

## WHAT IS REALLY WRONG WITH COMPELLED ASSOCIATION?

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### INTRODUCTION

*Roberts v. United States Jaycees*<sup>1</sup> held that it was constitutionally permissible for Minnesota to require the Jaycees, as a public accommodation, to desegregate and to admit women. *Boy Scouts v. Dale*<sup>2</sup> held that it was constitutionally impermissible for New Jersey to require the Boy Scouts, as a public accommodation, to remain partly desegregated by permitting an openly gay Scoutmaster to remain in the organization. It is not surprising that *Dale* has caused gnashing of teeth by those who applauded *Roberts v. Jaycees*: the commitment to integration seemed all too limited. Women counted; gays and lesbians did not.

Such an analysis is natural but too quick. Much greater dental destruction should have resulted both from *Jaycees* and from *Dale*. Those who support *Roberts v. Jaycees* should have been chilled by *Dale*, not entirely because of its outcome, but because the reasoning of *Dale* and the debate between the justices was entirely foreshadowed by Justice Brennan's opinion in *Jaycees*. The opinions in *Boy Scouts v. Dale*<sup>3</sup> and in particular the dissenting opinions of the liberal justices, follow the lead of Justice Brennan. In so doing, they reflect and forward a view of freedom of association that, while familiar, is importantly and

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<sup>1</sup> 468 US 609 (1984).

<sup>2</sup> 530 U.S. 640 (2000)

<sup>3</sup> 530 U.S. 640 (2000).

unpalatably incomplete. *Roberts v. Jaycees* was correctly decided, but the rationale that Brennan crafted corrodes our commitments to freedom of expression and association.

In this essay, I will pursue this claim: that Justice Brennan's opinion in *Jaycees* reflects and has reinforced an approach to the freedom of association that denigrates its value and implicitly distorts its intimate connection to freedom of speech. The mistake, or at least the omission it represents, parallels a similar error in a common articulation of the objection to compelled speech. Drawing upon a core, but under-emphasized, aspect of liberalism, I will try to make out a more persuasive case against compelled speech that, concomitantly, makes greater sense out of certain freedom of association claims and reveals a more intimate connection between freedom of speech values and freedom of association claims than standard models recognize.

Specifically, I will argue that the fundamental wrong of compelled speech in cases such as *West Virginia State Board of Education v. Barnette*<sup>4</sup> has less to do with its external effects – the possibility of outsiders misunderstanding a person's compelled speech as his own – and has more to do with concerns about the illicit influence compelled speech may have on the character and autonomous thinking process of the speaker who is compelled and about governmental efforts, however fruitless, to influence thinkers in this way. Similarly, the disvalue of compelled association is not fully captured by analyses that look to the risk that outsiders will misunderstand the association's message or that the organization'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 are 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 sorts of sites for the generation of thoughts and ideas. As with compelled

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<sup>4</sup> 319 U.S. 624 (1943).

speech, our concern should be turned partly inward rather than exclusively outward. The main risk to freedom of speech of compelled association has to do with the effect on the internal life of the association and not merely the impression it makes on outsiders.

I will also, more tentatively, advance a second claim about *Dale*: that the most interesting questions about the case were not raised and thoroughly pursued. What ought to have been mooted in *Dale* was not the issue of whether the inclusion of Dale, a gay Boy Scout leader, into the group would distort its message, but whether an association primarily of children and for children should enjoy the same form of protection of freedom of association as that properly extended to adult groups.

## I. RETHINKING THE DISVALUE OF ASSOCIATION

### A. *The Narrow Model of Association's Value and Its Distorting Effect on Freedom of Speech Analysis*

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 Boy Scouts leader from the Boy Scouts. The Court, in a 5-4 majority, found that the compelled inclusion of Dale violated the Boy Scouts' First Amendment rights of association. The main issues dividing the majority and the dissent were first, whether Dale's compelled inclusion in the Boy Scouts would alter the message of the Boy Scouts and second, whether it was clear that the Boy Scouts really did have a message that involved the rejection of homosexuality.<sup>5</sup>

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<sup>5</sup> Because the majority found that Dale's inclusion would substantially alter the Boy Scouts' message, it did not reach the question of whether there was a compelling state interest in preventing discrimination on the basis of sexual orientation. It thereby bypassed some quite interesting questions about what constitutes a state interest and, specifically, whether the 'state' in 'state interest' refers generically to governmental interests or whether it refers, abstractly or concretely, to the interests of the particular governmental entities on whose behalf they were

This methodology grows straight out of Justice Brennan's approach in *Jaycees*. In *Jaycees*, Justice Brennan began his analysis by distinguishing between intimate association rights and those association rights connected to the First Amendment. The latter garners civil protection "as a means" preserving other liberties.<sup>6</sup> While he acknowledged overlap between the categories, Justice Brennan located the boundary between intrinsically valuable associations and instrumentally valuable associations as that between intimate and expressive associations.<sup>7</sup> The boundary may be *identified* by the smallness, selectivity and seclusion of

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being asserted. These questions intersect with issues concerning federalism; whether 'state' is interpreted generically or as admitting to an interpretation that is more parochial may impact the degree of freedom states enjoy to experiment and pursue distinctive modes of government and regulation. Here, the lurking issue was whether states may declare certain goals to be state interests or compelling interests even when the federal government and federal courts have 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*, *DOMA*, don't ask, don't tell, and the President's endorsement of an amendment banning same-sex marriage on the one hand and *Romer v. Evans* and *Lawrence v. Thomas* on the other.

In identifying this issue, 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 just mean to call attention to some of the difficult issues connected to a test that renders the contours of a federal constitutional right possibly 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.

While the issue cannot be treated here, the contours of and conditions on being a state interest merit further thought. Similar difficulties to the ones described above may arise in cases involving the various interests in controlling or preventing the ability to control the means of death. Here, there may be diametric opposition between the interests different states declare (compare Oregon and Washington) and the interests declared by the federal government and some states (cite Oregon dispute). These disparities are enormously interesting especially in light of the feature of the compelling state interest test that requires some independent judgment by the judiciary as to whether, from the federal perspective, the state interest should be regarded as compelling. While I suggest above that a non-generic interpretation of state interest may support the experimentation values associated with federalism, such an approach may also limit the power of states. It might require, for instance, some real evidence of the state's commitment to the interest it espouses and this may require greater evidentiary showings than are typical; also, for better or for worse, such an approach might be in tension with some aspects of the notion that legislative intent is irrelevant. See *U.S. v. O'Brien*, 391 U.S. 367 (1968). In Justice Thomas' dissenting opinion in *Grutter v. Bollinger*, Thomas's analysis of Michigan's state interest seemed implicitly to endorse the parochial interpretation and to suggest another potential limitation, namely that a state's interest is limited to what happens within its geographical borders. Thomas reasoned that because most University of Michigan graduates practice outside of the state, Michigan cannot claim a state interest in the diversity of the law school's students. *Grutter*, 539 U.S. \_\_\_\_ (2003), 2003 U.S. Lexis 4800, at \*119-\*122. While Thomas' suggestion that a state's declared interest must bear a substantive relationship to the actual state's interests may be plausible, his application of this condition seems overly constrained. Michigan might well have an interest in contributing strong lawyers to the national pool, to attracting strong legal minds to the state, to building a great university where legal ideas are developed, and to building a strong reputation--even if the lawyers it produces ultimately relocate.

<sup>6</sup> *Jaycees* at 618.

<sup>7</sup> *Id.* at 618.

the former.<sup>8</sup> The Jaycees did not have these features, being a large, national, decentralized, ‘basically unselective’ group.

Thus, the Jaycees did not qualify for the protections afforded intimate (and in Brennan’s view, intrinsically valuable) associations. The question was whether the compelled inclusion of women unconstitutionally infringed their (instrumentally valuable) freedom of expressive association. If it did burden freedom of association, then a regulation compelling inclusion would only be permissible if an infringement served a compelling state interest unrelated to the suppression of ideas and one that could not be achieved through less restrictive means.<sup>9</sup> The regulation at issue, Brennan announced, advanced the interest of equality “through the least restrictive means,” for no demonstration was made that the inclusion of women “imposes any serious burdens on the male members’ freedom of association.”<sup>10</sup> Minnesota’s purpose was not to suppress ideas “or to hamper the organization’s ability to express its views,” but to eliminate discrimination.<sup>11</sup> He assessed whether a burden on expressive association was imposed by looking to whether the regulation directly affected the organization’s ability to engage in outward endeavors, such as civic or charitable lobbying and fundraising activities or “to disseminate its preferred views.”<sup>12</sup> 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 adverse views from their own.

