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# WHAT IS REALLY WRONG WITH COMPELLED ASSOCIATION?

Excerpt from:

by Seana Valentine Shiffrin\*

**R***oberts 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. Sixteen years later, *Boy Scouts of America 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 and to retain an openly gay Scoutmaster. It is no surprise that *Dale* caused gnashing of teeth by those who applauded *Roberts v. Jaycees*: the Court's commitment to integration seemed all too limited. Women counted; gays and lesbians did not.

Introduction

This analysis may be a partly accurate diagnosis of *Dale*'s resolution, but it does not fully capture what is troubling about *Dale* from a First Amendment perspective. Those who support *Roberts v. Jaycees*, especially liberals, should have been disturbed by *Dale*, not entirely because of its outcome, but because the reasoning of *Dale* and the debate between the justices was foreshadowed by Justice Brennan's majority opinion in *Jaycees*. In this Essay, I will argue that *Jaycees* was correctly decided but that Justice Brennan's majority opinion reflects and has reinforced a message-centered approach to freedom of association that denigrates its value and implicitly distorts and underplays its intimate connection to freedom of speech. A parallel mistake occurs in a common articulation of the objection to certain forms of compelled speech. Drawing upon a core, but underemphasized, aspect of liberalism, I will re-fashion the case against compelled speech in a way that concomitantly provides a stronger foundation for freedom of association. Specifically, the fundamental wrong of compelled speech in cases such as *West Virginia State Board of Education v. Barnette*,<sup>3</sup> which found the compulsory recitation of the Pledge of Allegiance unconstitutional, does not depend on the external effect of others possibly misunderstanding a person's compelled speech as his own. It has more to do with the illicit influence compelled speech may have on the character and autonomous thinking process of the compelled speaker, and with illicit and disrespectful governmental efforts, however fruitless, to exert such influence.<sup>4</sup>

Similarly, the wrong of compelled association is not fully captured by analyses that concentrate upon the risk that the association's message will somehow become garbled and less intelligible either to outsiders or insiders. Associations have an intimate connection to freedom of speech values not solely because they can be

mechanisms for message dissemination or sites for the pursuit of shared aims. Associations have an intimate connection to freedom of speech values in large part because they are special sites for the generation and germination of thoughts and ideas. As with compelled speech, our concern should be turned inward onto the internal thinking process of group members, rather than predominantly on whether there is confusion in the transmission of a group's message.

Rethinking the  
Disvalue of  
Compelled  
Association

the narrow  
model of the  
free speech  
value of  
associations

*dale and  
jaycees*

...The Court's framing of the issues in *Dale* grew straight out of Justice Brennan's opinion in *Roberts v. Jaycees*.<sup>5</sup> *Jaycees* involved a First Amendment challenge by the *Jaycees* against the application of a Minnesota public accommodations law to require the admission of women into the decidedly all-male *Jaycees*. . . . Justice Brennan began the analysis of the majority opinion by distinguishing between intimate association rights that are protected "as a fundamental element of personal liberty" and those association rights protected by the First Amendment. The latter garner constitutional protection not as a fundamental element of liberty but "as a . . . means" of preserving other liberties.<sup>7</sup> While he acknowledged overlap between the categories and a spectrum between the extremes, Justice Brennan located the boundary between intrinsically valuable associations and instrumentally valuable associations as that between intimate and expressive associations.<sup>8</sup> Intimate associations, such as the family, friendships, and other close personal relationships, are sites for the formation and transfer of culture and the emotional attachments that are crucial to one's identity.<sup>9</sup> On the other hand, expressive associations serve as venues for the pursuit of shared social, political, cultural, and religious ends and provide effective and safe means for voicing shared views.<sup>10</sup> As Justice Brennan articulated it, the right of expressive association derives from the "individual's freedom to speak, to worship, and to petition" for redress;<sup>11</sup> specifically, the right of association facilitates activities that enhance the effectiveness of the individual's First Amendment rights and that provide a protective buffer against potential state efforts at suppression.

