliefs of individual members. Nonetheless, the members of the group should have the ability to determine the conditions on which they interact and the people with whom they share and recognize the relations of identification and trust that underlie these processes of social influence, whether the chosen relationships are harmonious, articulate and focused, or shaggy, disorganized, and contentious.

From a moral standpoint, however, I affirm that people should be generally open to and comfortable in associative environments in which their

peers differ substantially from them and in which their views may be explicitly or implicitly challenged. But not all people are there, fully, all the time; frankly, most of us are not. Most find one sort of understandable and unique connection with those who seem familiar and who appear to have shared past life experiences. Some sorts of intellectual and moral progress and understanding may be in easier reach among those who seem familiar even where these judgments of familiarity and comfort are overly parochial. Such urges, morally, may be and have been historically taken too far. But, as with other instances of the right of freedom of speech, how individuals might best exercise the right does not define the full scope of the right. The right may encompass the ability to do what is morally wrong. The freedom of speech right encompasses a right to resist certain forms of mental interference and mind control and to make up one's own mind, even if the exercise of that right may sometimes lead a person to ignore important information, to emerge with incorrect judgments, and to make poor decisions.

To begin to delineate and defend the scope of the right to exclude unwanted members, let me return explicitly to the analogy between freedom of association and individual freedom of thought. My argument has criticized government regulations that, either as their aim or substantial effect, exert substantive influence on mental content in ways that are indifferent to and attempt to bypass the thinker's authentic consideration of and conscious engagement with the idea, especially when the exertion works by way of manipulating a character virtue presupposed by democratic society.⁹⁰ In the compelled speech context, in which a particular script is dictated, the concern is especially strong because a particular message or idea may be foisted onto the speaker in a way that bypasses her deliberative processes (or an attempt to do so may be at hand). As I will discuss in Part III, the parallel between compelled association and compelled speech is not complete in this specific respect, for compelled association does not necessarily involve an effort to foist a message or idea on association members through forced membership. Rather, compelled association risks an analogous interference in the autonomous process of thought formation in social groups, for this process relies on dynamics of trust and identification that may be disrupted or distorted by forced membership. Compelled association thus also displays an objectionable indifference to the autonomous thought processes manifested in voluntary social associations and their genesis, while yet representing an effort to make use of the character virtues associated with the close connections that are the product of voluntary association.

I have also criticized intrusions into the privacy of thought. This notion merits further unpacking in the individual case and then in its extension to the social case. First, individual freedom of thought is a clear requisite for meaningful freedom of speech protections. This holds true even when a

⁹⁰ See discussion *supra* Part II.B.1.

person is not actively deliberating in any focused way. Obviously, the government and the community may permissibly (and must) gain people's attention and influence their thoughts, for example through direct and indirect address, signs, letters, speeches, and media, etc.

But, though such efforts and successes in engaging others' thought are permissible and, indeed, essential to our leading meaningful lives together, the permission to provoke and engage others' minds is not sweeping and comprehensive across all contexts. The autonomous agent must have some ability to control what influences she is exposed to, to what subjects she directs her mind, and whether she, at all times, directs her mind toward anything at all or instead "spaces out" and allows the mind to relax and wander. To function as an independent thinker and evaluator, the individual must have domains in which she may enjoy the privacy of her thoughts. Some of the most productive, creative sorts of thinking follow periods of wool-gathering. Crystalline clarity may emerge from utter blankness. But even if this were not the case, the recognition of the individual thinker as independent and autonomous has to allow for some domains (spaces and times) in which the individual wields the power to control whether and how she approaches a subject and how and when she deploys her rational capacities. So, I contend it would be a First Amendment violation—an invasion of the domain of privacy of thought—were the government concerned to keep rational agents on the ball as much as possible, bombarding a person with attention-grabbing stimuli or with informative messages whenever she was on the brink of spacing out and relaxing. It would not be a sufficient defense that the messages did not disrupt or contradict a substantive line of thought she was pursuing or even that attending to them might strengthen her understanding of her own point of view.

This argument has an analog in the social domain. Social associations represent an important site for individual idea formulation, as I have been arguing. Compelled social association, then, may pose two objectionable hazards from a First Amendment perspective. First, compelled association may, by aim or by effect, exert substantive influence on individual members in an indirect, non-straightforward way, which takes advantage of and manipulates moral connections of trust and propinquity or, alternatively, may provoke guardedness, which detracts from the value of social associations. Second, compelled association may intrude on the privacy of social associations—the relaxed, unguided, unstructured social interplay that, for some, operates as the social intellectual counterpart of individual wool-gathering.

