

# Evaluating the Sociology of First Amendment Silence

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## Introduction

Silence is that curious answer to the riddle, “What is golden and disappears when you speak its name?” In the context of First Amendment jurisprudence, Silence is just as puzzling as a riddle. Silence may be used as a verb, as in, to cause a speaker to cease speaking or as a noun, as in, the absence of speaking or sound. In either form, Silence has long been recognized as a rhetorical vehicle for expression.<sup>1</sup> As it is wont to do, Silence often sits quietly in the interstices of First Amendment doctrine. But when she speaks, she roars. When Silence becomes speech, and that speech becomes law, Silence can get a thumping for its unseemly intrusion.

The thumping of silence as legal doctrine, such as it has been, was a product of the Court’s rescue of the Boy Scouts in *Boy Scouts of America v. Dale*<sup>2</sup> from an anti-discrimination law that would have forced the Boy Scouts of America to include openly gay leaders and

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1. When Sir Thomas More refused to publicly accept Ann Boleyn as the new Queen of England, More relied on the rhetorical principal that, when responding to a question/demand with silence, the silent party is recognized as answering in the affirmative. According to More: “The maxim is ‘Qui tacet consentire’; the maxim of the law is ‘Silence gives consent.’ If therefore you wish to construe what my silence betokened, you must construe that I consented, not that I denied.” ROBERT BOLT, A MAN FOR ALL SEASONS (Columbia Pictures 1966).

2. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

boys.<sup>3</sup> In *Dale*, the Supreme Court expanded the right of silence, originally established in defense of a schoolchild expelled from school for resisting mandated expression of belief,<sup>4</sup> and awarded that right to a powerful organization alleging that mere association with homosexuals required it to break its preferred silence about homosexuality.<sup>5</sup>

The critique here of silence as an element of expressive association grounded in the First Amendment—and as a doctrine friendly to power—calls for a quick statement on silence as a term. The treatment of silence in this Article, which draws heavily on sociological work, can be elusive. Silence is a complicated form of communication, often eloquent when chosen but destructive when imposed. It is golden, soul-killing, and, frequently, an expression of power. Silence is claimed as a shield but is also imposed as a sword. Silence is a pervasive factor in human interaction, with groups signaling to those interacting within a group that silence and caution about fitting in are necessary. Silence is also a means of expression. The control over silence in daily interactions among gatherings emanates from majorities and from persons exercising top-down authority. In the iconic case on silence, *West Virginia State Board of Education v. Barnette*,<sup>6</sup> silence, or a right against compelled speech, is about a privilege to symbolically retreat from a social demand to speak that the state seeks to impose on someone who lacks power. Because silence is a complicated social factor in human communication, and its uses lie on an infinite spectrum of meanings and power relations, the Supreme Court is predictably at sea in attempting to make attributions about silence in First Amendment doctrine.

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3. For the thumping, see Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819, 1819 (2002) (referring to the holding of *Dale* as “sheer lunacy”). It should be noted that, in May 2013, the Boy Scout organization voted to allow “openly gay boys and teens . . . to participate in scouting.” Elizabeth Weise, *Boy Scouts Vote to Allow Gay Members*, USATODAY (May 27, 2013), <http://www.usatoday.com/story/news/nation/2013/05/23/boy-scouts-gay-vote/2352077/>. The extent of the change and the actual practices in local troops is not clear. Mike Chalmers, *Many Unhappy with Decision on Gay Boy Scouts*, USATODAY (May 24, 2013), <http://www.usatoday.com/story/news/nation/2013/05/23/many-unhappy-with-boy-scouts-decision/2356607/>.

4. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that the state cannot compel a child to say the pledge of allegiance before class).

5. *Dale*, 530 U.S. at 640.

6. *Barnette*, 319 U.S. 624.

This Article will demonstrate that the transformation of a doctrine in defense of a helpless target of state power into a sword for power is a result of a twist in the “path of First Amendment law”<sup>7</sup> from a) a start in Holmesian embrace of a battle model for ideas, b) a side trip into a strongly “purposivist”<sup>8</sup> concern for a vulnerable school child, and c) the incorporation of the concern for a vulnerable child into the battle model in which a group with power may pose as a weak, endangered waif. Part I traces the development of First Amendment doctrine, starting with a general cultural deference to sovereign (and local community) power over dissident speech, taking a turn with a battle qua market metaphor, gaining nuance with the helping hand extended to the Jehovah’s Witness child, and maturing into a doctrine arming the powerful with a claim to a child’s vulnerability. Part I also discusses other doctrines, critically *Citizens United v. FEC*,<sup>9</sup> that seem to be logical outgrowths of the First Amendment marketplace of ideas logic,<sup>10</sup> a logic that points to allowing power to prevail in the “market” for ideas. Part II introduces the sociology of “silence.” My sociological analysis in Part II draws heavily on the landmark work of mid-twentieth century sociologist Erving Goffman, who devised an empirical framework, based on close observation and a literary turn of mind, of the kinds of social behavior, or social interaction, which he saw prevailing in contemporary (American) society.”<sup>11</sup> Using Goffman-style insights and similar materials, I suggest that the defenses of *Dale* miss the role that the First Amendment should play in efforts to increase *civic capacity*, including by legislative support in states using anti-

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7. Holmes is renowned for his major work on the “path of the law.” See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

8. For a helpful explanation of schools of thought on the correct interpretation of the First Amendment, see Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of Free Speech*, 86 IND. L.J. 1 (2011). Rosenthal defines the “purposivist” approach as hinging on a search for “primacy of governmental motive,” or “the likelihood that the regulation reflects a governmental motive to burden disfavored speech or speakers.” *Id.* at 2. As will be further discussed, the original meaning of the First Amendment is often described as “impossible to determine.” *Id.* at 7.

9. *Citizens United v. FEC*, 558 U.S. 310 (2010).

10. See *infra*, Part I.A.

11. TOM BURNS, ERVING GOFFMAN 8 (1992). The work of scholars of behavioral law and economics is also relevant. I recently discovered that in 2003, Cass Sunstein deployed a vocabulary for analyzing the need of societies for dissent and the risks of barriers to contact between groups. CASS SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003). His terms for capturing the phenomena of “conformity, dissent, and information”—key concerns of this Article—are discussed *infra*, Part II.A. Sunstein does not draw on the vein of sociological work prompted by the work of Erving Goffman.

discrimination law as a tool to enhance opportunities of wide engagement and the accumulation of experience through contact. Building civic capacity as a critical mission of free expression is the overriding theme of the material presented in Part II. Part III further develops the argument that an un-sociological doctrine garners support in part from the gain to the “chattering class”<sup>12</sup> of doctrines thought to energize debate among those most blessed with outlets for speech and public exchange, though the effect on developing a broad civic capacity among those who lack such blessings for self-development and assertions of personal autonomy is likely negative. A brief conclusion contrasts the Holmesian view of battle, as combined with the *Dale* doctrine in allowing the combatants to claim to be vulnerable, with an alternative view of the First Amendment as a constitutional support for human development.