Brennan's approach seemed to reduce to two questions. First, did the regulation of expressive association promote a compelling state interest, one unrelated to the suppression

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<sup>8</sup> Id. at 620. What I will argue is that Brennan’s division misleads by failing to acknowledge a wider range of distinctions. In particular, expressive association has intrinsic First Amendment value, not merely instrumental value.

<sup>9</sup> Id. at 623.

<sup>10</sup> Id. at 626.

<sup>11</sup> While the aim to eliminate discrimination is *not* directly an effort to suppress ideas or expression, I will argue later that there is an important non-accidental connection between regulating association membership and having an effort of influencing the thoughts and ideas of the membership.

<sup>12</sup> Id. at 627.

of ideas? And, second, was this interest promoted in the least restrictive way, i.e. in a way that did not disrupt the *outward* expressive activities of the group *or* prevent the group from excluding those with evident views in conflict with the association's message?<sup>13</sup> Such an approach naturally yielded the opinions in *Dale*, which focus on 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.<sup>14</sup>

On its face, the dispute between the majority and the dissent about how strong the opposition to homosexuality need be for the Boy Scouts to be construed as having a message critical of homosexuality is destructive both of free speech aims and of progressive aims. I begin with what is mistaken about the more extreme pole on the divide: the dissent's position. The dissent took the view that the Boy Scouts did not have a clear message standing for the rejection of homosexuality, and, therefore that the application of the New Jersey accommodations law to the Scouts would not threaten their expressive association interests. The mission statement of the Boy Scouts extolled its 'representative membership' and its inclusionary policies.<sup>15</sup> While, as the majority and the Boy Scouts noted, the Scout Oath and Scout Law do stress moral straightness and being clean, neither of these qualities is implicitly or explicitly contrasted with having a particular sexual orientation.<sup>16</sup> The Scoutmasters' handbook encourages Scoutmasters to avoid giving detailed advice or proffering specific opinions about sexuality; it nowhere declares that Scoutmasters should take a position on homosexuality, much less a negative one. In light of the Scouts' declarations of inclusiveness and their silence on the matter in key venues, the dissent claimed that the Boy Scouts' explicit statements of opposition to homosexuality (or

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<sup>13</sup> See also *Bd. Of Directors v. Rotary Club*, 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

<sup>14</sup> Of course, even if it were to, it might abridge no more than necessary. This question is not reached and *Dale* represents one of the few major cases in recent memory to take so seriously the least restrictive means test.

<sup>15</sup> *Dale* at 666-7 (Stevens, J., dissenting).

<sup>16</sup> *Id.* at 667-9.

sometimes, more narrowly, to the employment of gay leaders) were insufficient to establish that the Boy Scouts did actually take that 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.”<sup>17</sup> Further, such a view must have been adopted prior to any action on that view for the dissent criticizes the Boy Scouts’ later, more articulate policy statements opposing homosexuality because they were adopted after the fact.<sup>18</sup>

This is a troubling and counterproductive standard of what it is to voice a message -- all the more troubling given the dissent’s sympathies. For 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. Such a standard discourages the toleration *within* groups of dissent, experimentation, and critical re-examination of their stances.<sup>19</sup> 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. Such a standard encourages extremism in the articulation of a group message and encourages fear of internal criticism. Ironically, the dissent’s standard would discourage the sorts of gradual, tentative steps associated with genuine intellectual and emotional change and lasting social progress. Groups who tolerate

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<sup>17</sup> Id. at 676.

<sup>18</sup> Id. at 674.

<sup>19</sup> For a sensitive discussion of the salutary, common properties of intra-group dissent, see Madhavi Sunder, “Cultural Dissent,” 54 *Stanford Law Review* 495, 561-7 (2001). While articulating a much more sophisticated and nuanced approach to cultural interpretation and the internal virtues of cultural disagreement, Sunder, however, advocates a treatment of compelled association that I believe encourages pre-emptive intolerance. On her approach, “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. Even when informed by an interpretative approach such as her own that is more attune to and so more ready to recognize the presence of contests over meaning, I believe this standard would nonetheless encourage leaders to try 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 organizations 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 incentive effects of such a rule, as I discuss *supra*, 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 their exposure to divergent points of view, even when their resistance to such exposure is morally wrong or pragmatically mistaken.

discussion and movement in the direction of openness are more likely to lose control over their membership than those who adopt a posture of unyielding stridency. Such a result cannot really serve the goals of those who prize freedom of speech or those who prize inclusive, egalitarian, anti-bigoted values. If these standards have play, it is unclear how productive, effective change and evolution in perspective are to occur in associations who care about control over the composition of their memberships.<sup>20</sup>

Not only are the dissent's standards for what it is to voice a message counterproductive with respect to furthering egalitarian goals, they are intrinsically peculiar tests of what it is to stand for something and what it is to say something – to have and impart a message. The requirements of consistency, articulateness, and constancy implied by the dissent's analysis of whether the Boy Scouts had a message are extremely demanding standards. Consider how peculiar these standards would be in another freedom of speech context. We would not, for example, contemplate defending a claim of viewpoint-discrimination by challenging whether a censored speaker really, sincerely held the viewpoint or whether his expression of a point of view was coherently stated, free from contradiction, hesitation, or the suggestion of doubts. It would seem irrelevant to an effort to refute a claim of viewpoint discrimination that a censored speaker had 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 had taken place, or that no speech with that content had taken place.

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<sup>20</sup> Some have suggested that the requirement that one articulate clearly a bigoted message may serve as a disincentive for those groups who forswear that reputation. The choice to either appear intolerant or to 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. I argue later that there may be other disadvantages to prompting change in this way for groups who do not have this priority and that do yield to the pressure not to appear intolerant.

Of course, the dissent was attempting to police the boundary between excluding members in order to reflect and express a 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. And, if the standard of protection turns on whether or not regulations on association distort one's message, requirements that one have voiced the viewpoint clearly and over time are understandable criteria one would adopt to attempt to exclude pretextual justifications. But though they are understandable criteria, they seem dangerous. This is partly for the reasons I have articulated and partly because they would involve judges engaging in fairly detailed, intrusive forms of interpretative review of what an organization *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 someone who was *really* opposed to it on ideological grounds would speak – how volubly, on what grounds, in what fora.<sup>21</sup> While such reviews may not themselves preclude the adoption of dissenting views, they involve a form of judicial scriptwriting that is antithetical to a thorough-going concern about judicial imposition of content and the free exploration and articulation of ideas.<sup>22</sup>

This is not to argue that there is a more precise, better way of identifying the boundary between sincere and pretextual claims that an organization's exclusion of members of a group was pursuant to or expressive of one of its messages. But, it seems damning that the

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<sup>21</sup> Not only do these forms of inquiry seem intrusive, they also seem prone to failure. It is offensive for judges to impose their interpretation of an organization's aims on it but it is also likely to be difficult to do: without being a member of a group it may be hard to know what really does matter to it. See also Sunder, *supra*, *passim*, who argues that the Court's approach to cultural interpretation is overly blunt and insensitive to the dynamic nature of cultures; in particular, its efforts at interpreting the Boy Scouts were heavy-handed and monolithic.

<sup>22</sup> Compare the apt hostility to governmental script writing in *Cohen v. California*, 403 U.S. 15 (1971), in which the Court upheld a protestor's right to wear a jacket emblazoned with the slogan "Fuck the Draft," even in the face of arguments that his message could be conveyed with greater decorum.

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 sincere.

The majority provides a more plausible analysis of what it takes to stand for something or to articulate a point of view. However, the permissiveness of their standard makes it vulnerable to false positives – pretextual justifications for discrimination will appear to be exclusion motivated by adherence to a message or point of view. It is unclear how an organization run by reasonably intelligent people could ever fail this test.

I doubt that this problem is soluble. I suspect that the problem is not that the wrong measure of what distinguishes pretext from message was adopted, but rather, that the idea that the boundaries of freedom of association should turn on this distinction was misguided in the first place.

In retrospect, it didn't make much more sense when it was introduced. Let's return to the argument made by Justice Brennan in *Jaycees*: that since inclusion of women would not affect the message of the Jaycees, compelled inclusion of women did not unreasonably threaten their freedom of association interests. It's hard, actually, to articulate an interpretation of this position that seems plausible and attractive. On the one hand, the Court could be re-interpreting the meaning of the Jaycees' mission statement:

“to 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 and all nations,”<sup>23</sup>

to suggest that the Jaycees didn't really mean to be committed to the interests of young men as such, that 'young men' could be read as 'young people' or that this wasn't a particularly important part of its mission. But such an interpretation would seem difficult to sustain in the

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<sup>23</sup> *Jaycees* at 612-13.

face of the organization's insistence that it did mean what it literally said; to challenge the authority of the speaker here would involve appeal to an extremely overbearing, Pollyannic, paternalist theory of meaning. On the other hand, the Court could be 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. It is a fine logical point to be sure, but, sociologically, it is naïve to put a lot of weight on the idea that there was a group of professional young women chomping at the bit to lend a hand and participate equally in furthering the interests of young business men. And, whatever its merits, it is a bizarre place, normatively, to take a logical stand.