I am not arguing that individuals—whether alone or in associations—must be insulated from all efforts to influence or stimulate their thoughts. Quite the contrary. I am arguing that freedom of thought requires there should be some protected domains free from such efforts, including domains of interpersonal privacy. Specifically, the right to participate in certain processes of idea formation in some domains free from social efforts to influence thought encompasses not only the individual's mind, considered

in isolation, but also some social processes and sites of idea formation. Given the significance of social interaction and cooperation, the latter may be as important as domains for solitary contemplation.

2. *The Limited Scope of a Nearly Absolute Right to Exclude.*—The recognition of a nearly absolute right of social associations to exclude unwanted members does not entail that *Roberts v. Jaycees* was incorrectly decided, only that Justice Brennan's rationale was misguided. By contrast, Justice O'Connor's concurrence in *Jaycees* was largely correct. It drew an important distinction between social associations and business associations or associations that significantly operate as parts of the competitive economy. The strong freedom of association right for which I have advocated only directly applies to the former. In this section, I will sketch a defense of theoretical relevance of such a distinction in admittedly overly broad brushstrokes. I will not attempt to perfect any test that would serve as a criterion for delineation. For reasons of space, I will leave aside other complex cases of interest such as unions, political parties, the press, and media corporations.

Justice O'Connor's concurrence in *Jaycees* persuasively argued that the impact of forced association on the message of the Jaycees was not the relevant issue and that the standard articulated by Justice Brennan was both overbroad and under-inclusive. It might protect discrimination by commercial enterprises that engaged in some expressive activities but might provide insufficient protection for the power of an expressive association to create and define a "voice."⁹¹ While she acknowledged that it is difficult to draw a clear line between expressive and commercial associations, she argued that the constitutionality of statutes regulating association membership should turn on this line: "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."⁹²

Justice O'Connor's articulation of the First Amendment problem with compelled association was uncomfortably close to the spirit of Justice Brennan's. She emphasized a concern with whether regulation of membership would "necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard."⁹³ I have already objected to this narrow construal of the disvalue of regulating the membership of social associations and have argued that the First Amendment function of these associations should be more broadly construed. But these criticisms do not undermine the force of Justice O'Connor's larger point, namely that commercial associations may legitimately be treated differently, even if they

⁹¹ *Roberts v. Jaycees*, 468 U.S. 609, 633 (1984).

⁹² *Id.* at 636.

⁹³ *Id.*

have a message, the force or clarity of which might be diluted or distorted by regulations of their membership.

Specifically, two main features distinguish commercial associations from social associations such that the former may permissibly be subject to regulations to promote inclusion but not the latter. First, regulation to promote inclusive membership practices is justified when applied to associations whose primary purpose is participation in the commercial milieu because of the central importance of fair access to material resources and mechanisms of power. Second, because such associations operate within a highly competitive marketplace and have a fairly focused singular purpose whose pursuit is largely guided by this competitive context and aim of profitable operation, these associations do not function in a context that is likely to be conducive to the free, sincere, uninhibited, and undirected social interaction and consideration of ideas and ways of life.⁹⁴ Regulations requiring inclusive membership and employment practices, then, pose less of a threat to the aim of facilitating free and open sites of interaction and explicit and implicit communication because they are not natural sites for such activities. In Dan-Cohen's lingo, they are the theater in which detached roles take center stage.⁹⁵ This is not to say that integration in the workplace does not have a profound effect on the culture, and the attitudes and thoughts of workers. There is no question that it may, in primarily positive ways.⁹⁶ Rather, because workplace activities are singularly focused and already significantly regulated and limited by the requirements of marketplace activity, the infringement on freedom of association interests is not as significant as with social associations.⁹⁷ These associations are not structured in such a way to function well as sites for the realization of freedom of speech values I have been discussing. Further, given the basic significance of what they

⁹⁴ Cf. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 196 (1989). Baker's focus differs in two respects from mine: his is on commercial speech generally, not associations in particular, and it places greater emphasis on the individual speaker as central to the freedom of speech protection. And his conclusions are starker. He argues that since commercial speech has a "forced profit orientation," it therefore does not represent a "manifestation of individual freedom or choice." I do not take such a strong stand, and I do not mean to comment directly on the wide spectrum of commercial speech and when it does and does not garner strong constitutional protection. Nonetheless, my argument is a fellow traveler: freedom of speech requires protected contexts of freedom of association. Structurally, commercial associations are less well suited to serve these freedom of speech purposes within a competitive economy devoted to profit seeking, while failure to integrate them jeopardizes other foundational values. Hence, commercial associations merit a different level of constitutional protection.