### **I. The First Amendment: From a Holmesian Battle to the Death Among Warriors in Armor to a Battle Among Warriors Disguised as Vulnerable Children**

The doctrine from which the silence motif in the First Amendment emerges is the iconic individualistic ode in *Barnette* to the soul and spirit of a Jehovah’s Witness child.<sup>13</sup> The Court held that a child may not be penalized for failing to salute the American flag.<sup>14</sup> In the elegant pen of Justice Jackson, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”<sup>15</sup>

Justice Jackson’s famous words have reverberated from the time he wrote them. The words and the form of the protection provided contribute a deeply purposivist explanation of the First Amendment to protect freedom of thought from hostile majoritarian power where the wellsprings of individual capacity and dignity are most endangered. They have inspired an admirable vigilance against

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12. Anne E. Kornblut, *The Peculiar Power of the Chattering Class*, N.Y. TIMES (Apr. 2, 2006), <http://www.nytimes.com/2006/04/02/weekinreview/02kornblut.html#> (discussing different definitions of the “chattering class” and citing the Oxford English Dictionary Online definition of the term as “the liberal intelligentsia,” but noting that conservatives are also included in the term).

13. *Dale*, 530 U.S. at 642.

14. *Id.*

15. *Id.*

coerced belief imposed on a vulnerable citizen by an overreaching state. Yet the doctrine has grown well beyond the impulse of a Court first finding its way in applying civil liberties principles to the states. The silence principle now serves as a malleable weapon of the powerful against the powerless.

**A. *Barnette to Dale: The Child Becomes a Man With a National Civic Organization***

Because the *Dale* case is associated in shorthand recollection with a right of association, and is linked in many minds with the Boston Irish St. Patrick's Day Parade case, let us begin with a short explanation of the lineage of *Dale*, through *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*<sup>16</sup> ("GLIB"), and hence from *Barnette*. In *Hurley*, the organizers of the Boston Irish St. Patrick's Day Parade refused to permit GLIB to march in the parade under a banner identifying the group by name.<sup>17</sup> In a unanimous decision, citing *Barnette* for the critical point that the State "may not compel affirmance of a belief with which the speaker disagrees,"<sup>18</sup> the Court held that a parade is a quintessential form of symbolic speech and is therefore protected from state-mandated inclusion.<sup>19</sup> The Massachusetts courts had rejected the argument that the parade expressed anything.<sup>20</sup> The Court disagreed, saying that a parade "makes some sort of collective point,"<sup>21</sup> and is "a form of expression, not just motion."<sup>22</sup> The Court concluded that requiring admission of a group marching under a banner identifying them as gay and lesbian Irish persons "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."<sup>23</sup>

Why, then, might we regard the *Hurley* parade case as having a pedigree in *Barnette*'s protection of pure silence and non-speech? Some understand the Court to say the organizers were sending a message, so they were excused from sending a contrary message. But

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16. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Bos.*, 515 U.S. 557 (1995).

17. *Id.* at 572.

18. *Id.* at 573.

19. *Id.* at 578–81.

20. *Id.* at 563–64.

21. *Id.* at 568.

22. *Id.*

23. *Id.* at 573.

the core idea is *Barnette*—the right to refuse to engage in a symbolic gesture, such as, in *Barnette*, a flag salute or, in *Hurley*, the inclusion of an Irish group carrying a symbol the group does not wish to display. The structure is the same. Both the Seventh Day Adventist Child and the Irish parade organizers wished to go about their ordinary routine without being forced by the state to become the source of a symbol they do not choose, and which they reject when the proposition that they display it is brought to them by representatives of the State.

Likewise, in *Dale*, the Scouts had no stated rule in their official documents about gay Scouts.<sup>24</sup> When the issue arose because a young Scout leader had become openly gay at his university, the group notified him that he was no longer a Scout.<sup>25</sup> When the state of New Jersey notified the Scouts that state anti-discrimination law required Dale's continued membership, the Scouts claimed a right of silence.<sup>26</sup> The Scouts' executives reacted like the young child in West Virginia and the Irish parade organizers—that Dale's continued membership would constitute a coerced adoption of a symbolic meaning that it did not wish to embrace.<sup>27</sup> In each case, the claim is to maintain a form of silence. None of the plaintiffs had been sending a message about flag salutes, GLIB, or gay Scouts. Rather, they had private, unexpressed views that did not rise to the level of a matter about which they wish to make public statements. They wished, rather, to maintain their own silence. And, in their view, the state wished to end their silence by forcing them to engage in a symbolic gesture. Each case winds up treated by the Court as having the same problem at its core—a tearing away by the state of silence, or circumspection, in favor of a mandated expression.

Yet, the extent of the resemblance of the organizations' resistance to a state mandate to the plight of a child forced to make a physical gesture and speak a pledge is by no means otherwise exact. With individual roots in protection for a few vulnerable school children, the *Barnette* doctrine has grown into a wider-ranging right of individual speakers, and powerful groups, to reject small, and some large, impositions that might be argued to make the individual or

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24. *Dale*, 530 U.S. 669–70.

25. *Id.* at 644–45.

26. *Id.* at 645–47.

27. *Id.*

group a message-bearer for the state.<sup>28</sup> Many of these cases are decided with a narrow margin, suggesting that the choice of characterization of a law as reasonable regulation or a coerced speech or association is often close—and even malleable. Further, when the Court chooses to analyze anti-discrimination law that affects membership in large, unselective entities such as the Boy Scouts, it overlooks a critical feature of First Amendment analysis—the determination of whether a law that affects expression is content-based or content-neutral. Content-neutral laws, according to the Court, do not pose the same level of risk as do content-based laws of “excising certain ideas or viewpoints from the public dialogue.”<sup>29</sup> The Court, in one opinion, both explains why content-neutral regulations may survive if they advance a substantial government interest, and cites *Barnette* as standing, seemingly absolutely, for protection from coerced “utterance of a message favored by the Government.”<sup>30</sup> Yet the *Barnette* line is developed to protect a large organization without reference to the possibility that anti-discrimination law is content neutral and advances a substantial government interest. The Court appears to have separated the two lines of doctrine into separate compartments, thus providing a bulwark for large organizations that claim that an effect of rules against discrimination is suppression of the organization’s ideas. The organization is not vulnerable in the way of a child made an outcast by a state mandate, so the First Amendment harm, if any, must be something more than the use of state power to crush the individual’s spirit. Yet the Court invokes *Barnette* for a large, powerful group with no reference to a sociology of threat to speech values.

The result is a puzzling trend in the Court’s jurisprudence toward clothing the powerful in the garb of the weak, and thereby enhancing the power of the strong. Other doctrines in First Amendment

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28. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that state cannot require license plate slogan); *Speiser v. Randall*, 357 U.S. 513 (1955) (holding unconstitutional an oath as a condition to receive veterans benefits); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Hurley*, 515 U.S. 557 (holding unincorporated veterans’ group protected from forced inclusion of an identity group carrying a banner); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (holding that large mushroom grower was not required to pay fees for a generic advertisement sponsored by the federal government). But see *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 61–62 (2006) (stating that a government mandate requiring school receiving federal funds to engage in conduct that “includes elements of speech . . . is a far cry from the compelled speech in *Barnette* and *Wooley*”).