As a matter of fact, the inclusion of women in the Jaycees has gone hand in hand with an alteration of the mission statements of Jaycee organizations.<sup>24</sup> This isn't a surprise, and it shouldn't come as one to egalitarians. Much of the point of anti-discrimination and desegregation efforts depends on the idea that the integration of and exposure to excluded groups will affect people's thinking. Interacting with members of a different race or gender exposes one more vividly to their points of view, serves to humanize a group that has been caricatured and stereotyped, and makes one less likely to ignore or downplay their interests and concerns. Surely the impetus behind the compelled inclusion of women in the Jaycees was not the idea that not only men but women too should have an equal opportunity to promote the interests of young men. It was rather that the integration of women into the organization and organizations like it would have a salutary influence on how organizations such as the Jaycees devoted their energies and conceived of their missions: they would come to include women not only as their members but as the beneficiaries of their efforts. It is hard, I think, 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

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<sup>24</sup> cites

was a compelling *state* interest in ensuring that willing women had equal access to promoting the interests of young men as such?

This overview has been brief, but I hope it conveys the flavor of why I believe the Brennan approach in *Jaycees* is disingenuous and counterproductive to the protection of both freedom of speech and equality. It is disingenuous because no plausible understanding of the compelling state interest at stake could be reconciled with the idea that its pursuit would not distort any robust understanding of what the Jaycee's message was. And such an approach is ultimately counter-productive to the simultaneous pursuit of the protection of freedom of expression and equality, because: *either* one will take the dissent's path--a path that creates implausibly rigid standards for what is it to engage in expression and that simultaneously generates incentives for organizations to articulate and to impose internally, intolerant, unyielding attitudes that discourage dissent and experimentation; *or*, one will take the majority's path, which adopts a more plausible, permissive standard for what it is to articulate a message but in doing so renders association membership immune to anti-discrimination regulation. After *Dale*, it is hard to understand how, on the majority's reasoning, *Jaycees* is not in trouble.

Given what I believe is the hopelessness of the Brennan approach, how can one explain its emergence? One might cynically explain the *Dale* majority's attachment to it--as I have suggested, the approach ultimately undermines the purposes to which it was put. But this, of course, does not explain Brennan's position. I suspect that Brennan's approach is grounded in 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. Justice Brennan concomitantly imagines an overly narrow range of the dangers of compelled association, one that only locates the possible dangers of compelled

association outward, by concentrating on the potential alteration or distortion of the relationship between the association and the outside world that compelled association may occasion. By contrast, I believe the more pressing danger of compulsion is the effect it may have on the internal life of the association. Furthermore, such effects implicate First Amendment interests, not just the relational values served by associational membership.

To make these claims, I will argue that Brennan's dichotomy between intrinsically valuable forms of association and instrumentally valuable forms of association too quickly locates expressive associations in the latter category. Expressive associations may also have intrinsic value from a freedom of speech perspective. Before making out the fuller account of the connection between associational freedom and the First Amendment, I will prefigure the shift that I advocate for freedom of association analysis, from an exclusively outward perspective to one that also stresses an inward perspective, by illustrating how the same shift in orientation can better explain the constitutional protection against compelled speech represented by *Barnette*. Just as we should reconceive how we articulate the rationale for the *Barnette* protection, so we should re-think the rationale for *Jaycees*.

### *B. Compelled Speech*

Arguments against compelled speech by individuals often take a form analogous to the form of argument against compelled association voiced in *Jaycees* and then echoed in *Dale*. A common way to understand the rationale behind cases like *West Virginia State Board of Education v. Barnette*<sup>25</sup> and *Wooley v. Maynard*<sup>26</sup> is that they protect individuals from having to speak in ways that lead to their being misunderstood by others.<sup>27</sup> These rulings protect

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<sup>25</sup> 319 U.S. 624, 625 (1943) (finding a First Amendment right against compelled recitation of the flag salute)

<sup>26</sup> 430 U.S. 705 (1976) (recognizing a First Amendment right against being compelled to have the state motto "Live Free or Die" on one's license plate).

<sup>27</sup> The argument about compelled speech extends and deepens a position initially introduced in Vincent Blasi and Seana Shiffrin, *The Story of West Virginia State Board of Education v. Barnette*, in Michael Dorf, ed.,

individuals from having to attest to beliefs that they reject and thus from having others wrongly associate them with those ideas or beliefs. This is not a negligible concern, to be sure, but as many have pointed out, it is unclear whether this interest was powerfully implicated in cases like *Barnette* and *Wooley*. 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 of the required speech reflected the sincere, genuine thoughts of the utterer. If citizens are required to be associated with a particular message and this requirement is known, then the reasonable observer should conclude that the message may be only the state's, not the particular citizen's. 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.

The force of this critique can be over-stated. 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 a radical civil libertarianism. More plausibly, 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.

Nevertheless, the critique that compelled speech is unlikely to result in significant misunderstanding has a fair amount of force. The worry about misunderstanding seems slight -- at least where it is clear that the speech is compelled and the circumstances when it is compelled are reasonably well-defined, discrete, and obvious to observers. This does not mean that *Wooley* and *Barnette* were incorrectly decided. Rather, there are two superior justifications for their holdings.

The mistaken message theory focuses on what the audience to the compelled speech will infer and how it impacts the interest of the speaker in not being misunderstood. Two related, alternative theories 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.

Let's posit that a speaker has an interest in how she comes to produce messages - in how she thinks about subjects, and in reasoning about them sincerely and authentically. That is, the speaker has an interest in trying to come to conclusions about matters by thinking 'straight' about the relevant considerations that bear on the subjects. Compelled speech threatens to interfere with the pursuit of this interest. Take the flag salute as an example: one may worry that compulsory repetition of that message over and over again will have an influence on what and how one thinks. The message will become familiar to one. Its regularity may become a comfort and an internal source of authority for consultation. What one 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; their regular presence in one's speech and related action may predictably have an influence on what topics seem salient. Further, they may have an influence on how one thinks about what one thinks about. Commonly heard sentiments may become comfortable sentiments. Commonly voiced sentiments bear an even more intimate relation to the self.

The notion that what one says has a bidirectional relation to one's thought - that is, that what one says may influence and not merely reflect what one thinks - (as well as the thought that this may be a matter of concern) is familiar to feminists. Feminists, as well as anti-racists, have been pointing out (somewhat successfully for the most part) that how we speak (as well as what we hear) has an influence on how we think.<sup>28</sup> The persistent use of the male pronoun for the generic person may make one 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. 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.

This point is connected to the use of intuitions in moral methodology. It is common, when deliberating ethically, to consult one's intuitions or moral sense - to try to assess how we feel about an action or a situation and to think about how we are inclined to characterize it and speak about it. For example, discussions about the removal of aid in cases of euthanasia or abortion sometimes begin with someone saying: "we wouldn't call that a killing." 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,<sup>29</sup> set the moral agenda, and provide at least prima facie considerations about action. The use of such intuitions in moral theory is still somewhat under-theorized. Charitably interpreted, though, appeal to such intuitions is not an effort 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 ways of characterizing actual or posited situations are compressed, inchoate forms of reasoning in

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<sup>28</sup> See e.g., Mykol Hamilton, "Using Masculine Generics: Does Generic He Increase Male Bias in the User's Imagery?" 19 *Sex Roles* (1988) 785, 795, 798 (conducting an empirical study on the use of the masculine pronoun v. gender neutral pronouns and finding that 'use of the masculine pronoun per se increases male bias' by the language user)

<sup>29</sup> Compare with Barbara Herman, "The Practice of Moral Judgment," in *The Practice of Moral Judgment*.

which a wealth of experience and sensible reactions to experience are embedded. Through experience and acculturation, people navigate a wide range of ethical situations, make judgments and learn from others' actions and reactions. Their intuitions often reflect their unarticulated deliberative reactions to such situations and well as rationalizations of their own experience and action.