⁹⁵ See *supra* note 69; see also BAKER, *supra* note 94, at 204.

⁹⁶ See, e.g., CYNTHIA ESTLUND, WORKING TOGETHER (2003); Blasi & Shiffrin, *supra* note 43; Shiffrin, *supra* note 83.

⁹⁷ Rick Hills makes distinct but complementary arguments for the division between commercial and non-commercial contexts in *Two Concepts of 'The Economic' in Constitutional Law: The Underlying Unity of Due Process and Federalism Jurisprudence* (manuscript, on file with Northwestern University Law Review). Hills both defends and traces the historical recognition that individual autonomy can only be achieved in the economic sphere through regulation and that the economic sphere provides a special site for unifying a diverse citizenry.

distribute and produce for functioning as an equal citizen as well as their *closed* structure, typified by the tremendous barriers to operating parallel structures if one is excluded from the mainstream economic market, equal access must be ensured. Finally, the threat to free speech interests that such regulation might otherwise represent is averted by the existence of a protected sphere of voluntary social associations in which individuals may congregate with those they choose to engage in unstructured, open forms of activity and interaction.

These distinctions suggest that principles of equal opportunity have specific application where significant access to fundamental resources is at stake, where their method of distribution is highly competitive, and where there are other domains in which stronger norms of free association govern. But it may be reasonably objected that the strong right of exclusion enjoyed by voluntary associations entails that significant social and cultural resources may be held out of reach for those who are excluded.

I entirely agree that those excluded from voluntary associations such as the Boy Scouts may suffer from their exclusion from significant cultural enterprises. Such exclusion can be psychologically and socially harmful to those who experience it. (Members who engage in exclusion also lose out from the failure to associate with other people, although, broadly speaking, their loss is voluntary and therefore lacks the same oppressive social meaning.) I do not mean to discount those harms. They are a real, substantial cost of the protection of freedom of association, just as there are similar costs associated with other protected forms of expression that permit the voicing of hateful or ignorant sentiments.

I do think, however, that these costs differ in some significant ways from the impermissible sorts of exclusions from other social and economic resources just discussed. Put briefly, the principled (though by no means bright-lined) distinction lies along these lines: unlike access to material and economic resources, the values of cultural creation are fully achieved only when those who create also endorse the conditions of creation. Forced methods of generating culture suffer authenticity problems that undercut its value. Further, by contrast with those excluded from access to material resources or closed competitive markets, the excluded have the viable option to generate robust associations of their own and to create their own sites of culture and mutual recognition and trust. Of course, these alternatives may not substitute completely for what is sought by those who are subject to exclusion, namely inclusion and recognition by particular cultural entities. These alternatives may also lack the social cachet of, and social power wielded by, majority, mainstream groups. But they do provide opportunities for creating rival sources of recognition and social connection on a voluntary and fully authentic basis. Because the milieu of voluntary associations does not operate on as competitive and material a basis as business and related commercial association, the barriers to creating alternatives are lower and substantively different.

I have briefly argued that society must recognize some, but not every, domain of social interaction as private and that social associations are structurally better suited than commercial associations to provide the necessary social refuge of privacy required for a robust free speech culture. A full treatment would demand a delineation of the line separating commercial from social associations and an account of what constitutional limits should govern regulation of commercial association. Since my aim has been only to expand appreciation of the close connection between freedom of speech and freedom of social, voluntary associations, I will not attempt to fill in these gaps. I will just note two points in passing before returning to *Dale*: First, although I do not offer any algorithm to chart the divide between social and commercial associations and do not have any special confidence that a comprehensive algorithm exists, a sensible approach would be guided by an interest in ensuring every individual equal access to those resources necessary for individual and social functioning but whose production and consumption does not strongly depend on authenticity or sincerity of the producers and consumers. The latter clause leaves open familiar hard cases, such as whether religious associations engaging in significant transactions of products or services within the economic market may be forced to integrate, despite claims that their operations require that only religious adherents may be employees,⁹⁸ or whether agricultural associations committed to promoting organic farming methods may be forced to associate with agricultural associations that promote pesticide use.⁹⁹ The persistence of such hard cases seems predictable and confirming rather than undermining. I leave open whether a message-sensitive approach may be appropriate in those commercial associations cases in which individual speech interests are not at stake but in which commercial and expressive purposes are closely intertwined.¹⁰⁰

⁹⁸ Cf. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

⁹⁹ See *infra* note 100.