29. *Turner Broad. Sys. v. FEC*, 512 U.S. 622, 642 (1994).

30. *Id.* at 641.

jurisprudence also move in the direction of protecting the powerful from regulations if they fit a First Amendment conceptual slot.<sup>31</sup> The most visible, and the most contested in popular thought and in scholarly commentary, is *Citizens United*.<sup>32</sup> It lies at the extreme end and is the logical outcome of the marketplace-of-ideas conception of the First Amendment.<sup>33</sup> There are other cases that are often discussed in connection with the slotting by the Court of regulations of powerful organizations into an attack on the same endangered subject status as that borne by individual citizens at risk of government suppression of their speech or rights of expressive association. A recent empirical paper by Professor John Coates concludes, on the basis of patterns detected in a data set of First Amendment cases, that “corporations have begun to displace individuals as the direct beneficiaries of the First Amendment.”<sup>34</sup> Professor Coates’s particular concern is the expansion of protection for corporate speech, in the form of commercial speech, and the conflation of money expenditures by corporations with speech, and thus with the effects on the economy of such a “takeover of the First Amendment by corporations.”<sup>35</sup> But he is also concerned with the erosion of a republican form of government by the shift in the First Amendment away from protecting individuals to protecting large organizations and businesses.<sup>36</sup> For this Article, it should be noted that, realistically, the Boy Scouts is a business<sup>37</sup> sustained by government help and by free volunteer help.<sup>38</sup> It is a business that

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31. See *Citizens United*, 558 U.S. at 313 (rejecting the anti-distortion rationale for limitations on the use of corporate money to “prevent the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form”) (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990)); see *infra* notes 128–32 and accompanying text.

32. *Citizens United*, 558 U.S. 310.

33. I owe a debt to Lawrence Rosenthal for this phrasing. E-mail from Lawrence Rosenthal to author (Mar. 15, 2015, 8:53 P.M. EST) (on file with author).

34. John C. Coates, IV, *Corporate Speech and the First Amendment: History, Data, and Implications*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2566785](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566785).

35. *Id.* at 13.

36. *Id.*

37. It is a not-for-profit private corporation. ORGANIZATION OF THE BOY SCOUTS OF AMERICA, CHARTER AND BYLAWS OF THE BOY SCOUTS OF AMERICA, Article I, Section 4 (2014), available at [http://www.scouting.org/filestore/pdf/BSA\\_Charter\\_and\\_Bylaws.pdf](http://www.scouting.org/filestore/pdf/BSA_Charter_and_Bylaws.pdf) (“said corporation shall have no power to issue certificates of stock or to declare or pay dividends, its object and purposes being solely of a benevolent character and not for pecuniary profit to its members”).

38. Except for necessary professional and administrative personnel, Boy Scouting from top to bottom is conducted by adult volunteers. They receive no compensation or



was especially aided in taking on the posture of the threatened sole child by its identification in some minds with a religious identity—one that considerably misses the mark in describing the organizational premises and resources of the Scouts. The Scouts’ enterprise structure is sophisticated and well-tuned, and does not rely for its wide appeal on religious dogma.<sup>39</sup>

Some defenses of speech protection for corporations come to rest on a claim that the corporation is a form of association among individuals.<sup>40</sup> It follows, in that vein of rhetoric, that the right of the corporation to speak with minimal regulation, or at least only with regulation that can pass muster under the Supreme Court’s First Amendment jurisprudence casting those with power as weak, is a protection for expressive association.<sup>41</sup> Yet, Coates points out that corporations that have gained the protection of the Court have no underlying expression at all. In *Sorrell v. IMS Health Inc.*,<sup>42</sup> the choice of senior managers of a pharmaceutical marketing firm to make a First Amendment claim was “not to vindicate the expressive interests of any individual associated with IMS Health, Inc., but simply to make it easier for that company, as a business organization, to make money, at the expense of the privacy of Vermont residents.”<sup>43</sup> Coates notes that, on the facts of the case, in which IMS Health, Inc., succeeded in overturning a state law protecting from pharmaceutical company marketers information obtained from pharmacists about doctors’ prescribing practices, the actual individuals in the corporation who were in Vermont had an interest in having the data kept from marketers and held private.<sup>44</sup> The company as a speaker with expressive interests was an abstraction that swallowed the rights of actual individuals. The company was without any expressive

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material reward of any kind. BOY SCOUTS OF AMERICA, SAN FRANCISCO BAY AREA COUNCIL, <http://www.sfbac.org/training/structure>.

39. *Dale v. Boy Scouts of America*, 160 N.J. 562 (1999) (“BSA . . . does not espouse any one religion, explaining in the Scoutmaster Handbook that ‘[t]here is a close association between the Boy Scouts of America and virtually all religious bodies and denominations in the United States.’ Consistent with its nonsectarian nature, BSA Bylaws require ‘respect [for] the convictions of others in matters of custom and religion.’”).

40. Larry Ribstein, *First Amendment and Corporate Governance*, 27 GA. ST. U. L. REV. 1019, 1021 (2011).

41. *Id.*

42. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

43. Coates, *supra* note 34, at 31.

44. *Id.*

interest, except ones that “were instrumental and linked to . . . individual interests only through their profit motive.”<sup>45</sup>

In this way, the parallelism to the Scouts case emerges: Scout executives claimed a right of expressive association against individuals who would suffer a loss of state grants of individual rights as the price for an organizational victory for an expansive First Amendment claim.<sup>46</sup> Though there were surely Scouting participants who supported the exclusion, it remains the case that it was the Scouting executives who chose to litigate and managed opinion in pursuit of a perceived corporate interest not unrelated to financial goals.<sup>47</sup> The Scouting organization is a major organization, with many of the corporate characteristics discussed by Coates in respect of profit corporations. The Boy Scouts of America’s (“BSA”) revenue and compensation expenses satisfy the criteria of a medium to large corporate entity, making it one of the largest Title 36 Congressional charters.<sup>48</sup> In 2014, BSA was listed as the 28th largest United States charity, reporting revenue of \$1.24 billion and highest compensation at over \$1.2 million.<sup>49</sup> The BSA’s size might be compared to the American Red Cross, another Title 36 charter,<sup>50</sup> that reported \$3.5 billion in revenue for 2014 and its highest compensation at over \$600 thousand.<sup>51</sup> The largest United States charity, United Way, reported \$4.27 billion revenue for 2014 with its highest compensated employee at just over \$1 million.<sup>52</sup> While BSA’s revenue falls just outside the United States’ 212 largest private companies that reported between \$2 billion and 134 billion annual revenue, the charity boasts

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45. *Id.*

46. See, e.g., *Dale*, 530 U.S. at 645–47; *Hurley*, 515 U.S. at 568.

47. *Membership Standards: Status*, BOY SCOUTS OF AMERICA, <http://www.scouting.org/MembershipStandards/Status.aspx> (explaining the 2013 BSA board’s executive decision to discontinue excluding youth scouts solely on the basis of sexuality in response to rapidly changing views of Americans and adult Scouts relating to homosexual and lesbian relationships) (last visited Mar. 25, 2015).

48. 36 U.S.C. § 30901 *et seq.* (2013).