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 common 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 one lacks the belief. 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.<sup>30</sup> Similarly, though it may not 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.<sup>31</sup> Some even report finding themselves *thinking* as their characters

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<sup>30</sup> See Maimonides, *Guide to the Perplexed*, cite; Bachya ibn Pakuda, *The Duties of the Heart* (transl. Yaalkov Feldman) (1996), cite. See generally Nachum Amsel, *The Jewish Encyclopedia of Moral and Ethical Issues* (1994), pp. 176-181 (discussing Exodus 24:7, Maimonides and idea that performing *mitzvot* will be followed by and provoke an understanding of the meaning of the practices and not the reverse order). See also S. Schechter, *Some Aspects of Rabbinic Theology*, (NY: MacMillan, 1969), p. 161 (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 ed. David Lieber, *Etz Hayim* (Rabbinical Assembly: New York) (2001) (1460-4) at 1460, 1464 (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]). Some interpret this effect as occurring not with the person but within the community. The practice has associational effects. See supra note 2. This is only one reading. It may be that on Maimonides' view, the ritual's practice cultivates awareness of and perhaps confidence in one's always present but latent belief.

A different view challenges in a deeper way the division between faith and practice. On this view, there is no separation between practice and faith such that one could practice in a certain way contrary to faith but still retain one's faith. On this view, to be faithful just is to act in certain ways. See notes to Exodus 14:31, *Etz Hayim* 405 "In the Hebrew Bible, 'faith' does not mean belief in a doctrine or a creed. It refers to trust and loyalty expressed through commitment and obedience."

<sup>31</sup> The idea is a familiar one (which is not to say that its familiarity renders it true). Some examples: Writing about the effect that her immersion into roles had, Shakespearean actress Zoe Caldwell remarked: "It takes me usually six months to regain my self, my life." Zoe Caldwell, *I Will Be Cleopatra* (New York: W.W. Norton, 2001), p. 214. Christine Lahti recently reported that playing a Holocaust-era Jewish gynecologist provoked panic attacks, insomnia, and experiences of anxiety she had not had before. 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

would.<sup>32</sup> Indeed, this effect is part of the motivation for using drama as an educational and therapeutic tool.<sup>33</sup>

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

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There are No Choices,” New York Times, April 13, 2003, p. 12. One of the more striking claimed examples of this effect is that of Ronald Reagan. Michael Paul Rogin argues in *Ronald Reagan: The Movie*, 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*, (UC Press, 1987). W. Somerset Maugham explores the phenomenon in his novel *Theatre* (1937). Julia, the protagonist, finds herself reciting lines from her plays at crucial moments in her personal life, unaware as she is doing it that they are not her own words. George Cukor’s “A Double Life” tracks, albeit over-dramatically and fairly implausibly, the descent into jealous insanity of an actor playing Othello who cannot distinguish between the play and his own life.

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 behaviors that, while accessible from the actor’s personal experience, would not be the actor’s own but for the practice of playing the role.

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; in conversation, he connected this deeper understanding to a change in some of his political views and, in particular, to coming to an opposition to the death penalty. Some doubts about the spill-over 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 Studies in the Arts*, 1995, 13:1, 47-53. 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 the show’s run or whether longer runs would make a difference.

<sup>32</sup> In one interview I did 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, 2/12/03).

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, by contrast with compelled speech, actors intentionally try to identify with – even immerse themselves in - their roles and what their characters say, at least while they are performing, to deliver a convincing performance. But, second, while the immersion may be greater, it is, in part, achieved as a deliberate end. There is a high level of awareness and deliberate framing of 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. The compulsory nature of the speech may possibly recede into the background of the agent’s awareness because it is not essential to its performance that it be a *performance*; quite the contrary, 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. Whereas, the ‘pretend’ nature of the actor’s activities is persistently salient; the point of what the actor is doing is that it is a performance. These last two contrasts may be relevant to how much direct, non-deliberative influence the performed speech has on the actor’s thoughts and how much easier it may be for the actor, as a person, to maintain distance from the insincere speech.

<sup>33</sup> See e.g., Mallika Henry, “Drama’s Ways of Learning,” *Research in Drama Education*; Abingdon; Mar 2000 vol 5, issue 1 45-62.

speaker (as well as her audience) knows that the speech is compelled, won't this knowledge have an impact on how great the influence is of what she says on what she thinks? Isn't it less likely that these spoken words 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?

The brief reply to this objection is that speakers have an interest in avoiding an analog to cognitive dissonance. A moral agent has an interest in avoiding what I will call performative dissonance: states of conflict or tension between 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 one's utterances.<sup>34</sup>

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<sup>34</sup> Some results in cognitive psychological research may lend support. See e.g. Robert Levenson, Ekman and Wallace Friesen, *Voluntary Facial Action Generates Emotion-Specific Autonomic Nervous System Activity*, 27 *Psychophysiology* 363, 364, 368, 376, 382 (1990) (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); Paul Ekman and Richard Davidson, *Voluntary Smiling Changes Regional Brain Activity*, 4 *Psychological Science* 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); Robin Damrad-Frye and James D. Laird, *The Experience of Boredom: The Role of Self-Perception of Attention*, 57 *J. Personality and Social Psychology* 315, 315 (July-Dec. 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). The studies tend to confirm 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 we are interested in (that the relevant mental states may be caused by and not only causes of the relevant activities). See e.g. Laird at 315. One might believe the causal thesis without agreeing about its underlying mechanism and without subscribing to one of the tenets of self-perception theory: that agents infer their mental states from their activities and these inferences either constitute their mental states or cause these mental states to happen.

Barbara Fried asks whether and why this phenomenon would be more exaggerated when a person is compelled to voice a claim rather than to listen to it. While I am not qualified to 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 she merely hears. The argument below about sincerity may provide a partial explanation of the phenomenon. One's own statements are typically associated with oneself and are typically associated with moral norms of sincerity; consequently, connections of identity and pressures of sincerity may be activated. By contrast, when one listens, there is an intrinsic separation between oneself and what is communicated.

The argument I am gesturing at may be clarified by introducing a related, additional 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 that rote recitations may have over time upon one's thoughts pose a threat to one's independent and critical deliberative thought processes. Given its First Amendment commitments, the state cannot act in a way that conflicts with, and may undermine, its citizens' capacities and exercise of independent judgment. Compelled speech requirements of the sort at issue in *Barnette* and *Wooley* show disrespect towards, and may even threaten, other character virtues that are integrally related to the well-functioning of a robust First Amendment culture.

In particular, compelled speech requirements conflict with recognition of and respect for the value of sincerity. 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, they are compelled to pledge to something that they may not believe is worth pledging to, or which 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 by the speaker, since it is compelled, and that, likewise, the attestation is not taken seriously as an attestation since it is compelled. Perhaps the audience's knowledge of the conditions of utterance (and the speaker's knowledge of the audience's awareness) is sufficient to make it the case that these are not really full-fledged attestations or pledges so that the state is not, technically, compelling some of its citizens to *lie*. But, I suspect that this maneuver posits too much flexibility on the part of the speaker toward her own speech-acts and that further, it would be reasonable for speakers to resist developing such flexibility. Such compartmentalization may

be difficult to achieve.<sup>35</sup> One may reasonably object to having to stand in a relation of distrust to oneself, to having to engage in self-vigilance, so as to avoid having the state use one's own activities as a mode of access into one's thoughts.

Compartmentalization may also be especially costly with respect to serious utterances. That is, there may be certain sorts of utterances that have special gravity or significance to speakers: e.g. 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 context does not unequivocally convey the speaker's (contextual) meaning. It may be important to religious people, for example, not to 'take the Lord's name in vain,' even if a swearing utterance is understood by the speaker and the audience not to be serious.<sup>36</sup> Some sorts of significant performances may be cheapened if people engage in them insincerely or pretend at them. 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: on some views of promising, we create the institution of promising and create a set of speech acts that make it

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<sup>35</sup> 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 it is reasonable for the everyday citizen to object to having to engage in to maintain control over her mind. See Neuringer and Wills, p. 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; reporting his observation of others, he also connected actors' use of alcohol as well as binge eating to efforts to overcome the influence of a character and to return to oneself.