¹⁰⁰ For example, take the complicated conjunction of *Glickman v. Wileman Brothers & Elliot*, 521 U.S. 457 (1997) and *United States v. United Foods*, 533 U.S. 405 (2001). Together, these cases appear to stand for the proposition that commercial associations enjoy limited rights against compelled association and compelled speech. *United Foods* seems to take the puzzling *prima facie* stance that for such associations, rights against compelled speech are more attenuated when the compulsion occurs within the context of a compelled association that serves larger economic purposes and involves a wider span of economic regulations on members. 533 U.S. at 412. While this may seem to be a version of the perverse idea that a little compulsion is worse than a lot, it might be better understood as viewing the members of a compelled agricultural association as losing some of their independent identity as individual actors and thereby, some of the basis for objection to some types of compelled speech. An aspect of *Glickman*'s analysis that permitted compelled speech arising within a legitimate compelled association because no participant was required to "endorse or to finance any political or ideological views," 521 U.S. at 458, left unclear how to categorize compelled endorsement of messages that may serve to advance the profit of the individual producer but are at odds with the producer's views about the quality or methods of business (as opposed to the method of marketing that was at issue in *Glickman*). For instance, an organic farmer may have strong grounds to resist mandatory membership in an agricultural

III. *DALE* REVISITED: ASSOCIATIONS OF CHILDREN

To recap: I have argued that the *Jaycees* approach to the value of association is wrongly message-based and excessively outwardly focused. The *Jaycees* approach assumes that an association's organizational purpose and value typically emanates outward, that it is focused upon communication of a determinate message, and that our concerns about regulations of associations should center around how that function is affected by regulations. As I have suggested, this is an overly narrow way of thinking about the value and function of associations. The importance of associational freedom may have much more (or at least as much) to do with aspects of the internal life of associations that may be unconnected to the articulation or reinforcement of a shared message: namely, how members stand to affect one another's thoughts and how associational membership affects insiders, not outsiders.

But in turning our focus inward, we should be careful not to adopt an analog of the *Jaycees* approach by articulating the value of associational freedom in terms of associations with specified purposes and well-defined commonalities between members.¹⁰¹ Rather, we should begin with the idea that associations provide welcome sites for the development of ideas, discussions and disputes between members in an environment they find sufficiently comfortable and conducive. Associations that serve this function may or may not have clearly-specified shared beliefs and purposes and may be susceptible to dynamic change; such susceptibility is consistent with and even indicative of the association functioning in a typically valuable way.

These points should come as no surprise if one turns to the Boy Scouts in particular. The point of that association is not to provide a focal point for community-spirited young boys and men to come together and articulate a specific message to the public at large, to potential members, or to themselves. It is an institution designed to influence and to teach young boys how to think and act. Its attention is directed inward, toward its members; its point is to influence their character. A colleague's old Scout manual makes this explicit:

Scouting is learning to grow into responsible manhood, learning to be of service to others By taking part enthusiastically in all activities of patrol and troop, by learning the skills that Scouting has to offer, by living up to the ide-

association that promotes pesticide use. Related facts arise in *Cochran v. Veneman*, 359 F.3d 263, 267, 274, 280 (3d Cir. 2004) (finding for small, "traditional," non-hormone-using dairy farmers who objected to mandatory contributions to the "Got Milk?" ad campaign because the campaign suggested all milk is alike and thereby promotes environmentally wasteful production methods). See also *Livestock Marketing Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711, 713, 715–16, 726 (8th Cir. 2003) (finding for domestic beef producers who objected to mandatory assessment for generic advertising about beef that promoted all cattle rather than domestic cattle), *cert. granted sub nom.*, *Veneman v. Livestock Marketing Ass'n*, 124 S. Ct. 2389 (2004).

¹⁰¹ See White, *supra* note 85, at 374 n.2 (articulating an approach that characterizes associations as defined by the pursuit of a shared purpose, clarifying and extending Brennan's theory in *Jaycees*).

als of Scouting, you will become the man you want to be.¹⁰²

While some Scout virtues are visible to the public, the manual emphasizes that many Scout virtues, like thrift, bravery, reverence, and cleanliness (of spirit) are “hidden to other people.”¹⁰³ In this sense, the Boy Scouts provide the perfect example given the points I want to make about associations. Their function is often internal and concerns the interactions and mutual influence of their members as much as or more than their stance, their external communications, or their influence on outsiders.

But in two related respects, the Boy Scouts are not prototypical of the associations that the right to associational freedom protects. First, it is an association filled with children, not adults. Second, it is an association filled with children that is directed and run by adults. These two features raise constitutional questions that were not, but should have been, prominent in the debate in *Dale*. I will not attempt to provide a full disposition of these questions but instead will try to show why they pose deep, difficult questions that go beyond those faced by the *Dale* Court.