49. *The 50 Largest U.S. Charities*, FORBES, <http://www.forbes.com/companies/boy-scouts-of-america> (last visited Apr. 12, 2015).

50. 36 U.S.C. § 30901 (2013).

51. *The 50 Largest U.S. Charities*, FORBES, <http://www.forbes.com/companies/american-national-red-cross> (last visited Apr. 12, 2015).

52. *The 50 Largest U.S. Charities*, FORBES, <http://www.forbes.com/companies/united-way/> (last visited Apr. 12, 2015).

substantial economic resources.<sup>53</sup> It also makes its policy decisions through a small body concerned with business factors or potentially idiosyncratic personal preferences.<sup>54</sup> In an April 19, 2014, update, the executive committee of the Scouts made findings as to the “rapidly changing attitudes towards sexual orientation.”<sup>55</sup>

Each case—*Dale*, *Hurley*, and *Sorrell*—carries nuances that support differing generalizations about the way in which individual interests yield to the interest of an organization posing as a threatened individual. Nonetheless, the underlying confusion of personas is a consistent presence in the reasoning about the risk to expression from government regulations aimed at protecting individuals, creating civic capacity, and supporting responsive, republican government. The exact form of the confusion is less important than a) the confusion and b) the effect on civic capacity of an amorphous subject status manipulated for institutional interests. The insistent intrusion of profit-motivated marketers, against the preference of those whose private information becomes the marketers’ speech, is the fragile expressive interest afforded protection. The aggressive salesman becomes the endangered supplicant for judicial aid. The legal masks<sup>56</sup> that hide the personae of the subjects of Court decisions in a cloud of abstraction become personifications of an abstraction. The personification, instead of abstractions used to describe human beings, is empty of speech content but successfully resistant to state regulation and harmful to individual First Amendment needs.

The *Burwell v. Hobby Lobby*<sup>57</sup> case provides a further example of a corporate claim to embody the vulnerability of an isolated individual. Though *Hobby Lobby* arises from a different doctrinal line, a First Amendment protection for religion awarded statutory additional protection through Fourteenth Amendment congressional power, it is also an instance of the conflation of a large, wealthy entity

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53. Andrea Murphy, *America’s Largest Private Companies 2014*, FORBES, <http://www.forbes.com/sites/andreamurphy/2014/11/05/americas-largest-private-companies-2014> (last visited Apr. 23, 2015, 2:18 PM).

54. The Bylaws provide that the Executive Board shall consist of no more than 64 regular members elected annually, *ex officio* members from each region, appointed youth members not to exceed five, and two special members. CHARTER AND BYLAWS, *supra* note 37, at §2, cls. 1–4.

55. *Membership Standards: Status*, BOY SCOUTS OF AMERICA, *supra* note 47.

56. JOHN NOONAN JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS (2002).

57. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

with an individual persona. Hobby Lobby is organized as a for-profit corporation under Oklahoma law.<sup>58</sup> In an opinion for the Court, Justice Alito borrows quotations about corporations from various sources to blur the distinctive way in which corporations are legally separate from the human owners and entirely independent of the personas of officers and directors.<sup>59</sup> The opinion fails to address the core conception of the corporation: that of the juridical separation of its legal personality from any human being associated with the corporation.<sup>60</sup> The concept of limited liability turns on this fundamental conception of the corporation; conflating it with the personal concerns and religion of owners or directors erodes any concept of the corporate veil. Basic doctrine in corporate law teaches that one must take the consequences that accompany the choice of a business entity for conducting an enterprise. The *Hobby Lobby* case is ignorant of this simple requirement that teaches the necessity of learning the legal features of a form, making an informed selection, and then accepting the consequences of the choice.<sup>61</sup> Corporate form delivers the good of limited liability, as it entirely separates the legal personality of the owners and participants from the entity.<sup>62</sup> As to the substitution of the individual persona that was the origin of protective law through Congressional clarification and Court interpretation of First Amendment principles affecting religion, the concern arose in a classically individual appeal for protection from government power.<sup>63</sup> The matter at dispute involved the denial of a state benefit to two employees who had been discharged by a private employer because they used peyote in a sacramental ritual.<sup>64</sup> The state denied these two religious practitioners unemployment compensation because they were dismissed for misconduct, the use of an illegal substance.<sup>65</sup> The Supreme Court ruled that a neutral state law that burdened a religious exercise did not have to contain an exception in order to conform to the First Amendment.<sup>66</sup> The result was Congressional

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58. *Hobby Lobby*, 134 S. Ct. at 2765.

59. *Id.* at 2768–72.

60. *See generally id.*

61. *Id.*

62. Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 574–82 (1986) (detailing the history of limited liability within corporations in England and the United States).

63. *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

64. *Id.* at 874.

65. *Id.*

66. *Id.* at 890.

action, intended to afford protection to religious practice, as a practical matter to persons practicing minority religious rites or observing minority religious requirements.<sup>67</sup>

Its jurisprudential evolution is not unlike the journey from Court solicitude for frightened school children being forced to salute a flag against their conscience to a right of a rich corporation to exemption from state anti-discrimination law. The movement is from individuals taking part in a religious rite of their spiritual beliefs to exemption of a large, profit-making corporation from compliance with a national law designed to deliver basic medical care without discrimination against women of reproductive years. Protection for vulnerable individuals becomes a privilege of opt out from general law for large enterprises, with little concern for the impact on individual needs for which legislatures have otherwise provided. Thus, though the holding in *Hobby Lobby* is about religion, and has an element of legislative input, the propensity of the Court to favor the powerful—against the expressive development of gay young men and boys or the needs of women of child-bearing age for autonomy and hence expressive development—is of the same kind.

Finally, *Citizens United* contains a symphony of First Amendment jurisprudential instrumentation rendered as a tribute to a speech market free of regulatory input. The market both envisioned and set free is one in which the wealth of monetary resources is married to discursive wealth, thereby freeing capital to dominate the modern media and to use the methods of propaganda, repetition, and bombardment. The freeing of capital is brought into greater perfection in *McCutcheon v. FEC*,<sup>68</sup> which held unconstitutional biennial limits on the amount an individual could contribute in total to federal political candidates.<sup>69</sup> An earlier case held that Arizona did not have a sufficient justification to provide funds on a matching basis, as against privately funded candidates, for candidates who accepted public funding and abided by restrictive rules.<sup>70</sup> Justice Kagan's dissent aimed directly at the inversion of the usual bromide that insists that more speech is a First Amendment good: "Except in a world gone topsy-turvy, additional campaign

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67. Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb4 (1993).

68. *McCutcheon v. FEC*, 133 S. Ct. 1242 (2013).

69. *Id.*

70. *Ariz. Free Enterprise Club v. Bennett*, 131 S. Ct. 2806 (2011).

speech and electoral competition is not a First Amendment injury.”<sup>71</sup> Justice Kagan was also blunt about the lack of “a decent respect” by the Court for the objectives of the citizens of Arizona to have elections that bring into office representatives “accountable to the many.”<sup>72</sup>

The money-as-speech doctrine of the Court does not forbid the poor from participating in campaigns, or the middle class, or even the upper middle class. But in a real sense, it may be said to silence them. Persons bombarded by the roar of a great wind, or a mammoth roar of water, generally abandon speech or appeal to a deity.<sup>73</sup> Some settings so dwarf the single person, or a collection of people—the human form—that all fall silent. The crescendo of speech, and publicized access of a limited class of donors to candidates, brings into civic space the same kind of silencing roar as the sea in storm, one that renders fruitless the heretofore common middle class engagement with contributing “my two cents”<sup>74</sup> to the political fray.