<sup>36</sup> Analogously, there may be some practices it is important not to *pretend* to engage in. Some parents object to their children playing with toy guns because they think it may be important to our resistance to killing not to pretend to kill. Although, as I discussed in the text, some Jewish 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, an actively religious, 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," *The New Republic*, (October 11, 1954), 11-13 at 12.

possible for us to bind ourselves through speech, e.g. we deem it possible to bind ourselves by declaring “I promise.” The maintenance of linguistically ideal practices, that is, maintaining a practice by which it becomes possible to bind oneself in this way just by uttering certain phrases, may depend upon the phrases’ use being regularly sincere and restricted to sincere use. To use and preserve the practice’s special social significance, speakers may have to restrain their uses of it and treat its terms as though they have special significance. But this attitude need not be restricted to those who believe certain phrases or terms make possible practices that would otherwise be impossible. One may believe commitment is possible without special phrases like “I promise” or “I swear” while nonetheless thinking that it is important to showing respect for the practice and its value that one restrict one’s use of phrases that invoke the practice to sincere utterances. There is something special about ‘giving one’s word’; taking that seriously requires that one should not make a practice of joking around about it or attesting insincerely.<sup>37</sup>

Thus, compelled speech requirements may also 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 crucially bound up with the power of the justification for First Amendment protections. While free speech protections in any particular case do not turn upon whether the speaker is actually sincere, many different values of the First Amendment depend upon or are enhanced by sincerity on the part of individual citizens. If some part of the value of the First Amendment rests upon our joint interest in approaching and appreciating the truth, this effort is vastly facilitated by speakers giving voice to what they actually believe has merit (or may have merit, or is at least worth

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<sup>37</sup> In Blasi and Shiffrin, *supra* note 27 at 458, we also develop a related concern about compelled speech, namely that compelling insincere attestations to promote government purposes treats citizens and their speech capacities in objectionably instrumental ways.

grappling with). An ethic of sincere belief in the truth of one's professions helps to focus the collective attention of the populace on the ideas that hold the most promise of meeting various human needs, whether practical or intellectual. An ethic of sincere professions of belief also focuses citizens' interest and attention on 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 of the importance of freedom of speech in promoting the ideal of mutual understanding among citizens who appreciate each others' needs and concerns and who strive to forge political accommodations on the basis of this appreciation. Genuine understanding and accommodation depends upon citizens' voicing their needs sincerely and abstaining, so far as possible, from grandstanding, manipulation, and other forms of cynical gamesmanship.

Of course, as Meir Dan-Cohen has explored in depth, there are contexts in which sincerity is not expected from a speaker such as when a telephone operator thanks us for our business or wishes us a good day.<sup>38</sup> This need not be disputed. Utterances qua citizen, unlike those of a telephone operator or a student of a language, do not take place in a context in which insincerity is reasonably expected and transparently associated with a role with which one is not supposed to identify. There is no well-defined role with clear, discrete boundaries comparable to the employee or to the language learner that the pledge reciter is to occupy that justifies indifference to 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.

So, to summarize, one objection to substantive recitation requirements is that, at best, they manifest indifference to a character virtue that should be encouraged and supported if the values of the First Amendment are to be well realized. A related, perhaps more important,

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<sup>38</sup> Meir Dan-Cohen, *Harmful Thoughts* (2002).

concern is that a recitation requirement places the citizen who strives to be sincere but who does not believe the contents of the recitation either to disobey the law or compromise the character virtue. In effect, the requirement places citizens in a dilemma, pitting 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 functioning of a free republic.

The *Barnette* protection, then, is best understood if one attends not to the audience of the compelled speaker but to the effect of compulsion on the character and mental contents of the compelled party. Turning our attention inward onto the association rather than (exclusively) outward onto its audience also, I believe, provides a stronger defense of protections against compelled association. 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.

### *C. The Value of Association*

What lurks behind the model of freedom of association in *Jaycees* and *Dale* is what I call the amplification device conception of freedom of association. On this conception, associations are valuable from a freedom of speech perspective because they serve to amplify the messages individuals seek to express. By banding together, individual speakers can be louder, thereby more effective in dispersing their message and able to convey more accurately the intensity and depth with which its content is adhered to by a range of members of the public.<sup>39</sup>

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<sup>39</sup> Roderick Hills independently coined a similar label, labeling this approach the 'megaphone' conception. See Roderick M. Hills, Jr., 78 NYU LR 144, xxx (2003).

The idea that associations provide effective instrumental means for like-minded individuals to join together, broadcast their views and exert stronger, safer modes of influence is well expressed in *N.A.A.C.P. v. Claiborne*.<sup>40</sup> Drawing together a group of precedents, the court remarked: “The practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. ...By collective effort individuals can make their views known, when, individually, their voices would be faint or lost.” 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 dictum that... “effective 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.”<sup>41</sup>

This understanding of the value of association makes association *a tool* for expression. It lends itself, naturally, to an approach to freedom of association that focuses on whether the message or *outward expression* of the members becomes distorted by a regulation. But while this surely is among the values of association, it is an incomplete picture. On this understanding, associations channel disparate individuals who independently share a point of view into a louder, more concentrated output stream. A regulation is problematic if the effect is to distort the output so that it no longer closely resembles the model of what the input is supposed to look like. This view of associations, and of what the *problem* of their regulation may be drastically undervalues their relationship to freedom of speech values. Associations, I will argue, are not merely instrumental broadcasting tools to make expression more effective. An important function of private associations is that they operate as sites in which

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<sup>40</sup> 459 U.S. 858 (1982).

<sup>41</sup> *NAACP v. Claiborne* at \_ (quoting *NAACP v. Alabama ex rel Patterson* 357 U.S. 449, 460 (1958)). (*Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981))

the thoughts and ideas of members are formed, in which the content of expression and speech is generated, not merely compacted 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 in light of their relationships to the outside world. Investigations into the constitutionality of regulations of association must be more sensitive to its value and integral connection to freedom of speech.

Nor is the picture fully complemented by observing that association membership may have intrinsic value--that larger organizations may, in part, instantiate some of the social values standardly associated with smaller intimate associations like the family.<sup>42</sup> Participation in them provides companionship, a sense of belonging, connection to others, social support and may cultivate interest in politics and social problems outside of the self. This is true as well but there is another core aspect of associations connected to free expression that I aim to uncover. Instead of stressing exclusively the effectiveness of associations in broadcasting outwards, the most important connection between association and speech is an internal and creative 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, common agendas, and a revisiting of notions. Ideas are tested, developed and accepted within social settings. The views one comes to have and to consider are heavily influenced by who we interact with and especially who we trust. If we think of associations as sites where ideas are developed and take root (instead of just relying on models of export), then just as with *Barnette* the danger of compelled association is not simply message distortion but something more akin to mind control.

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<sup>42</sup> See e.g., George Kateb, "The Value of Associations," in Nancy Rosenblum ed., *Freedom of Association*; Robert Putnam, *Bowling Alone*; Nancy Rosenblum, *Membership and Morals*.

There are two, interconnected ways to make out this 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.<sup>43</sup> The other way is to argue that normatively it is what we would expect and want from citizens within liberalism. What follows is a sketch of an argument that emphasizes the latter strand.<sup>44</sup>

As I intimated earlier, Brennan's dichotomy between intrinsically and instrumentally valuable associations and his mapping of expressive associations onto the category of instrumentally valuable associations are too simple. Expressive associations and membership therein also have intrinsic value. In saying this, I do not mean merely to acknowledge that sustained and structured forms of social interaction can be central elements of individual well-being, although this is true and already poses a difficulty for Brennan's dichotomy. I mean further to assert that expressive associations bear a more intimate relationship to the values of freedom of speech than the instrumental picture contained within Brennan's analysis.

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<sup>43</sup> 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*, passim (1998), Malcolm Gladwell, *The Tipping Point* (2000), and Eviatar Zerubavel, *Social Mindscapes* (1997). Two more focused and in-depth treatments of anecdotal phenomena appear in Louis Menand, *The Metaphysical Club* (2001) and Jenny Uglow, *Lunar Men* (2002). See also discussions about group think and other forms of group dynamics in Cass Sunstein, cite, et alia. "Deliberative Trouble? Why Groups Go To Extremes," 110 *Yale Law Journal* 71 (2000).

<sup>44</sup> The argument I make connects joint idea production with the values and character traits found within liberalism. 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 Roth, "Practical Intersubjectivity," Frederick Schmitt, ed. *Socializing Metaphysics* (2003). For discussion of the epistemic and moral warrants to rely on others' everyday testimony (where this term is understood outside its specialized legal meaning), that is to say, their apparently sincere utterances, see e.g., Elizabeth Anscombe, Tyler Burge, "Content Preservation," 102 *Philosophical Review* 457 (1993) (arguing for an apriori entitlement to a rebuttable presumption to accept others' apparently sincere claims); "Interlocution, Perception, and Memory," 86 *Philosophical Studies* 21 (1997) (developing further the argument for an apriori entitlement to accept others' claims); Karen Jones, Philip Nickel. The literature on copyright and intellectual property has also stressed some of the collaborative, although sometimes uncoordinated, processes of intellectual generation and expression. See e.g. work of Jeremy Waldron, Wendy Gordon, Mark Rose, et alia. See also Ann Ruggles Gere, "Common Properties of Pleasure: Texts in Nineteenth Century Women's Clubs," 10 *Cardozo Arts & Enter. L.J.* 647, passim (1992) (describing collaborative projects, joint intellectual influence, and inward focus within women's literary clubs).