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

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

Justice Brennan assessed whether a burden on expressive association was imposed by looking to whether the regulation directly affected the association's ability to engage in outward endeavors, such as civic or charitable lobbying and fundraising activities or "to disseminate its preferred views."<sup>15</sup> The regulation at issue in *Jaycees*, Justice Brennan reasoned, advanced the interest of equality "through the least restrictive means," for no demonstration was made that the inclusion of women "impose[d] any serious burdens on the male members' freedom of expressive association."<sup>16</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>17</sup> The Court concluded that the regulation would not require the Jaycees to alter their creed to promote men's interests nor would it prevent their adopting selection criteria that excluded people with views adverse to their own....

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

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

rethinking the connection between associations and free speech

focusing just on whether the association had a message rather than on what *sort* of association it was. Before making out the account of the more intimate connection between associational freedom and the First Amendment, I will discuss compelled speech to prefigure the shift from a predominantly outward-looking, message-centered approach to one that also stresses an inward, thought-centered perspective.

the case  
against  
compelled  
speech

Arguments against compelled speech by individuals sometimes take a form analogous to the form of argument voiced in *Jaycees* and echoed in *Dale*. For example, consider the constitutional protection against compelled recitation of the Pledge of Allegiance recognized in *West Virginia Board of Education v. Barnette*<sup>40</sup> and the subsequent protection against having to sport state-dictated messages on one's license plate recognized in *Wooley v. Maynard*.<sup>41</sup> These opinions exhibit admirable distaste for government-prescribed orthodoxies "in politics, nationalism, religion, or other matters of opinion."<sup>42</sup> But interpreting the meaning of the objection to orthodoxy is a delicate matter. The objection, of course, could not be to the government's taking strong, even unequivocal, positions on political topics.<sup>43</sup> Rather, it is that the mode of government speech was objectionable and infringed on the compelled speaker's rights. One way to understand this speaker-based rationale behind cases like *Barnette* and *Wooley* is that they protect individuals from having to mouth government orthodoxies that may misrepresent their views to others.<sup>44</sup>

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

The worry about misunderstanding seems small — at least where it is clear that the view and the contents of the speech are compelled and the circumstances of compulsion are reasonably well-defined, discrete, and obvious to observers.<sup>47</sup> There are two superior justifications for the holdings of *Barnette* and *Wooley* that focus

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

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

freedom of  
thought and  
mental  
autonomy

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

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



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

The phenomenon is not limited to contexts involving gender or particular patterns of speech. It is also not entirely an unwelcome phenomenon that ways of speaking and acting may influence one's thought processes.<sup>51</sup> Take, for instance, the use of intuitions in moral methodology. It is common, when deliberating ethically, to consult our intuitions (or what some call our moral sense). We try to assess how we react to and feel about an action or a situation, to think about how we are inclined to characterize it and to speak about it, and to reflect on how we behave in such situations. Philosophers may be especially prone to consult their speech habits. For example, discussions about the removal of aid in cases of euthanasia or abortion sometimes begin with someone saying “we [would or] wouldn't call that a *killing*.” Others may reflect more on their patterns of action and their moral reflexes in similar situations or in the very situation at hand. Such intuitions may not be (and in the long run should not be) treated as dispositive, but they often provide starting points for ethical thought,<sup>52</sup> set the moral agenda for further investigation, confirmation, or disconfirmation, and provide at least *prima facie* considerations about action.

...Through experience and acculturation, people navigate a wide range of ethical situations, make judgments, and learn from their own and others' actions and reactions. Their intuitions often reflect their unarticulated yet still deliberative reactions to such situations, as well as rationalizations of their own experience and action. So, it is an important skill of the moral agent that she learns from how she acts and draws lessons from her action both consciously and unconsciously in deliberation. Thus, it should also be important to an agent to maintain control over how she acts and speaks so as to maintain control over the evidentiary pool from which she may later draw in further action and reasoning.