The philosopher Stanley Cavell describes the “my two cents” implicated in the speech of an individual: “Exercising the right to speak not only takes precedence over social power, it takes precedence over any particular form of accomplishment; no amount of contribution is more valuable to the formation and preservation of community than the willingness to contribute *and the occasion to be heard. . . .*” Cavell discusses the use in the movie *Mr. Deeds* of the phrase, “I’d like to put in my two cents.”<sup>75</sup> Cavell writes:

. . . [T]he contribution of two cents is one that can likely be responded to equally by others; it leaves your voice your own and allows your opinion to matter to others only because it matters to you. It is not a voice that will be heard by villains. This means that to discover our community a few will have to be punched

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71. *Id.* at 2833 (Kagan, J., dissenting).

72. *Id.* at 2845.

73. “And he arose, and rebuked the wind, and said unto the sea, Peace, be still. And the wind ceased, and there was a great calm.” *Mark* 4:39 (King James ed.) (response of Jesus to the fear of disciples in the stern of a ship caught in a storm).

74. “My two cents” is said to arise from the contribution by a widow to a church treasury, to which rich men were showily giving quantities of silver, presumably for social status. “And there came a certain poor widow, and she threw in two mites, which make a farthing.” *Mark* 12:42 (King James ed.).

75. STANLEY CAVELL, *CITIES OF WORDS: PEDAGOGICAL LETTERS ON THE REGISTER OF A MORAL LIFE* 206 (2004) (emphasis added).

out, *made speechless* in their effort to usurp or devalue the speech of others. It is a fantasy of a reasonably well ordered participatory democracy. It has its dangers; democracy has; speech has.<sup>76</sup>

Cavell concludes that the motion picture, in helping keep “the perfectionist, utopian register of democracy alive” makes “a contribution somewhere between two cents and the largest fortune in the world.”<sup>77</sup> The Court’s treatment of large fortunes as expressively endangered has the effect in several applications of “punching out” the wrong person—the average citizen hoping to add her two cents to democracy and to the learning process of the whole community.<sup>78</sup>

How did the Court find a jurisprudential path to these odd portraits of the threat to First Amendment freedoms through regulations that are not, on their face, aimed at suppressing speech, but at advancing First Amendment interests, and which in fact seek to maintain value for the “two cents” that help to maintain civic space in “a reasonably well ordered participatory democracy”?<sup>79</sup>

#### **B. Early Development of the First Amendment: Reaction Against the King’s Power to License Speech, Some Ambiguity About the Founders’ Views on Seditious Libel**

In this subsection, I will provide a survey of the early beginnings of American norms of free speech and the evidence provided by sophisticated commentary on the history and original public meaning supporting an interpretation of the First Amendment. I will rely substantially on the work of historian Leonard Levy, supplemented by the recent work of law professor Lawrence Rosenthal examining historical evidence in light of the emergence of “original public meaning” as a strong factor in scholarly and judicial readings of

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76. *Id.* at 207 (emphasis added).

77. *Id.* The comment of Jesus concerning the comparison of the widow’s mite to the contribution of silver resonates with Cavell’s rendering for democracy of “my two cents.” Jesus advised the disciples: “That this poor widow hath cast more in, than all they which have cast into the treasury. For all they did cast in of their abundance; but she of her want did cast in all that she had, even all her living.” *Mark* 12:43-4 (King James ed.).

78. “So there grows up a sort of solidarity of learning, a professorship of things in general—exactly that, for, in spite of the smile the term may cause, it is ‘professors of things in general,’ like Teufelsdröckh, that all men in heart must be.” LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 8 (1952).

79. CAVELL, *supra* note 75, at 207.

Constitutional text.<sup>80</sup> Some readers who are well versed in First Amendment history may choose to skim (or skip) this subsection and go to Part II. This subsection does, however, compare past approaches to maintaining conformity in enclaves with present day doctrine that is a subject of this Article.

Levy generally argued that the provenance in history of strong speech protection was weak.<sup>81</sup> After some years of hearing other scholars critique his thesis, Levy conceded he may have argued the point too strongly and so made some revisions in his landmark book, *The Emergence of a Free Press*.<sup>82</sup> Rosenthal, however, has indicated that he thinks “the evidence is even more confusing than does Levy.”<sup>83</sup> The brief survey that follows is intended to provide a context, drawing mainly on the work of these two scholars, for critiquing the means by which the Supreme Court has shaped an uncertain original meaning with respect to the silence principle as used to protect majorities from “expressive” contact with minorities.

The First Amendment is often described as having arisen from the anger of the colonists over the powers of the English monarchy to license publications before they could be printed.<sup>84</sup> The strong consensus on that minimum meaning of the First Amendment supports the Court’s absolutism about prior restraints on publication.<sup>85</sup> The power of the King and Parliament to prevent speech before it could occur was the most salient ill against which the First Amendment was aimed.<sup>86</sup> Thus, any suggestion of pre-clearance

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80. See Rosenthal, *supra* note 8.

81. LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985) [hereinafter *FREE PRESS*]. See also LEONARD W. LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* 3 (1963) (asserting that “prosecution for the cause of conscience” was a frequent menace in early America).

82. LEVY, *FREE PRESS*, *supra* note 81, at 12–13 (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES* 152). Levy explains the critical influence of Blackstone on “the minds of American framers.” The critical distinction made by Blackstone was that “the *liberty of the press* . . . consists in laying no *previous* restraint upon publications, and not in censure for criminal matter when published.” *Id.*

83. Email from Lawrence Rosenthal to author (Mar. 15, 2015, 8:53 P.M. EST) (on file with author).

84. LEVY, *FREE PRESS*, *supra* note 81.

85. “It should be noted at the outset that the First Amendment provides that ‘Congress shall make no law . . . abridging the freedom of speech, or of the press.’” That leaves, in my view, no room for governmental restraint on the press. *N.Y. Times v. United States*, 403 U.S. 713, 720 (1971) (Douglas, J.).