In brief, the argument I plan to make is this. Although liberalism is often criticized for being overly individualistic and insufficiently attentive to intermediate associations,<sup>45</sup> 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.<sup>46</sup> To 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.<sup>47</sup> The role social cooperation plays in liberal theory is absolutely central. It is the starting place of the theory and of its conception of the person. Social cooperation provides opportunities for individuals to develop autonomous capacities, some 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, where the conditions and value of their autonomy are thought to be more prior to and in some tension with the compromises of social cooperation. For liberals, social cooperation is an integral context in which the autonomy of individuals is formed and may achieve its full exercise and value.

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<sup>45</sup> See e.g. Michael Sandel, *Liberalism and the Limits of Justice*, and Michael Sandel xxx.

<sup>46</sup> 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. *A Theory of Justice* (1971) § 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. *Morality of Freedom*. Also cite essay from public space collection. Contrast this with Robert Nozick's more troubled discussion of social cooperation in *Anarchy, State and Utopia* (1975), pp. xx and with 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*.

<sup>47</sup> See also Seana Shiffrin, "Race, Labor, and the Fair Equality of Opportunity Principle," in Symposium on John Rawls and the Law, *Fordham Law Review* xx (2004).

Brennan's theory implicitly resembles more of a libertarian theory of association than a liberal theory of association. A liberal theory should take more seriously that associations have formative effects on their members and that they are not merely conglomerations of people who have stable identities and pre-formed positions.

Social interactions, like one's activities, may have an inchoate influence on one's thought. This 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 relations of trust, reciprocity, mutual engagement, mutual interest and mutual enjoyment of each others' company. And the trust we engage in does not amount solely to beliefs that people will keep their commitments and refrain from doing one another harm. It also involves epistemic relationships in which we often take others' assertions as 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 some prominence on our mental agenda. Such epistemic relationships form partly because they are essential for pursuing complex projects of material labor as well as of intellectual production that would not be possible were we to regard ourselves as responsible for independently initiating every thought and for verifying every claim.<sup>48</sup>

They also form as a valuable and natural aspect of the relationships of mutual interdependence and engagement. These relationships are instrumentally useful but their significance in people's lives goes far beyond that. These relationships of cooperation and mutual dependence involve high levels of emotional engagement and emotional and cultural definition. People whose lives are inter-twined are reasonably and understandably be influenced by one another's thoughts and ideas. They will both consciously and

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<sup>48</sup> See also Tyler Burge, "Content Preservation," *supra* note xx, at 466, 485 (noting that most of our knowledge derives from and builds upon others' communications). See also Coady, Hardwig, and Welbourne.

unconsciously take an interest in what their peers are interested in. They may try to understand one another, to come to consensus where possible, and to organize their interests around one another. Mature moral agents engaged in practices of engagement and cooperation become sensitive to one another, have attitudes of charity toward one another and aim toward certain forms of harmony and cooperation with one another. Sustained interaction with one another will influence their thoughts. Their mental lives will be structured substantially through processes of absorbing and reacting to the ideas and beliefs of their companions, as well as their actions. These processes of absorption and reaction are built upon and refined to produce different ideas and views than 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, sites of association are sites in which ideas are exchanged and built upon; that individuals' mental lives are strongly influenced by these interactions; and that ideas and expressions 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.<sup>49</sup> Though such a view correctly turns attention away from the perception of and communication with outsiders, it still draws on the idea that associations must involve individuals who band together to pursue independently and antecedently formed beliefs and aims and that it is essential that the members share ideas and beliefs. Both of these pictures neglect what I believe to be the core feature of associations that essentially connects freedom of association with freedom of speech: associations may be and often serve as sites of *idea formation* in

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<sup>49</sup> See Stuart White, "Freedom of Association and the Right To Exclude," *Journal of Political Philosophy*, (1997) 373, 377, 380 (characterizing freedom of association and its value as the ability to pursue shared set of beliefs).

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.

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Thus far, I have claimed that: liberalism champions social interaction and coordination and that it regards autonomy as realizable and most fully realized within such systems, not as opposed to it; 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 character virtues associated with social cooperation.

To connect this 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 because of 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 their instrumental properties and because the connection between cooperation and idea-production is more pronounced in associations since they involve continuous and regular interactions by individuals who come to exert influence upon one another.

Second, given the sorts of influence closely interacting people have on one another, members of social associations have important freedom of speech interests in having very strong control over the membership of such associations. One set of reasons would be success-oriented. We would expect these processes to work more readily in contexts where members feel comfortable with one another and feel as though they can readily trust one another. If they regard social associations as important places in which ideas are developed,

circulated and tested, they may have speech-related interests in ensuring that the associations function well.

The other set of reasons is more protective in nature. Given the character virtues activated and inculcated by social cooperation and the openness to influence of one's beliefs and mental agenda by others with whom one interacts in relations of trust, we might expect individuals to regard it as fairly important to be able to be selective about those they interact with, especially in contexts in which the interactions and conversations may be or are meant to be relaxed and unfocused. If they feel they will be influenced by those they have close interactions with, that their character traits and virtues render them open to such influence, they may reasonably want to protect themselves against being influenced, in ways they may not be able to predict or articulate, 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 horror sounds in concerns of mind control and 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, in order to have some reason to believe what they say. Nor, on the other hand, do I mean to claim that all relations of trust contribute directly and immediately, all-things-considered, to the discovery or appreciation of truth. Nor am I claiming that prescriptively, one should be influenced only by those that one happens to trust; one may, of course, trust unreliable or wrongheaded people.

What I mean to claim is as follows: Individuals may well have *pro tanto* warrants to accept others' seemingly sincere assertions as a default matter. Nonetheless, relations of trust can reasonably and often do, empirically, encourage or enhance both the level of engagement

with others' claims and ideas as well as the level of acceptance of them. 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. Whether or not such reasons supply justifications for greater rates of acceptance of others' claims, they certainly provide justification for higher levels of engagement with others' claims. One, often, should at least attend to the beliefs of those with whom one has interactions and relationships, even if only to evaluate them critically.

These interactive effects, I claim, enrich – in essential ways – the intellectual climate in which the First Amendment operates and has meaning. 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 it operates.<sup>50</sup> Of course, some trusted people will be unworthy and many of the views fostered and developed will be false and even pernicious.

The two speech concerns complement one another. One might object to the protective rationales both against compelled speech and compelled association that individuals should

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<sup>50</sup> This last point is the focus of Roderick Hills' extremely interesting essay "The Constitutional Rights of Private Governments," with which I have much sympathy. Hills stresses that protecting the institutional autonomy of associations is important in order to foster contexts in which robust and effective debates and dissent may occur. While I agree with this and while we largely agree on the flaws of the Dale approach (even independently hitting upon parallel metaphors, see *supra* note x), 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 organization or how heterogeneous the organization's membership is. See Hills at 219 et seq. I think there are similar problems with fair use analyses that treat parody as a specially protected category. Compare with Volokh, brief.

exercise techniques of self-protection. They should be vigilant in ensuring that they do not entertain or come to believe 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, whether or not it is realistic to expect people to police their belief formation that 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 idea formation. Such vigilance requires enacting barriers of resistance, remove, and chary trust. Such stances interfere with the achievement of the organization's function.

A different way to put this point is this. Meir Dan-Cohen has fruitfully distinguished between nondetached and detached roles.<sup>51</sup> In detached roles, one can perform the obligations of the role successfully without identifying with the obligations and even without performing them sincerely; not so with nondetached roles. The A.T.& T. operator can successfully perform her obligations by thanking you for using A.T.&T. without actually being grateful and we might add that she has not acted poorly by expressing gratitude insincerely. Not so of the parent who thanks the stranger for helping his child. The parent will not have performed his filial duty well if his thanks are insincere and we should think the worse of him if they are. In my view, the proper analysis of the value of freedom of speech does not take the A.T. &T. operator as the paradigm case around which to build a theory. A constitutional regime's approach to compelled speech and to compelled associations should not depend too heavily for its justification on the expectation that its citizens maintain detachment from what they are made to say or from their associates.

Our approach should recognize the existence of some sorts of associations that are not organizations in Dan-Cohen's sense, ones in which we expect people to be open and

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<sup>51</sup> Meir Dan-Cohen, *Harmful Thoughts: Essays on Law, Self and Morality* (Princeton: Princeton University Press, 2002), pp. 13-22. See also *supra* note \_.

responsive with one another, to not be especially on their guard. I want to insist both that expectations of non-detachment are more realistic than expectations of thorough-going detachment -- that people interacting with one another socially and regularly seek and tend towards nondetachment amongst each other -- and that expectations of widespread detachment are normatively unappealing. It is preferable to create 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.