A. *Do Children Enjoy the Same Freedom of Association Rights as Adults?*

Don’t get me wrong: It was not lost on the *Dale* Court that children populate the Boy Scouts. Concerns, and their dismissals, about the influence of gay Scoutmasters on young boys lurked overtly and covertly in the briefs.¹⁰⁴ However, the presence of children raises an entirely different issue than the one that panicked the Boy Scouts advocates—namely that children might be adversely affected by an integrated set of Scoutmasters. To the contrary, I will argue, the presence of children cuts against the Boy Scouts’ case because it significantly complicates its freedom of association claim.

By and large, it was taken for granted by all the Justices in *Dale* that the standard test for freedom of association claims applied. The question was whether the New Jersey accommodation law, as applied, passed or failed this standard. But both legally and theoretically, the application of the standard test should have raised eyebrows. Legally, the contours of children’s constitutional rights, including their free speech rights, often differ from those of adults.

¹⁰² See, e.g., BOY SCOUTS OF AM., BOY SCOUT HANDBOOK 19, 380 (7th ed. 1969) [hereinafter BSA 7TH EDITION HANDBOOK]; see also BOY SCOUTS OF AM., BOY SCOUT HANDBOOK 1 (11th ed. 1998) (“Scouting promises you experiences and duties that will help you mature into a strong, wise adult.”).

¹⁰³ See BSA 7TH EDITION HANDBOOK, *supra* note 102, at 404.

¹⁰⁴ See, e.g., Petitioners’ Brief for Writ of Cert. at 5–6, 28–29, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699) (suggesting gay men cannot serve as good role models); Amicus Brief of the American Public Health Association et al., at 15–18, *Dale* (No. 99-699) (discussing insinuations in the briefs and citing evidence that gay men are no more likely to be pedophiles than straight men).

It is, after all, constitutionally permissible to require children to be schooled and to subject them to direct efforts to influence their mental content, even in light of their resistance and even where mandatory education of adults would be constitutionally suspect.¹⁰⁵ Further, despite the insight and insistence in *Tinker*¹⁰⁶ and *Barnette* that children enjoy constitutional rights and First Amendment rights in particular, subsequent cases such as *Bethel School District v. Fraser*,¹⁰⁷ *Hazelwood School District v. Kuhlmeier*,¹⁰⁸ *Vernonia School District v. Acton*,¹⁰⁹ *Pottawatomie v. Earls*,¹¹⁰ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹¹¹ make clear that these rights do not take the same shape as those of adults. I do not endorse this subsequent line of cases, but in light of it, it seems strange that the freedom of association analysis in *Dale* proceeded so smoothly on the adult track. For it seems much easier to make the case that students may be made to integrate than it was to make the case that children may be constrained from speaking injudiciously, from speaking openly on controversial subjects, or from enjoying bodily privacy.

Theoretically, the prior section's argument for a fairly absolute right to exclude unwanted members from social or expressive associations works straightforwardly only for adults. The right for strong control over the composition of associations is an autonomy right of the individual members, one integrally connected to their free speech interests (among others). It relies also on the idea that individuals should be able to exert control over who they interact with, given that their interactions will either activate their virtues of trust or will require demanding forms of resistance that individuals may reasonably object to, given that it would complicate and constrain the free expression of their character virtues in social commerce. These arguments all presuppose an agent with life experience and at least the maturity age brings, one who has had opportunities to develop her autonomous capacities such that she may be reasonably thought to be responsible for the exercise of her autonomy. Children, due to their comparative lack of experience and less developed forms of autonomy, may not have adequate

¹⁰⁵ For a critical discussion of mandatory education requirements, see Martin Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Incultation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62 (2002).

¹⁰⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹⁰⁷ 478 U.S. 675 (1986) (upholding restrictions on ribald student political speech).

¹⁰⁸ 484 U.S. 260 (1988) (upholding restrictions on controversial student newspaper article).

¹⁰⁹ 515 U.S. 646 (1995) (upholding student drug testing).

¹¹⁰ 536 U.S. 822 (2002) (upholding student drug testing).

¹¹¹ 505 U.S. 883, 894–99 (1992) (upholding requirement that minors obtain parental consent or a judicial bypass for abortion while striking down a spousal notification requirement for adult women). See also *City of Dallas v. Stanglin*, 490 U.S. 19, 27 n.4 (1989) (upholding restrictions on age-based dance halls because dancing is not a form of First Amendment associational freedom but also noting many restrictions that would be unconstitutional if applied to adults are valid if applied to children).

grounds to lay claim to the full rights of freedom of association to exclude others for any or no reason.