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

ritual expressive of a belief even if one lacks the belief.<sup>54</sup> 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>55</sup>

Similarly, though it may not always be their aspiration, some actors find that they take on (often temporarily) some of the habits, character traits, and perspectives of the characters they play.<sup>56</sup> Some even report finding themselves thinking and feeling as their characters would.<sup>57</sup> Indeed, this effect is part of the motivation for using drama as an educational and therapeutic tool.<sup>58</sup>

Obviously, this is a complex phenomenon that is difficult to interpret with confidence or clarity. It is worth noting three important contrasts between the insincere speech of acting and that of compelled speech. First, in contrast to compelled speech, actors intentionally seek to identify with — even immerse themselves in — their roles and what their characters say, to deliver a convincing performance. Second, this immersion is deliberate. The actor has a high level of awareness and deliberately frames the process; it is fairly transparent (and voluntary). Third, the performance is valued by the actor and others as a performance; it is a special event of non-authentic expression that is not a quotidian element of the actor's life. This may make its status as a performance more salient to the actor than to the compelled speaker. For non-actors, the compulsory nature of the speech may possibly recede into the background of the speaker's awareness because it is not essential to its performance that it be a performance. Quite the contrary, those who compel the speech typically aim for the compelled speech to come to be sincere, or at least for its compulsory nature not to be salient to the agent. However, compelled speech may come to exert an influence on the thoughts (and actions) of the speaker in a way that surreptitiously bypasses the agent's conscious consideration and does not reflect her sincere deliberation about the matter. Autonomous thinkers therefore may have strong objections against a loss of control over what they say.

But, it might be objected, since the speaker (as well as her audience) knows that the speech is compelled, won't this knowledge have an impact on the extent to which what she says influences what she thinks?...My replies are threefold. First, where the compelled speech is frequent and presented as standard, normal conduct, the background compulsion may not be salient. I have in mind cases like the Pledge of Allegiance and school prayer. Second, it is not clear that awareness of the pretense serves as a reliable barrier against the pretense affecting one's belief and affective states.<sup>59</sup> Third, moral agents who value sincerity and transparency have a general

interest in avoiding an analog to (or on some descriptions, a kind of) cognitive dissonance. A moral agent has an interest in controlling and being able to avoid states that I will call “performative dissonance”: states of conflict or tension between what one says or appears to say and what one thinks. This interest provides some subtle internal pressure to conform one’s thoughts to one’s utterances and vice versa. Where the utterances cannot be altered because they are compelled, the impulse to avoid performative dissonance may exert subtle, perhaps unconscious, pressure to alter one’s thoughts to conform to the content of those utterances.<sup>60</sup>...One’s own statements are typically associated with oneself and with moral norms of sincerity. Consequently, connections of identity and pressures of sincerity may be activated.<sup>62</sup> By contrast, when one listens, there is an intrinsic separation between oneself and what is communicated....

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

But, the most important connection between association and speech is not that of amplification. Rather, the central connection is an internal creative and constituting one: associations and social connections are places where ideas are formed, shared, developed, and come to influence character... We should think of associations as sites where ideas are developed and take root, instead of just viewing them as devices for exporting ideas to others. On this conception, by analogy to *Barnette*, the danger of compelled association is not simply or necessarily that of message distortion but something more akin to interference with freedom of thought. This argument challenges the idea that social associations must be consciously engaged in expressive activity or have a concrete message to garner First Amendment protection. Bowling leagues, drinking clubs, knitting circles, and debating societies, as well as the NAACP, should fall under the umbrella of the First Amendment’s protection.<sup>77</sup> Hence, I will replace Justice Brennan’s language of “expressive associations” with the broader language and wider implications of “social associations.”...

There are two interconnected ways to make out the intimate connection between associations and freedom of speech. The more obvious way is to substantiate the sociological claim that people's ideas and beliefs are influenced by their social relationships.<sup>79</sup> The other way is to argue that, normatively, it is what we would expect and want from citizens, especially within liberalism....