86. LEVY, *FREE PRESS*, *supra* note 81, at 12–15 (explaining the rule of “Parliamentary privilege” that forbade reporting on Parliamentary proceedings and the thin protection provided by the difference between prior restraint and criminal



of speech is anathema to American law.<sup>87</sup> Yet the human impulse to restrain disruptive speech before it happens was and is strong. Levy debunks any notion that the American colonies were the birthplace of a strong protection for speech.<sup>88</sup> Though there is an image of vigorous exchange among hardy colonists with strong views, in fact the pattern was one of enclaves that did not welcome outsiders who brought dissent with them.<sup>89</sup> Here, the story from the past about insular geographic enclaves anticipates aspects of present day doctrine. The de facto “licensing” of groups by First Amendment doctrine to veto state laws and, by the power of exclusion from broadly inclusive groups, to protect domains of private royalty in contemporary life from contact with expression implied by identity, relocates the impulse to censorship away from an official body and into bodies “licensed” by the Court’s silence jurisprudence. The result, empirically, is what Justice Brandeis called “enforced silence.”<sup>90</sup> The state does not exercise its sovereign power, gained by winning a battle that awards dominance to the strongest force,<sup>91</sup> but it permits “enforced silence” to be a normative rule for groups with power. Indeed, a good example of practical prior restraint can be seen in early group exclusions that prevented speech—the power of a community “to banish or extra-legally punish unwelcome dissidents.”<sup>92</sup> The power of a small “enclave” to enforce conformity made the distinction between legal powers of prior restraint or punishment mainly a matter for theory. Similarly, the delegation to a group of the power of exclusion as a protection of conformity in large civic groups blocks expressive gains through contact before they occur. The dynamics of small groups that maintain a consensus, as described by twentieth century sociologists,<sup>93</sup> is a nice fit for

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prosecution for seditious libel). One theorist treats “verbal battles and strains” as a part of “the totality of animal-environment involvements” and concludes: “Hence, there is no point in trying to preserve a split between physical and verbal forces or strains of conflicts in human relations for both are equally implicated in the course of recorded history.”). C. D. MORTENSEN, COMMUNICATION, CONFLICT, AND CULTURE, COMMUNICATION THEORY 281 (1991).

87. *N.Y. Times*, 403 U.S. 713.

88. LEVY, FREE PRESS, *supra* note 81, at 16.

89. *Id.*

90. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

91. *See supra* notes 28–39. The Holmesian view of speech as battle is supported by forms of communication theory.

92. LEVY, FREE PRESS, *supra* note 81, at 16.

93. MORTENSEN, *supra* note 86, at 276 (1991) (explaining human conflicts as a “confluence of animalistic urge and ecological necessity . . . from a communicative

understanding small communities in the early American colonies. In small tight-knit points of proximity and activity, an apparent consensus is likely to mean domination that is below the surface.<sup>94</sup> Hence, a portrait of amity is often misleading, yet in American history, as depicted by Levy, there was pressure to maintain solidarity in communities capable of mobilizing an apparent consensus to maintain a smooth surface, often by extra-legal means. The legal treatment of dissent in the wider context of state authority was not necessarily an improvement, though Levy indicates that judges were not the agents of suppression one might suspect they would be.<sup>95</sup> Rather, the sources of punishment for speech were governors acting in a quasi-judicial capacity and popular assemblies using powers to punish breaches of Parliamentary privilege.<sup>96</sup>

Thus, where speech is concerned, majorities have been in need of a judicial check, to restrain a common human impulse to suppress dissent. Outside that context, it does not follow that majorities should be generally disabled, where speech is not the subject of laws passed by legislative bodies. I will address the problem that may arise when judges project into the twentieth century regulatory work of majorities a purported infringement of the First Amendment, though the affected regulations may be supportive of a First Amendment mission of building civic capacity. As seen in this subsection, majorities have a track record of temptations in the way of speech suppression; the judicial role to check that temptation is important, but its extension beyond that is less well founded.<sup>97</sup>

Levy describes a libertarian impulse in the United States only emerging belatedly as compared with the sentiment in England.<sup>98</sup> He connects the emergence in the United States to the Jeffersonian recognition of a threat from the enactment by the Federalists of the Sedition Act as part of a plan to control public opinion to assure the Federalists' re-election.<sup>99</sup> According to Levy, the Sedition Act, in contemporary parlance, moved the goal posts for a libertarian defense of free speech, since it incorporated protective principles for

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standpoint . . . viewed as expressed struggles over the distribution of scare resources—material, economic, and symbolic”).

94. *Id.* at 281.

95. LEVY, *FREE PRESS*, *supra* note 81, at 17.

96. *Id.* at 17–23.

97. *See infra* Part I.D.

98. LEVY, *FREE PRESS*, *supra* note 81, at 297.

99. *Id.*

which libertarians had fought, such as proof of intent and jury trial.<sup>100</sup> The result was that, in their own defense, the Jeffersonians embraced a newly broad view of freedom of speech, particularly for political advocacy.<sup>101</sup> Finally, Levy concludes his important review of the American history of free speech, with its twists and turns among battlers bent on erasing the opposition and the facts of “everyday life” in communities with the power to expel outsiders, with a shrug.<sup>102</sup> So far as the First Amendment goes, “[w]hat [the framers] said is far more important than what they meant.”<sup>103</sup>

In the twentieth century, the Court moved to a vision of a competition of ideas in a free market. The history of the American understanding and practice of free speech, before the twentieth century, validates a vision of a contest, but also supports a sociological understanding of the importance of group interactions to the apportionment of expressive capacity. The ecological/evolutionary theory of communication talks of “the survival of the expressively most fit but also the disappearance of the least articulate.”<sup>104</sup> History, later doctrine (*infra* Part I.B), and ecological evolutionary theory converge in an understanding of a competition in the area of speech, with variation in the overall explanation of conflict, but with convergence on a sense that winning is a function of power in an unregulated struggle.

The late Edwin Baker sought to reframe First Amendment doctrine less pugilistically—with an explicit normative mission. As have others, he sought to move doctrine away from a model of laissez-faire market competition to a set of markers bounding a single realm of liberty and self-expression and self-determination.<sup>105</sup> Arguments Baker fashioned appealed to “modern social theory,”<sup>106</sup> the sociology of knowledge,<sup>107</sup> and psychoanalytic considerations,<sup>108</sup> none of which has a presence in Supreme Court’s First Amendment doctrine. Indeed, to the extent the marketplace doctrine contains a progression in jurisprudence by incorporating psychological thinking,

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100. *Id.*

101. *Id.* at 301.

102. *Id.* at 149.

103. *Id.*

104. MORTENSEN, *supra* note 86, at 287.

105. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 5 (1989).

106. *Id.* at 14.

107. *Id.*

108. *Id.* at 15.

it is that of the battle-scarred Nietzschean on the American high court, the Magnificent Yankee, Justice Holmes. Yet the aspiration of the First Amendment, in the words of the Supreme Court, is not to winnow speakers but to empower all citizens to contribute to political choice: “The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”<sup>109</sup> The complexity of language as a product of human interaction, even where the fittest survive, suggests that the Court may need better guidance than constitutional bromides about how it can achieve true neutrality in regulating ground rules for free expression.

### C. Holmes, the Sovereign, and the Field of Combat

The previous subsection addressed the tentative beginnings of the First Amendment as constitutional doctrine protective of free speech against the perceived interests of the sovereign. For purposes of this section, it is sufficient to recall that the Court was slow to see a role to overrule the judgment of the legislature, if the legislature deemed speech to be dangerous to the state or to public peace and order.<sup>110</sup> The Court did not second-guess the legislative assessment of danger.<sup>111</sup>

In early cases, the Court affirmed convictions for speech that today seems tame.<sup>112</sup> Justice Holmes is widely seen as a shaping figure in the evolution of the First Amendment toward the more protective form it began to take in regard to speech thought dangerous to the

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109. *Citizens United*, 558 U.S. 310.