If so, then the case for *Dale* would be more troubled. We might well claim that children's association rights are weaker or differently structured—that the state may reasonably judge that children may be required to interact with a wide range of people in their social activities and to confront and assess the validity of their and others' biases toward unpopular groups. This may ensure that children have a wide informational base to inform their subsequent, adult exercises of autonomy and to ensure that children enjoy equal opportunities that might otherwise be denied by other children's untutored discriminatory choices.¹¹²

The suggestion that *Dale* is complicated by the fact that it is a children's association may be subject to two objections, one about *Barnette* and the other about the proper framework with which to think about the Boy Scouts. The first: *Barnette*'s example is supposed to illuminate my analysis of compelled association, but how can I embrace *Barnette* while challenging *Dale*'s application to children since *Barnette* was about children? Doesn't the argument for the (original) application of the *Barnette* right against compelled speech falter for the same reasons that I allege pose a difficulty for *Dale*? The second is about whether the proper characterization of the Boy Scouts is as an association of children or as a mixed association of adults and children.

B. *Barnette and Children*

It is already something of an issue to explain how *Barnette* can be reconciled with the clear constitutional power of the state to compel the education of children. The subsidiary question is, assuming *Barnette* can be reconciled with this power, which category of regulation—that of compelled speech or that of mandatory education—does the regulation of membership in children's associations more closely resemble.

Children's compelled speech of the type invalidated in *Barnette* is distinguishable from mandatory education efforts in ways that may be brought out by contrasting the mandatory Pledge with legitimate educational efforts to teach or persuade students of the contents of the Pledge, its vision of America, and the worthiness of allegiance. Specifically, legitimate educational efforts involving such views differ in two ways from illegitimate recitation requirements.¹¹³

First, presenting information, ideals, visions, reasons and arguments to students for their evaluation, deliberation and assessment manifests a clear

¹¹² See William B. Rubenstein, *Boy Scouts Is a Training Ground for Homophobia*, L.A. DAILY J., Dec. 29, 2000, at 6–7 (suggesting that, after *Dale*, the Boy Scouts represent an effort to teach children to discriminate).

¹¹³ A version of this argument was initially introduced in Blasi & Shiffrin, *supra* note 43, at 454–65.

division between the proponent of the views (the state) and the intended audience (the students). This separation intrinsically recognizes the distinctness of the audience in a way that compelled speech requirements do not. The latter literally conflates the speaker and the intended audience, marking no explicit recognition of the separation between them.¹¹⁴ Addressing students as an audience, instead of corralling them into speaking, shows respect for the virtues of sincerity and intellectual independence.¹¹⁵ Second, educational efforts keyed to persuasion go further and show more nuanced attention to the beliefs of students. A teacher who employs the pedagogy of persuasion engages with the questions and doubts of her students. Such a teacher actively nurtures the evaluative and deliberative capacities of students to help them arrive at conclusions that are truly their own. Such interactions show respect for the judgments and attitudes of students, in contrast to the indifference manifest in recitation requirements.

Regulating membership of children's associations resembles mandatory education more than compelled recitation, although the analogy is not straightforward. Unlike compelled recitation, inclusion-oriented membership regulations do not amount to a direct effort at mind control with a specified content. Associational interaction may influence mental contents and one's views, but the method of affecting the mind has even less specified content than the sort of persuasive educational efforts just defended. While the influence may transmit slowly and non-transparently and thus may be analogous to compelled speech, the site of influence is more dynamic and possibly bi-directional. This, in combination with the special urgency of establishing a foundation in children for equal citizenship and the basis for fully developed, informed exercise of autonomy rights over their lifetimes, provide grounds for regarding *Barnette*-for-children as apt but *Dale*-for-children harder to defend.¹¹⁶

C. *The Parental Association Right—Pierce and Dale*

A second possible objection might be advanced against my bare description of *Dale* as a case about children and their exercise of associational liberty. The case might also be described as a case that implicates the associational interests of adults—either the adults who run and participate in the association or the parents of the children who participate.

¹¹⁴ See *supra* text accompanying notes 46–61 (discussing the illegitimacy of compelled speech, including the possibility that recitation may cause internalization of its message).

¹¹⁵ See *supra* text accompanying notes 62–68 (discussing how compelled speech compromises virtues of sincerity).