...The strongest forms of liberalism start from premises that emphasize the significance and value of social relationships and social cooperation.<sup>82</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>83</sup>...

liberalism,  
social  
cooperation,  
and social  
connection

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

Social interactions, like one's activities, influence the subjects and content of one's thought. This effect is not merely a product of familiarity and the tendency to assimilate and integrate that which is close. It is also a product of admirable qualities that serve our moral ends. Social cooperation involves not merely efficient divisions of labor but also the relations of trust, reciprocity, mutual engagement, mutual interests, and mutual enjoyment of each others' company fostered by social cooperation. Our relations of trust do not amount solely to beliefs that people will keep their commitments and refrain from doing one another harm. Trust also involves participation in epistemic relationships in which we often take others' assertions to be true; in other cases, we take them to be likely to be true or at least worth considering. The concerns and beliefs of our fellow cooperators occupy a prominent place on our mental agenda. Such epistemic relationships form partly because they are essential for pursuing complex projects of material labor as well as for intellectual production. Such projects would not be possible were we to regard ourselves as responsible for independently initiating every plan, every belief, or for verifying every claim.<sup>84</sup>

Such epistemic relationships also form because they are outgrowths of proper and natural moral attitudes cooperators take toward one another. Cooperation and mutual dependence involve high levels of emotional and cultural engagement and self-definition among participants. People whose lives are intertwined are reasonably and understandably influenced by one another's thoughts and ideas. They both consciously and unconsciously take an interest in their peers' interests. Mature moral agents engaged in cooperation become sensitive to one another, and aim toward certain forms of consensus, intersecting interests, and mutual understanding. Sustained interaction with others will influence what people think about and what conclusions they draw. Their mental lives will be structured substantially through processes of absorbing and reacting to the ideas and beliefs of their companions. These are built upon and refined to produce ideas and views that differ from those that would be produced by solitary individuals or ones who interact but do not build relationships of cooperation and interdependence. That is, the suggestion is that in liberal societies, in sites of association as well as other locales, ideas are exchanged and built upon; that individuals' mental lives are strongly influenced by these interactions; and that ideas and expressions, whether shared or held only by certain individual members, are the joint product of these forms of association. On this picture, then, associations are not merely devices for more efficient broadcasting of ideas and views that like-minded individuals have independently but coincidentally formed. Nor is the more sophisticated view that they are sites for the mutual pursuit of shared aims a full characterization of the general value of association.<sup>85</sup>...

liberal virtues  
and the value of  
free  
associations

Thus far, I have claimed that liberalism champions social interaction and coordination and regards social cooperation not as a challenge or threat to individual autonomy, but as a context in which autonomy is most fully realizable. I have also claimed that social cooperation involves forms of conscious and unconscious epistemic cooperation and mutual influence, both as a means of pursuing more complex material and intellectual joint endeavors but also as a byproduct of the character virtues associated with social cooperation.

To connect these claims to issues of freedom of association and compelled association involves two further but fairly predictable steps. First, social associations merit strong forms of protection within a liberal society, both to facilitate the non-speech-related benefits of close and regular social connections to other community members and to protect First Amendment interests. Social associations bear a special relationship to

speech values partly in light of the instrumental properties emphasized in Justice Brennan's model. They also bear such a relationship because the connection between cooperation and the production, generation, and refinement of ideas is pronounced in associations; they involve continuous and regular interactions between individuals who come to exert intellectual influence upon one another in explicit and implicit ways.

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

I do not mean to suggest that one must affirmatively trust specific people, whether consciously or not, to have some reason to believe what they say. Nor do I claim that all relations of trust contribute directly and immediately to the discovery or appreciation of truth. Nor am I making a prescriptive claim that one should be influenced only by those with whom one is in a comfortable relation of trust. Rather, I claim that, while individuals may well have *pro tanto* warrants to accept others' seemingly sincere assertions as a default matter, relations of trust can reasonably, and often do empirically, encourage and heighten both the level of engagement with others' claims and ideas as well as the level of their acceptance. The higher degree of acceptance of claims can be justified by epistemic reasons and explained by normative pressures. Epistemically, trust and specific beliefs about others' expertise and reliability may supply reasons that overcome

reasons to doubt. Normatively, there are often reasons to try to find consensus and common ground with those with whom one shares activities and space; one also has normative reason to provide and to consider carefully criticism and deviation from those with whom one shares such bonds. Whether or not such reasons justify greater rates of acceptance of others' claims, they certainly justify higher levels of engagement with others' claims. Often, one should at least attend to the beliefs of those with whom one has interactions and relationships, even if only to evaluate them critically.<sup>86</sup> If, as it turns out, one fails to share common ground with these peers, one may be pushed by these normative considerations of friendship and community to devote time and mental energy to grapple with this issue, rather than others, and to come to a more articulate accounting for one's cross purposes.