110. *See infra* Part I.B.

111. *Gitlow v. New York*, 268 U.S. 652, 668 (1925) (“By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow or organized government by force, violence and unlawful means, are so inimical to the general welfare and involved such substantive evil that that they may be penalized in the exercise of the police power. That determination must be given great weight. Every presumption is to be indulged in the validity of the statute.”). In *Gitlow*, the Court, upon applying the First Amendment to the states, articulated an extremely deferential reasonableness standard that allowed the State to punish those who abuse the freedom of speech in ways “inimical to “the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace.” *Id.* at 667.

112. *See generally Debs*, 249 U.S. 211 (upholding Eugene Debs’s conviction under the Espionage Act for speaking against the draft and war recruiting); *Abrams v. United States*, 250 U.S. 616 (1919) (upholding two similar convictions under the Sedition Act of 1918).

sovereign.<sup>113</sup> In the material that follows in this subsection, I give considerable attention to the ideas that helped animate Justice Holmes's contribution to twentieth century judicial thinking about how to assess the danger of speech to the existing political system or guard against the possible existence of an immediate threat to public peace and safety. Some may differ with an approach that plumbs Justice Holmes's private beliefs for commentary on the judicial model that over time emerged from his influence. One reader of a draft of this Article commented: "What is most important for your purposes, it seems to me, is that the strong and powerful are most likely to prevail in the marketplace of ideas."<sup>114</sup> Justice Holmes is the Supreme Court judicial source of the notion that a marketplace of ideas is a testing ground for speech that provides a degree of protection against bad ideas.<sup>115</sup> For readers who regard the marketplace concept as a sufficient statement of the governing conception, the material on Holmes may be unnecessary to the primary claims. For others, the agnosticism of Holmes about any means of establishing which values should be accepted as superior over other values—except force—may be of interest in assessing the trajectory of legal reasoning as a set of surface understandings and rationales implicated in judicial contributions. Even for those who dismiss judicial biography as lacking explanatory power in law, information about what a towering judicial figure, especially one of an intellectual and literary bent, might have thought about the reasons for a doctrine is not alien to the understanding of the operational import of the doctrine.

Justice Holmes readily and casually participated in the early holdings, applying his general view that a dominant force—the state—could crush opposition as a normal expression of power confronted with a difference of opinion.<sup>116</sup> Under the influence of a

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113. See generally THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* (2013).

114. E-mail from Lawrence Rosenthal to author (Mar. 15, 2015, 8:53 P.M. EST) (on file with author). See also Anita Bernstein, *Abuse and Harassment Diminish Free Speech*, 35 PACE L. REV. 101, 127 (forthcoming 2015) ("Contemporary decisional law about the constitutional right to free speech tends to favor overdogs.").

115. *Abrams v. United States*, 250 U.S. 630 (1919) (Holmes, J., dissenting). See also *infra* note 145 and accompanying text.

116. Brad Snyder, *The House That Built Holmes*, 30 LAW. HIST. REV. 661 (2012); DAVID A. HOLLINGER, *THE "TOUGH-MINDED" JUSTICE HOLMES, JEWISH INTELLECTUALS, AND THE MAKING OF AN AMERICAN ICON*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 223 (Robert W. Gordon ed., 1992) (noting his friendships with Felix Frankfurter, Harold Laski, and Louis Brandeis).

young group pressing him to move the Court away from economic due process and to protect expression,<sup>117</sup> Holmes began to rethink his views on expression but did it in his own frame—that of battle. As is widely celebrated, Justice Holmes began to articulate the means by which the Court might begin to restrain the long-standing impulse of societies to silence dissenters from state power as exercised responsively to the strongest interests in the political system.<sup>118</sup> Holmes identified the risk of harm from speech as the analytic key to the Court’s application of First Amendment protection of speech.<sup>119</sup> Before that, the Court had suggested fearfulness as the grounds for First Amendment jurisprudence: Even the tiniest spark might become a conflagration.<sup>120</sup> Justice Brandeis countered such rhetoric with an appeal to the courage of the founding generation, a generation that did not live in fear:

[t]hose who won our independence by revolution were not cowards. They did not fear political change. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.<sup>121</sup>

Over time, the Court integrated these insights about risk assessment and civic confidence into its governing jurisprudence: the assessment of “incitement” should be evaluated in light of intention, imminence, and likelihood.<sup>122</sup> The ultimate expression of that confidence in the value of speech and intrepid refusal to make fear the guide to citizen speech rights occurred when the Court refused to enjoin the publication of the Pentagon Papers, despite an understanding that the

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117. See generally Snyder, *supra* note 116; HOLLINGER, *supra* note 116, at 223; HEALY, *supra* note 113.

118. Professor Zechariah Chafee, Jr., wrote a landmark work, FREEDOM OF SPEECH (1920), that is credited with “earn[ing] him a permanent place in the pantheon of civil liberties.” DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW 1 (1986). In the area of free speech, Chafee is described as having reacted against state legislation passed on behalf of wealth against collectivists. *Id.* at 79.

119. Frohwerk v. United States, 249 U.S. 204 (1919).

120. See *Gitlow*, 268 U.S. at 669.

121. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

122. Brandenburg v. Ohio, 395 U.S. 444 (1969).

release could harm national security interests and cost lives.<sup>123</sup> This part of the Court's First Amendment jurisprudence is sturdy, well accepted, and an advancement of the understanding of the value of speech.<sup>124</sup> The commitment to speech over a desire for conformity and safety is so strong that the Court is willing to take on moral risk: Their protection of speech could cause some harms to eventuate, as they are often warned.<sup>125</sup>

Unfortunately, the emotional habit of steeling themselves to the possible harms of speech may have gained a grip that leads some of the Justices to scant the human costs of other, less obvious upshots of strong, even dogmatic judicial applications of First Amendment doctrinal innovations.<sup>126</sup> The less obvious applications include protection of speech that harms vulnerable people and defenseless creatures.<sup>127</sup> The Court rejects all efforts to limit hate speech,<sup>128</sup> applies its black letter law logically and mechanically to hamper legal protections for animals used in "crush" videos,<sup>129</sup> and refuses to allow states to fashion laws that protect families of fallen soldiers from loud hate speech aimed at the funeral rites of their lost sons, wives, brothers, fathers, or other loved ones.<sup>130</sup> Professor Burt Neuborne has

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123. *N.Y. Times*, 403 U.S. at 759 (Blackmun, J., dissenting) (suggesting soldiers' deaths could result from publication of stolen documents about the Vietnam War).

124. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

125. The warnings to the Supreme Court are reflected in the dissenting opinion discussed in *supra* note 123.

126. *See infra* notes 128–32 and accompanying text.

127. *Id.*

128. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court held that speech that lies within a categorically unprotected genre—fighting words—nonetheless may not be censored selectively. The import was that the government may not, as the City of St. Paul had done, single out for punishment forms of expression placed on public or private property, such as a burning cross or Nazi swastika, that were "bias-motivated." *Id.* at 392. The ruling makes it almost impossible to regulate hate speech without also regulating protected speech.