¹¹⁶ Much more could be said to address these complexities, especially to calibrate the significance of the interest children have in exercising what autonomous capacities they already possess in childhood and how much respect that interest should be accorded in light of the competing state interests in integration and in ensuring that citizens are afforded the necessary opportunities to develop these capacities fully. My aim here, though, is not to resolve the matter, but to underscore that these issues were central but went unacknowledged.

The Boy Scouts involve both children and adults in a mixture that defies clean description. But this only reinforces my contention that *Dale* involved more complicated questions about associational freedom than the Court faced. Perhaps we should see it as an association of the active adult participants, who are organized for the benefit of children. This would not make the associational freedom claim simple, however, because the adults are not merely making decisions about with whom they themselves associate but with whom children will associate. It is not obvious that the strong associational liberty of adults should be understood to extend that far, to require control over others' associations. Given what is at stake for the children excluded—the benefits of integration, including an interest in exposure to a wide range of influences—the case for extending associational liberty here seems weak. Generally, the argument for associational rights becomes strained when it involves a claim to be able to command or control the associational practices of people other than oneself.

The exception to this last generality may be the family. The best case for recognizing a strong association right in *Dale* is to think of the Boy Scouts as an association of parents and their children, one that involves the participation of other adults to promote its purposes. The relevant association right would be that of the parents, flowing from the parental rights recognized in *Meyer v. Nebraska*¹¹⁷ and *Pierce v. Society of Sisters*,¹¹⁸ and reiterated in *Troxel v. Granville*.¹¹⁹

There is reason to feel ambivalent about *Pierce*¹²⁰ (and to think *Meyer* can be defended on grounds other than parental rights). On the one hand, children and the community have an interest in ensuring that children have a broad range of influences and experiences that allow them to develop their autonomous capacities and that provide them with information to facilitate a more informed exercise of the autonomy rights they will later fully enjoy. Fostering children's development and protecting their autonomy rights may require that we provide a buffer against parental control of children where its exercise might eclipse important opportunities for children.

On the other hand, *Pierce* can not be easily dismissed. Although it is usually considered an early substantive due process case, it has strong free

¹¹⁷ 262 U.S. 390 (1923) (finding unconstitutional a regulation forbidding the teaching of foreign languages to young children).

¹¹⁸ 268 U.S. 510 (1925) (finding a constitutional right of parents to send their children to private schools instead of public schools).

¹¹⁹ 530 U.S. 57 (2000) (finding parental rights violated by a statute allowing anyone to petition for visitation and deciding petition without any deference to parental decision).

¹²⁰ See also ROB REICH, BRIDGING LIBERALISM AND MULTICULTURALISM IN AMERICAN EDUCATION ch. 6 (2002); Barbara Bennett-Woodhouse, *Speaking Truth to Power: Challenging the Power of Parents to Control the Education of Their Own*, 11 CORNELL J.L. & PUB. POL'Y 481 (2002); Barbara Bennett-Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992); Steven Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, 11 CORNELL J.L. & PUB. POL'Y 503 (2002).

speech underpinnings. Specifically, citizens have an interest in having some measure of control over those they associate closely with—not just from a privacy standpoint, but from a First Amendment perspective. Close associations among moral agents tend (and should tend) to engender sympathy, identification, and thereby exert a powerful influence on one's thoughts and one's mental agenda.¹²¹ Put bluntly and in exaggerated form, if the state is able both to compel education and to exercise complete control over the content of the education of the child, it begins to approach the ability to nurture and insert a state agent into the home. We need not posit a religious need to have children share one's point of view or practices in order to practice one's own religion fully and then try to formulate a free exercise interest in order to posit a First Amendment concern here. The same mind-control concerns articulated earlier in the paper have traction. Put less dramatically, individuals, as thinkers, have an interest in safe havens for thinking freely and with privacy, both from scrutiny and from persistent counter-influence, especially that sort of counter-influence that exploits character virtues. They have an interest in havens in which they may develop their thoughts in trusting relationships with others. The family and the home are obvious venues to locate these havens, both because of the close emotional ties family members cultivate and because of the dominance of the home in everyday life. Friendships too have a special place as sites for individuals to think alone together, sites in which one can engage in social commerce with some distance from the special pressures (and benefits) of familial life.

Hence, this argument provides a relatively simple route from the First Amendment to the constitutional protection for contraception found in *Griswold v. Connecticut* and *Eisenstadt v. Baird*.¹²² The right to contracept may be seen as derivative of the First Amendment right of association that naturally encompasses the family and includes, within its sweep, a strong right to exclude unwanted members from the circle of trusted intimates.¹²³

If we affirm some right to raise children, then there is a case for *Pierce* on First Amendment grounds. But given the other concerns raised about children's autonomy interests as well as their need to be treated as equals and to be trained in treating others as equals, that case is at best uneasy and tempered. In *Runyon v. McCrary*, the Court recognized this, finding that parental associational rights did not extend so far as to shelter private

¹²¹ See *supra* Part II.B.2 (arguing the link between the First Amendment and social associations).