These interactive effects, I claim, enrich — in essential ways — the intellectual climate in which the First Amendment operates and has meaning. Some ideas and schools of ideas gain greater development and refinement than they would in isolation, while others are muted and more closely evaluated within a climate of sympathy; the dissent and criticism they generate may be more effective because of the congenial milieu in which they are aired.<sup>87</sup>...

... Legally, neither articulateness, decisiveness, nor coherence should be preconditions for the successful assertion of free association rights. Freedom of speech must protect the process by which ideas and expressions are generated, nurtured, and mooted, both in individuals and within groups. Any plausible theory of the development and evaluation of ideas should recognize that this process may involve dispute, dissension, substantive missteps, and unclarity (especially within a social setting), that these stages may be temporary or ongoing, and that these features are not necessarily a sign of failure. Dispute or dissension within a group of people who are comfortable with one another and willing to associate may be a productive catalyst in the formation and understanding of the beliefs of individual members. Nonetheless, the members of the group should have the ability to determine the conditions on which they interact and the people with whom they share and recognize the relations of identification and trust that underlie these processes of social influence, whether the chosen relationships are harmonious, articulate and focused, or shaggy, disorganized, and contentious.

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

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

...My argument has criticized government regulations that, either as their aim or substantial effect, exert substantive influence on mental content in ways that are indifferent to and attempt to bypass the thinker's authentic consideration of and conscious engagement with the idea, especially when the exertion works by way of manipulating a character virtue presupposed by democratic society.<sup>90</sup> In the compelled speech context, in which a particular script is dictated, the concern is especially strong because a particular message or idea may be foisted onto the speaker in a way that bypasses her deliberative processes (or an attempt to do so may be at hand)... Compelled association does not necessarily involve an effort to foist a message or idea on association members through forced membership. But, it does risk... an analogous interference in the autonomous process of thought formation in social groups, for this process relies on dynamics of trust and identification that may be disrupted or distorted by forced membership. Compelled association thus also displays an objectionable indifference to the autonomous thought processes manifested in voluntary social associations and their genesis, while yet representing an effort to make use of the character virtues associated with the close connections that are the product of voluntary association.

[I]ndividual freedom of thought is a clear requisite for meaningful freedom of speech protections. This holds true even when a person is not actively deliberating in any focused way. Obviously, the government and the community may permissibly (and must) gain people's attention and influence their thoughts, for example through direct and indirect address, signs, letters, speeches, and media, etc.



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

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

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

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

I have advanced considerations supporting a strong right of freedom of association, stronger than the one articulated by the Court in *Dale*. Nonetheless, I am not convinced that *Dale* was correctly decided. The most interesting questions about the case were not addressed. What ought to have been mooted in *Dale* was not the issue of whether the group's retention of Dale, a gay Boy Scout leader, would distort its message, but instead whether an association primarily of children and for children should enjoy the same form of freedom of association as is properly afforded to groups of adults. In two related respects, the Boy Scouts are not prototypical of the associations that the right to associational freedom protects. First, it is an association filled with children, not adults. Second, it is an association filled with children that is directed and run by adults. These two features raise deep, difficult constitutional questions that were not, but should have been, prominent in the debate in *Dale*...



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<sup>1</sup> 468 U.S. 609 (1984).

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

<sup>3</sup> 319 U.S. 624 (1943).

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

<sup>5</sup> 468 U.S. 609 (1984).

<sup>7</sup> *Jaycees*, 468 U.S. at 617.

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

<sup>9</sup> *Jaycees*, 468 U.S. at 618-19.

<sup>10</sup> *Id.* at 622.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 621.

<sup>13</sup> *Id.* at 620-21.

<sup>14</sup> *Id.* at 623.

<sup>15</sup> *Id.* at 627.

<sup>16</sup> *Id.* at 626.

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

<sup>40</sup> 319 U.S. 624, 625 (1943).

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

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

<sup>43</sup> This point and the general account of compelled speech offered here extends a position initially introduced in Vincent Blasi & Seana Shiffrin, *The Story of West Virginia State Board of Education v. Barnette*, in *Constitutional Law Stories: An In-depth Look at Ten Leading Constitutional Cases* 433, 454-61 (Michael Dorf ed., 2004).