#### *D. 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 underwrite it, suggest a corresponding right to exclude unwanted members. The right to exclude should be fairly absolute. To invoke it, members of an association need not have to show that they have a clear message they are attempting to communicate to others or to themselves. Nor need an association articulate a clear common purpose in order to enjoy the freedom to exclude. Neither articulateness, decisiveness, nor coherence should be preconditions for successful assertion of free speech rights. Freedom of speech must also protect the process by which ideas and expressions are generated, nurtured, and mooted both in individuals and in groups. Any plausible theory of the development and evaluation of ideas should recognize that, especially where the process takes place in a social setting, the process may involve dispute, dissension, and unclarity, that these stages may be temporary or perhaps 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.

On this analysis, then, the Supreme Court's decision in *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*<sup>52</sup> makes perfect sense, whether one understands it as a compelled speech case or a compelled association case. In *Hurley*, the Supreme Court recognized a First Amendment right on the part of the organizers of the Irish American parade to exclude a group who wished to march in the parade under a banner identifying themselves as the Irish-American Gay, Lesbian and Bisexual Group of Boston. From the perspective of the test articulated in *Jaycees*, the decision seemed arbitrary because the parade organizers were not attempting to convey any particular message and had not exercised any other sort of selectiveness about whom to include or exclude. This has led some to frame the *Hurley* decision as one that turns on the special features of public forms of expression, like parades or protests, and the special delicacy of government regulation of such public forms of expression. I do not wish to deny that distinction, but on the account I am articulating, it need not be depended upon. *Hurley* might instead be understood as affirming that where the freedom of association right adheres, its possessors need not have a coherent set of reasons relating to a coherent message or purpose that they can articulate for why they will or will not exclude certain parties. Instead, we should recognize that robust

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<sup>52</sup> 515 U.S.557 (1995).

freedom of speech requires comfortable spaces in which individuals enjoy free conditions in which they contemplate and form ideas; that this space should not be construed in an entirely individualistic way but we should recognize that thought production and idea affirmation happens productively in social contexts; and so, there should be some arenas of social congregation in which members of groups have the power to decide what forms of human influence they will be open to and willing to interact with in contexts of mutual trust and voluntary association. To affirm such a right is not to endorse the decision of the organizers of the Irish American parade. Their decision was wrong and bigoted. But the freedom of speech right does, as I believe it does, encompass 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 will lead a person to ignore important information and to emerge with incorrect judgments. What I have argued here, is that the right to participate in certain processes of idea formation free from social control encompasses not only the individual's mind, considered in isolation, but also some social processes and sites of idea formation that may be as crucial as 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 opinion was misguided. By contrast, Justice O'Connor's concurrence was largely correct. It drew an important distinction may be drawn between associations that operate as social associations and those organizations that operate as business associations or as parts of the competitive economy. The strong freedom of association right for which I have

advocated only directly applies to the former.<sup>53</sup> In this section, I will defend the theoretical relevance of such a distinction, but I will not attempt to perfect any test that would serve as a criterion for delineation.

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 would be both overbroad and underinclusive. Such a standard might potentially provide protection for the discrimination of 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."<sup>54</sup> 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."<sup>55</sup>

Justice O'Connor's articulation of the first amendment problem with compelled association was uncomfortably close to 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."<sup>56</sup> I have already registered the objections that might be made to this narrow construal of the disvalue of regulation of social

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<sup>53</sup> There may be more limited freedom of association rights other organizations enjoy. Glickman may have presented more complex issues that the Court majority canvassed. For instance, an organic farmer may have strong grounds to resist mandatory membership in an agricultural association that promotes pesticide use.

<sup>54</sup> 468 U.S. at 633.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* At 636.

or expressive associations and argued that the First Amendment function of these associations should be more broadly construed. But, I do not think these criticisms undermine the force of the general point she was making, namely that commercial associations may be legitimately treated differently, even if they have a message, the force or clarity of which might be diluted or distorted by regulations of their membership.

Why may they be treated differently?

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. Further, because such associations operate within a highly competitive marketplace and have a fairly focused purpose whose pursuit is largely guided by its context of operation, these associations do not function in a context that is likely to be conducive to the free, sincere, uninhibited, and undirected consideration of ideas and ways of life.<sup>57</sup> 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. This is not to say that integration in the workplace does not have a profound effect on the culture and the attitudes of workers. There is no question that it may, in primarily positive ways.<sup>58</sup> My point is not that workplace interaction cannot be formative in significant ways but rather that because the 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 especially significant. These associations are not structured in such a way to function as sites of freedom of speech and further, there are

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<sup>57</sup> Compare C. Edward Baker, *Human Liberty and Freedom of Speech* (1992).

<sup>58</sup> See my "Race, Labor, and the Fair Equality of Opportunity Principle," *Fordham Law Review* 2004 and Cynthia Estlund, *Working Together* (2003).

voluntary associations available to individuals in which they may congregate, with those they choose, to engage in unstructured, open forms of activity and interaction.

The argument I have just given suggests that principles of equal opportunity have specific application where access to resources is at stake and where their method of distribution is highly competitive. But it may be 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. In reply, I concede that those excluded from voluntary associations such as the Boy Scouts may indeed suffer by not being allowed to participate in significant cultural enterprises. But, the value of cultural creation is achieved just when those who create it also endorse it and its conditions of creation. Forced methods of generating culture suffer authenticity problems that undercut its value. Further, the excluded have the option to generate 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 feeling included and recognized by particular cultural entities. 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 a basis as businesses and related commercial associations, the barriers to creating alternatives are not as high.

### III. DALE

I have been arguing that the *Jaycees* approach to association is excessively outwardly focused. The *Jaycees* approach assumes that the model of an association's organizational purpose and value emanates outward: that it is focused upon communicating with a larger,

external public 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 and that the interest in associational freedom may have much more (or at least as much) to do with the internal life of associations: 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 not 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.<sup>59</sup> Rather, we should begin with the idea that associations provide welcome sites for the development of ideas, discussions and disputes between members in a comfortable, conducive environment that may or may not have clearly specified shared beliefs and purposes and that may be susceptible to dynamic change.

These points should come as no surprise if one turns one's attention to the Boy Scouts in particular. The point of the Boy Scouts organization is not to provide a focal point for community-spirited young boys to come together and articulate a message to the public at large or even to potential members. It is an institution designed to influence and to teach young men what to think and how to act. Its attention is directed inwardly, toward its members -- its point is to influence their character.<sup>60</sup>

So, in one sense, the Boy Scouts are prototypical of the points I want to make about associations. Their function and point is often internal and concerns the interactions and

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<sup>59</sup> See Stuart White, *supra* note x, at 374 n.2 (articulating an approach that characterizes associations as defined by the pursuit of a shared purpose and as clarifying and extending Brennan's theory in *Jaycees*.)

<sup>60</sup> See e.g. Boy Scouts of America, *Boy Scout Handbook*, 7th ed. (1969), p. 19. "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 ideals of Scouting, you will become the man you want to be." p. 380. 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," p. 404. Point out *Jaycees'* creed also echoed interest in internal life.

mutual influence of their members as much or more than their stance or communications or influence on outsiders.

But in two related respects, the Boy Scouts are not prototypical of the sorts of associations that associational freedom protects. First, the Boy Scouts is an association of children, not adults. Second, it is an association of children that is directed and run by adults. As I will argue, these two features raise interesting constitutional questions that were not, but should have been, prominent in the debate in *Dale*.

Don't get me wrong: it was not lost on anyone 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 and in the opinions. This is not the issue that I have in mind. The presence of children raises an entirely different issue than the one that occupied the fears and hysterics of the Boy Scouts advocates. I want to claim that the presence of children cuts against the Boy Scouts' case because it weakens the freedom of association claim.

By and large, it was taken for granted 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 idea that the standard test applied should have raised eyebrows. Legally, the contours of children's constitutional rights often differ from those of adults and it is strange that the question of the standard wasn't squarely faced. Theoretically, it is not clear that children's associations have the properties that would render them subject to the same protections as adult organizations.

In the prior section, I assert a fairly absolute right to exclude unwanted members in social or expressive association, whether or not such exclusion is necessary to preserve the clarity (if there is any) of the association's transmitted message (if there is one). But the argument, I think, supports such a strong right only for adults. The right I have described 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 on the idea also that individuals should be able to exert control over who they will 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 engaging in; the reasonable objection may be, in part, that they may balk at complicating and constraining the free expression of their character virtues in social commerce. But these arguments all presuppose that the agent we have in mind has had the relevant experience and exposure to a diversity of people as well as the relevant opportunities to develop her autonomous capacities such that she may be reasonable thought to be empowered and responsible for the exercise of her autonomy. Children, due to their comparative lack of experience and fledgling forms of autonomy, may not have adequate grounds to lay claim to the full rights of freedom of association to exclude others for no 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 exercise of autonomy.