¹²² 381 U.S. 479 (1965); 405 U.S. 438 (1972).

¹²³ Lawrence Tribe has also recently drawn a connection between the rights of intimate association, protected in *Meyer*, *Pierce*, *Griswold*, and *Lawrence*, and the First Amendment rights of speech and assembly. See Lawrence H. Tribe, *Lawrence v. Texas: The 'Fundamental Right' that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1939–42 (2004). In arguing for the right to exclude entry into the family, I do not mean to deny that in very significant respects, the family is a foundational unit of economic distribution and exchange. A full analysis of the family as both private and economic association is not possible here however.

schools from laws forbidding racial discrimination.¹²⁴ Children's interests in developing the capacities for a fully autonomous life provide some pull against an unconstrained parental right to dictate the terms of children's encounters and education, especially since parenting, and hence, susceptibility to parental duties, for most, is optional. The strength of the case for *Pierce* also wanes to the extent that the state implements autonomous teaching methods (and is constitutionally required to do so). That is, if the state exposes children to a wide range of views but does not attempt to indoctrinate children,¹²⁵ then there is more to the argument that parents have the opportunity to offer counter-instruction and engage productively in influencing children's intellectual development.¹²⁶

Even if *Pierce* is sustainable, framing the Boy Scouts' exclusion of gay leaders as an extension of parental associational liberty is still a shaky step. The argument for associational liberty protected by *Pierce* has significant traction because the state's efforts to influence children operate on children through mandatory education regulations. Further, daily schooling has a pervasive presence in a child's life. By contrast, in the case of the Boy Scouts and other social associations, participation in the association is not mandated by the state. Parents may already withdraw their children if they have concerns about whom they will interact with in social associations.¹²⁷ Further, its operations are not as time-consuming and pervasive. Thus, some of the concerns about infiltration of the safe haven for the mind are less powerful in the case of compelled association than in the case of compelled education and, so, the interests in providing children a range of experiences and training in moral behavior may come to the fore. The right to substitute private for public schooling might be sustained while still resisting a right to shelter social associations of children from inclusion-oriented regulations. A hybrid approach of this sort would permit parents to exercise substantial influence over their children's lives as well as their own home life, without giving them complete control over what their children are ex-

¹²⁴ 427 U.S. 160 (1976).

¹²⁵ See Blasi & Shiffrin, *supra* note 43, at 474; see also Reddish & Finnerty, *supra* note 105.

¹²⁶ Of course, one may retain a healthy skepticism that local schools will hue to these educational ideals, even if constitutionally mandated. Compliance concerns might tip the balance in favor of a parental right to educate privately.

¹²⁷ I do not wish to downplay the importance of social associations for children. However, our recognition that parents are sincerely trying to provide the best for their children does not entail that we must be fully accommodating of parents who want to insulate their children entirely from diverse experiences. At some point, state interests in nurturing a future citizenry that respects equality may require an arena for expression. Parents who disagree may have to make some hard choices. This difficulty is somewhat mitigated by the *Pierce* permission to school privately, although importantly, this option may be unavailable for parents of modest means. Religious associations for children may represent an additional arena for stronger parental control if free exercise considerations dictate greater exclusionary powers.

posed to. I believe this flexibility and compromise is a virtue of the approach.¹²⁸

IV. CONCLUSION

Freedom of association has an intimate connection to freedom of speech, much closer than is contemplated under the message-based, amplification-device conception seen in *Dale* and *Jaycees*. Appreciating the closer connection between freedom of association and freedom of speech calls into question constitutional analyses of regulations that focus on whether an association has a message, what it is, and whether it is disrupted by the regulations. Having a coherent message is not a precondition of an association's First Amendment value. Social associations full of diverse, disagreeing people who are not even attempting to generate a message may merit as much First Amendment protection as those full of people with a singular focus on publicizing a clear agenda. The more pressing inquiry, I have suggested, is what sort of association is involved, and in particular, whether it is the sort of association that is structurally suited to be a site for realizing the First Amendment values I have articulated.

¹²⁸ Of course, the inverse is also a possibility: mandatory public schooling but complete parental control over the composition of social associations for children. I do not argue against this compromise here. It has its attractions, although it is unlikely to be legally or politically feasible.