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

<sup>45</sup> See *id.* at 473-75, 482-83 (discussing this difficulty and for that reason, shifting from a free speech account to an autonomy analysis to explain the full *Barnette* protection); see also Laurence Tribe, *American Constitutional Law* § 15-5, at 1317 (2d ed. 1988) (making the criticism of *Wooley*).

<sup>46</sup> The force of this critique, of course, can be overstated. Outsiders who are unaware of the legal convention may mistake compelled utterances for voluntary ones. As some of my students have insisted, tourists to New Hampshire might not know the license plates' messages were state-dictated and might mistakenly infer a citizenry that was united behind radical civil libertarianism. Also, the reception of a voluntarily uttered message may be affected when that message is *sometimes* compelled. An audience savvy to the fact that the utterance is compelled in some contexts may not recognize it as voluntarily delivered in others. The voluntary utterance may be mistakenly taken to be a compelled utterance or as an ironic comment on the compelled utterance. Ironically, those who agree with the content of the compelled utterance may have a greater complaint against its compulsion than dissenters. The former's ability to communicate their sincerity may be compromised by its sometimes being compelled. But even when the context is clear, the compelled speaker has the different complaint that I discuss in the text.

<sup>47</sup> Although, in "The Attribution of Attitudes," Edward Jones and Victor Harris found that some listeners still inferred the speaker believed the content of her speech even when the listener knew the speech was assigned. This attribution effect was, however, significantly less powerful than in cases where the listener believed the speech's content to be chosen. Further, the effect in both situations was more pronounced where the content of the speech was unusual or unpopular. Furthermore, the situation studied differed from the sort of compelled speech I am discussing in that the speech in Jones' study was nonetheless constructed by the speaker (even if the direction of its content was assigned), was not frequent, and was not assigned by the state. Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 *J. EXPERIMENTAL PSYCHOL.* 1, 23-24 (1967).

<sup>48</sup> This claim bears a relation to the philosophical discussion about whether rational agents can coherently try to believe a proposition directly on the basis of reasons that do not directly support that proposition but rather merely support the desirability of believing that proposition. See, e.g., Bernard Arthur Owen Williams, *Problems of the Self* 136-52 (1973); Pamela Hieronymi, *Controlling Attitudes*, 87 *PAC. PHIL. Q.* 45-74 2006. Suppose they are correct that rational agents, qua rational, cannot decide directly to believe a proposition on the grounds of the desirability of that proposition's being believed, but can only come directly to a conclusion by assessing the considerations taken to bear on the proposition and finding them to appear true and to yield the conclusion. Then, it would seem natural to think that they would have an interest, qua rational

agents, against being manipulated into beliefs that are not held because the considerations that bear on the proposition were available to them and directly affirmed as yielding the proposition at issue as a conclusion. That is, they would have an interest in not being manipulated into coming to believe in ways inconsistent with their rational agency.

<sup>49</sup> See Jon Elster, *Alchemies of the Mind: Rationality and the Emotions* 333, 364-65 (1999); see also Eliot Aronson, Dissonance, Hypocrisy, and the Self-Concept, in *Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology* 103, 113 (1999).

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

<sup>51</sup> See Tamar Szabó Gendler, *On the Relation Between Pretense and Belief*, in *Imagination, Philosophy, and the Arts* 125, 125, 127, 131-36 (Matthew Kiernan & Dominic Lopes eds., 2003) (discussing psychological evidence that pretending can cause belief and affective states among children and adults, even when subjects are "explicitly aware" of the pretense, and discussing the connection between this phenomenon and important cognitive mechanisms); see also William Ian Miller, *Faking It* 109-20 (2004).

<sup>52</sup> Compare this with Barbara Herman's discussion of the role of rules of moral salience within the more formal Kantian moral system. See Barbara Herman, *The Practice of Moral Judgment*, in *The Practice of Moral Judgement* 73, 76-83, 86-88, 90 (1993).