Such a position would be in keeping with much legal doctrine concerning children's' constitutional rights. 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 if

mandatory education of adults would be constitutionally suspect.<sup>61</sup> Further, despite the insight and insistence of *Tinker*<sup>62</sup> and *Barnette* that children enjoy constitutional rights and First Amendment rights in particular, subsequent cases such as *Bethel v. Fraser*,<sup>63</sup> *Hazelwood School District v. Kuhlmeier*,<sup>64</sup> *Vernonia School District v. Acton*,<sup>65</sup> and *Pottawatomie v. Earls*,<sup>66</sup> make clear that these rights do not take the same shape as those of adults. I do not mean to endorse these cases, but in light of them, it seems strange that the freedom of association analysis in *Dale* proceeded so smoothly using 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 or from speaking openly on controversial subjects.

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? Doesn't the argument for the (original) application of the *Barnette* right against compelled speech falter for the same reasons as I allege pose a difficulty for *Dale*?

Of course, it is already something of an issue to explain how *Barnette* sits with the clear constitutional power of the state to compel the education of children. And the subsidiary question would be, assuming *Barnette* can be reconciled with this power, which category the regulation of children's' associations more clearly resembles. Briefly, children's' compelled

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<sup>61</sup> For a critical discussion of mandatory education requirements, see Martin Redish and Kevin Finnerty, "What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox," 88 Cornell L. Rev. 62 (2002).

<sup>62</sup> *Tinker v. Des Moines School Dist.*, 393 US 503 (1969).

<sup>63</sup> 478 US 675 (1986) (upholding restrictions on offensive student political speech).

<sup>64</sup> 484 US 260 (1988) (upholding restrictions on controversial student newspaper article).

<sup>65</sup> 515 U.S. 646 (1995) (upholding student drug testing).

<sup>66</sup> 536 US 822 (2002) (upholding student drug testing).

speech of the type invalidated in *Barnette* seems distinguishable from mandatory education efforts in a number of ways that may be brought out by contrasting compelled speech, such as the mandatory pledge, with legitimate educational efforts to teach or persuade students of such things as the contents of the pledge, its vision of America and the worthiness of allegiance.

Presenting students with such views differs in three ways from recitation requirements.<sup>67</sup> First, presenting to students information, ideals, visions, reasons and arguments for their evaluation, deliberation and assessment manifests a clear 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 conflate the speaker and the intended audience and mark no explicit recognition of the separation between them. 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. Finally, addressing students as an audience, instead of corralling them into speaking, shows respect for the virtues of sincerity and intellectual independence and so is consistent with recognition of the underlying character traits of citizens necessary for achieving the various purposes served by the freedom of speech.

The case of regulating children's associations strikes me as more like mandatory education than like compelled recitation, although the analogy is not straightforward. Unlike compelled recitation, regulated association that takes the form of inclusion-oriented

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<sup>67</sup> A shorter version of this argument was initially introduced in Blasi and Shiffrin, *supra* note 27, at 405-6.

regulations does not amount to an effort at mind control with a specified content. In fact, 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 education efforts just defended. While the influence may transmit slowly and non-transparently and so work somewhat as compelled speech does, the case of compelled association shares with educational efforts that the site of influence is more dynamic and possibly bi-directional. These reasons, in combination with the special urgency of establishing a foundation for equal citizenship and informed autonomy, strike me as providing sufficient grounds for regarding *Barnette-for-children* as apt but *Dale-for-children* suspect.

More could be said here but I want at least to acknowledge a second possible objection. One might question my suggestion that *Dale* should be understood as a case about children and their exercise of associational liberty. The case of the Boy Scouts might be thought to implicate the associational interests of adults – either the adults who run and participate in the organization or the parents of the children who participate. Despite some preliminary efforts at investigation, I do not know enough about the Boy Scouts' organizational structure and mission to assess whether it is best understood as an organization of children organized by adults, of adults for children, or some mixture that defies clean description.

Briefly, the direction I want to go in here is to suggest that even if it is an organization of adults for children, that the associational liberty of adults should not be understood to extend in that far because associational liberty rights are more limited and self-regarding; they should be more qualified when associations involve children than they would be if only adults were involved. The case for an associational right of unrelated adults seems to me to be weak, both because of the interests children have in exposure to a wide range of influences and because, generally, the argument for associational rights becomes strained when it involves a claim to be able to command or control the associational practices of other people

than oneself. The exception to this generality may be the family. The best case for recognizing a strong association right in the case of the Boy Scouts is to think of the Boy Scouts as an association of parents and their children, one that involves other adults as well to promote its purposes, and of the association right of the parents as flowing from the parental rights recognized in *Meyer* and *Pierce*.

I think there is strong reason to be ambivalent about *Meyer* and *Pierce*.<sup>68</sup> On the one hand, as I have argued above, 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, I do not think *Meyer* and *Pierce* are easily dismissed as clearly wrong once one attends more fully to the neglected interests of children. Although they are usually considered substantive due process cases, there are strong First Amendment underpinnings to their results, especially on the account I have been developing. As I have argued, citizens have interests in having some measure of control over those they associate closely with—not just from a privacy standpoint but from a First Amendment standpoint – since close associations among moral agents tend (and should tend) to engender sympathy, identification, and a powerful influence on one's thoughts and one's mental agenda. Looked at this way, *Pierce* in particular can be seen as a First Amendment case. Put most bluntly and in exaggerated form, if the state is able both to compel education and to exercise complete

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<sup>68</sup> See also Steven Shiffrin, *The First Amendment and the Socialization of Children: Compulsory Public Education and Vouchers*, Symposium: Children and Education: Tensions Within the Parent-Child-State Triad, 11 *Cornell Journal of Law and Public Policy* 503-51 (2002); Barbara Bennett-Woodhouse; Abner Green; Rob Reich.

control over the content of the education of the child, it is as though it is able to insert a state agent into the home. We need not posit a religious need to have one's children share one's point of view or one's practice 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 great traction here. 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, as I argued above, 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. Notice too that this argument provides a relatively simple route from the First Amendment to *Griswold v. Connecticut*.<sup>69</sup> 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.

If we affirm some right to raise children (both to procreate and to adopt), then it seems 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 an uneasy and tempered one for a number of reasons.<sup>70</sup> 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

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<sup>69</sup> 381 US 479 (1965).

<sup>70</sup> In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court's ruling found that freedom of association rights associated with education did not extend so far as to allow private schools to exclude students on the basis of race.

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. That is, if the state exposes children to a wide range of views but does not attempt to indoctrinate children,<sup>71</sup> 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. Of course, one may retain a healthy skepticism that local schools will hue to these educational ideals, even if constitutionally mandated. Compliance concerns may well tip the balance in favor of a parental right to educate privately.

Even if *Meyer* and *Pierce* are sustainable, the case for claiming that the Boy Scouts' exclusion of gay leaders is an extension of parental associational liberty seems like a shaky step. The argument for associational liberty protected by *Meyer* and *Pierce* has significant traction because the state's efforts to influence children operate 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 organizations, participation in the organization is not mandated by the state. The influence feared by some parents of gay leaders on children, and hence indirectly, on parents, is one that parents may already elect to opt out of.<sup>72</sup> Further, its operations are not as time-consuming and pervasive. So some of the concerns about infiltration of the safe haven for the mind of the home are less powerful here

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<sup>71</sup> See discussion in Blasi and Shiffrin supra note 27 at 474; see also Martin Redish and Kevin Finnerty, "What Did You Learn In School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox," 88 Cornell L. Rev. 62 (2002).

<sup>72</sup> This is not to say that participation in social associations is not important for children and perhaps even necessary for their well-being and development. But, I do not think we have to be fully accommodating of parents who want to insulate their children entirely from diverse experiences just because we recognize that these parents are sincere and are trying to provide for their children. At some point, state interests in respecting equality and regulating bigotry may have an arena for expression. Parents who disagree may have to make some hard choices. This in itself does not seem overly problematic, especially since the approach already respects their association interests by allowing private schooling. Religious associations for children may also represent an additional arena for stronger parental control as free exercise concerns may weigh in the balance to dictate greater exclusionary powers.

and the interests in providing children a range of experiences and training in moral behavior may come to the fore. 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 children. I believe this flexibility and compromise to be a virtue of the approach.<sup>73</sup>

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<sup>73</sup> 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 give any arguments against this compromise here and it has its attractions, although it is unlikely to be legally or politically feasible.