<sup>54</sup> See generally Moshe Halbertal & Avishai Margalit, *Idolatry* 174-76 (Naomi Goldblum trans., 1992) (discussing the widely shared view that "the adoption of a religious way of life, which embodies the right beliefs, increases the chances that the person who lives this way will come to believe in the true religion, while someone who adopts an idolatrous way of life is much more likely to adopt idolatrous beliefs as well."); see also Nachum Amsel, *The Jewish Encyclopedia of Moral and Ethical Issues* 176-81 (1994) (discussing Exodus 24:7, Maimonides, and the idea that performing mitzvot will be followed by and provoke an understanding of the meaning of the practices and not the reverse order); S. Schechter, *Some Aspects of Rabbinic Theology* 161 (1969) (arguing that the ideal is to obey law for its own sake but that those unable to do so should still study Torah and fulfill the commandments "for this occupation will lead in the end to the desired ideal of the purer intention"); Edward L. Greenstein, *Dietary Laws*, in *New York Rabbinical Assembly* 1460, 1464 (David Lieber & Etz Hayim eds., 2001) (stating that dietary practices are meant "to instill the idea that life belongs to God"; unlike Christian views, the Torah holds that the physical and spiritual are not separate; "the many meanings that are encoded within [dietary] behaviors are meant to act on and cultivate the ethical and spiritual dimensions of those who observe them" (emphasis added)). Maimonides, an influential adherent of the doctrine, appeared to believe that the effect might occur for false rituals and views, not merely true ones. This infused his understanding of the prohibition on performing acts associated with idolatry. Maimonides, *Mishneh Torah, The Book of Knowledge* 66a-69b (Moses Hyamson trans., 1974). For an articulation of the view by a Christian, see Blaise Pascal, *Pensées* 155-56 (Honor Levi trans., 1995) ("You want to find faith and you do not know the way? You want to cure yourself of an

unbelief and you ask for the remedies?... [B]ehav[e] just as if they believed, taking holy water, having masses said, etc. That will make you believe quite naturally, and according to your animal reactions.”).

<sup>55</sup> For more general discussion of the idea that pretense of virtue may lead to virtue, see Miller, *supra* note 51, at 28.

<sup>56</sup> The idea is a familiar one (which is not to say that its familiarity renders it true). Some examples: Writing about the effect of her immersion into roles, Shakespearean actress Zoe Caldwell remarked, “It takes me usually six months to regain my self, my life.” Zoe Caldwell, *I Will be Cleopatra* 241 (2001). Christine Lahti reported that playing a Holocaust-era Jewish gynecologist provoked panic attacks, insomnia, and experiences of anxiety. She recounted that it was difficult to move beyond her character’s experiences, that it took “several months to recover,” and found “when I got back to my life, I could take nothing for granted ever again.” Robin Pogrebin, *A Survivor’s Story: Choosing When There Are No Choices*, N.Y. Times, Apr. 13, 2003, at 12. Michael Paul Rogin argues that Ronald Reagan was unable to disentangle his real life from his cinematic roles and that this confusion infected his Presidency. Michael Paul Rogin, Ronald Reagan, *The Movie and Other Episodes in Political Demonology* 1-43 (1987). In an interview with a young method actor, he reported that it typically took him a week to recover fully from taking on a character for an audition; that roles he had played influenced his behavior toward his brother and his girlfriend; that he responded emotionally to a commercial he saw as a character he recently played would have; and that playing an emotionally disturbed man influenced how he later viewed and responded to a friend’s emotional problems. Interview with Santiago Ponce, Method Actor, in Los Angeles, Cal. (Feb. 12, 2003). The phenomenon is not, I think, belied by the method-influenced idea that good actors draw from their own experiences or even re-enact prior emotional episodes. For while an actor’s insight into, and presentation of, a character may be driven by her own direct experience, the composition of the character’s traits—the character’s attitudes, judgments, habits, behaviors—that the actor inhabits may be quite different from the actor’s own. Taking on a role may push one towards a pattern of thoughts and behavior practice of playing the role. Interview with Latima Good, Actress, in New York, N.Y. (Sept. 13, 2004). Not all actors experience significant leakage between their characters and their outside lives. One actor I interviewed (KK) did not believe he was directly influenced by his roles in this way. Although he reported that playing troubled characters helped him to understand certain sorts of people and their actions better, he connected this deeper understanding to a change in some political views and to coming to an opposition to the death penalty. Some doubts about the spillover effect of acting onto the actor’s personal life are expressed in Charles Neuringer & Ronald A. Willis, *The Cognitive Psychodynamics of Acting: Character Invasion and Director Influence*, *EMPIRICAL STUD. ARTS* 47-53 (1995). Their study, however, was based on a fairly short period of time and a relatively small sample, assessing student actors’ responses over only the rehearsal process and a short run of performances. It did not attempt to assess whether the role had an influence on the actor after a long run.

<sup>57</sup> For a rich discussion of the philosophical issues involved, see Richard Wollheim, *Imagination and Identification*, in *On Art and the Mind* 54, 60-76 (1974). Other results in cognitive psychological research lend suggestive support. See, e.g., Robin Darnrad-Frye & James D. Laird, *The Experience of Boredom: The Role of Self-Perception of Attention*, 57 *J. PERSONALITY AND SOC. PSYCHOL.* 315, 315 (1989) (reporting “much research” that “people induced to act as though they held particular emotions, attitudes, motives or beliefs” report later having these mental states); Paul Ekman & Richard Davidson, *Voluntary Smiling Changes Regional Brain Activity*, 4 *PSYCHOL. SCI.* 342, 345 (1993) (distinguishing between the presentation of voluntary and involuntary smiles but finding that deliberately produced smiles generate some of the brain activity associated with positive emotions); Robert Levenson et al., *Voluntary Facial Action Generates Emotion-Specific Autonomic Nervous System Activity*, 27 *PSYCHOPHYSIOLOGY* 363, 364, 368, 376, 382 (1990) (describing exercises directing actors and non-actors to configure their faces as though they were experiencing emotion as well as those directing subjects to relive a past emotional experience significantly influenced subjects’ current mental and emotional states). The studies support the view that actions can influence feelings and beliefs, not just reflect them. Some of these studies conflate more behaviorist views (that the relevant mental states are identical to a set of activities)

and epistemological views (that one's mental states are known by observing one's behavior) with the causal thesis that the relevant mental states may be caused by, and not only causes of, the relevant activities. See, e.g., Damrad-Frye & Laird, *supra*, at 315.

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

<sup>59</sup> See Gendler, *supra note 51*, at 125, 131.

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

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

<sup>71</sup> See also Amy Gutmann, *Freedom of Association: An Introductory Essay*, in *Freedom of Association* 3 (Amy Gutmann ed., 1998).

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

<sup>77</sup> Families and friendships are also central in this conception.

<sup>78</sup> I will also bracket the further complications posed by state funding of some groups. I discuss some of these complications in *Egalitarianism, Choice-Sensitivity, and Accommodation*, in *Reasons and Values, Themes from Joseph Raz* 270, 296-30 (Philip Pettit et al. eds., 2004).

<sup>82</sup> For example, John Rawls' *A Theory of Justice* treats social cooperation as the unproblematic beginning point around which the theory revolves, not the hoped for end of the justificatory project. See, e.g., Rawls, *supra note 53*, § 4. Joseph Raz's work has also emphasized the supportive role and constitutive context for individual autonomy provided by liberal forms of social cooperation. See, e.g., Joseph Raz, *Morality of Freedom* (1988); see also Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law & Politics* 10, 13, 18, 39, 106-07 (1996). By contrast, see Robert Nozick's more troubled discussion of social cooperation in *Anarchy, State and Utopia* 183-98 conceives them, to act in cooperation with one another in *Morals by Agreement* (1987).

<sup>83</sup> See also Seana Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 *FORDHAM L. REV.* 1643, 1662-68 (2004).

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



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

<sup>86</sup> For further philosophical discussion of trust, see Annette Baier, *Moral Prejudice* 1-18, 95-203 (1995); Karen Jones, *Politics of Credibility*, in *A Mind of One's Own* 54-77 (Louise Antony & Charlotte Witt eds., 2d ed. 2002).

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

<sup>90</sup> See discussion *supra* Part II.B.1.