129. *See, e.g.*, *United States v. Stevens*, 559 U.S. 460 (2010) (striking down federal law criminalizing the distribution of "crush video" depictions of cruelty to animals for consumption by sexual fetishists).

130. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011) (vacating a nuisance judgment against offensive and insulting protesters at military funerals); *see also* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (striking down California law limiting children's access to violent video games). The Supreme Court has allowed the majority to limit disfavored speech on multiple occasions. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393 (2007) (permitting school principal to punish a student for a sign at a school event that might "reasonably" be read to promote drug use); *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (limiting the speech rights of public employees); *Beard v. Banks*, 548 U.S. 521 (2006)

reviewed these cases scathingly, featuring them as examples of the Court's jurisprudence that fails to capture "Madison's Music" in the First Amendment.<sup>131</sup> Neuborne suggests that the Court consistently shapes First Amendment law to benefit the powerful at the expense of the weak.<sup>132</sup>

The scanting of the weak for the powerful—or lustily loud—voice is not entirely without a paternity in the fierce philosophy embraced by the justice so celebrated for setting the First Amendment on its twentieth century course away from the right of the state to suppress opposition. Justice Holmes, above all, believed in the notion of "might makes right," and in the lack of ultimate validity for any belief.<sup>133</sup> The only test of a belief, for Mr. Justice Holmes, was its fate on a battleground.<sup>134</sup> Holmes emerged from serving as a young soldier in the Civil War without a commitment to a set of beliefs, but with a valorization of war.<sup>135</sup> Holmes treated as sacred the fight among soldiers<sup>136</sup> who will throw away their lives in the service of a cause that is wrong, or trivial, or incoherent.<sup>137</sup> Similarly, Holmes believed that, in politics, sovereign will, backed by power, was the only basis for law.<sup>138</sup> In the United States, with a political system wedded to a majoritarian basis for policy, the Holmesian elevation of power as the basis for law, and Holmes's oft-expressed rejection of any grounding of values in anything other than

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(permitting denial to certain prisoners of all non-religious written materials on the grounds of deference to a rational policy devised by prison officials).

131. See generally BURT NEUBORNE, *MADISON'S MUSIC: ON READING THE FIRST AMENDMENT* (2015).

132. *Id.*

133. See *infra* notes 138–40 and accompanying text.

134. *Id.*

135. See Oliver Wendell Holmes, *The Soldier's Faith*, in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 90–91 (Richard A. Posner ed., 1997) (praising soldiers who die for "a blind belief" and calling the message of war "divine").

136. *Id.*

137. Peter Gibian, *Opening and Closing the Conversation*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 207 (Robert W. Gordon ed., 1992).

138. ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 14–30 (2002) (reviewing the evidence of Holmes's "power-based philosophy"); Gibian, *supra* note 137, at 211 (demonstrating Holmes's conflation of truth with power, and describing Holmes's view of majority rule as the equivalent of a dominant national power). See also CHARLES ROYSTER, *THE DESTRUCTIVE WAR: WILLIAM TECUMSEH SHERMAN, STONEWALL JACKSON, AND THE AMERICANS* 283 (1991) (noting the view that Holmes's soldier metaphor meant that "the powerful state, not ideas or principles, was the ultimate recourse in politics").



a personal preference,<sup>139</sup> pointed toward a war of ideas in which the most powerful speaker would win, and win rightly because power is the measure of values.<sup>140</sup> But, of course, our political system is not purely majoritarian, so the question of power is not a pure proxy for the majority. Winners in particular areas have types of clout to make policy<sup>141</sup> and then resources to take losses to the Supreme Court for relief.<sup>142</sup> Hence, the concern in this Article about the capture of the First Amendment by forces of power for interests that are not a clear win for speech is not a concern about majoritarian power, but instead about a new kind of domination of political and constitutional outcomes. Evidence suggests that private power, less than majoritarian electoral power, is increasingly the sole currency of our common political life.

The metaphors Holmes used in his great First Amendment dissents have to do with battle, in Peter Gibian's phrase, "a verbal model of battle," of "conflict based on power."<sup>143</sup> The direct path in Holmes's mind from the logic of "kill[ing] heretics" or "whip[ping] Quakers," which is acceptable if a group is certain of truth, leads to a battle among ideas, in a clash almost as exhilarating and life affirming as all-out war.<sup>144</sup> In his landmark dissent in *Abrams v. United States*,

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139. ALSCHULER, *supra* note 138, at 26.

140. *Id.* (rejecting rights as only an imaginary prophecy of how public force will be used against those who attack the right); *see also* ROYSTER, *supra* note 138, at 283 (characterizing Holmes as seeing the outcome of the Civil War, not as a triumph of natural rights, but as a result of the "will of the powerful").

141. *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSPECTIVES ON POLITICS* 564 (2014):

Multivariate analysis indicates that economic elites and organized groups representing business interests have substantial independent impacts on United States government policy, while average citizens and mass-based interest groups have little or no independent influence. The results provide substantial support for theories of Economic-Elite Domination and for theories of Biased Pluralism, but not for theories of Majoritarian Electoral Democracy or Majoritarian Pluralism.

142. Adam Liptak, *First Amendment, 'Patron Saint' of Protesters, Is Embraced by Corporations*, N.Y. TIMES (Mar. 24, 2015), available at <http://www.nytimes.com/2015/03/24/us/first-amendment-patron-saint-of-protesters-is-embraced-by-corporations.html>.

143. *See* Gibian, *supra* note 137, at 212.

144. *Id.* at 212 (quoting Holmes as writing to Harold Laski, "it seems logical to me in the Catholic Church to kill heretics and [for] the Puritans to whip Quakers") (citing THE HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935 217 (Mark DeWolfe Howe ed., 1953)).

Holmes presents a bracing image of a good reason to allow combat among ideas:

. . . [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>145</sup>

Here, Holmes refers to his own experience of fighting in war. Joining the Grand Army of the Republic out of a belief in abolitionism, the experience of war taught Holmes that the ideas receded, but the “soldier’s faith” in the honor of combat remained.<sup>146</sup> His sense of values after the War have been described as Nietzschean, existentialist, and skeptical.<sup>147</sup> Gibian also comments on the focus in Holmes’s writings on martial figures.<sup>148</sup> Holmes confirms his comfort with power imposed in the combat of ideas and maintained by force: “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”<sup>149</sup> Thus, in the tracing to a Holmesian idea of force meeting force, and ideas battling for dominance, there is little room to admit concern for the ability of the strongest speakers to drown out weak speakers, inflict isolation or harm on isolated groups subject to social disfavor, or gratuitously traumatize the survivors of fallen soldiers.

As to equality as a constitutional norm for judicial enforcement, which might also serve to enable weaker voices to be heard or to be part of a community that would rather, in Holmes’s oft repeated proposed resolution of difference, “kill them,” Holmes was scathing:

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145. *Abrams v. United States*, 250 U.S. 630 (1919) (Holmes, J., dissenting).

146. ALSCHULER, *supra* note 138, at 146–47.

147. *Id.* at 6, 18–20.

148. *See* Gibian, *supra* note 137, at 198.

149. *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

[D]eep seated preferences cannot be argued about—you cannot argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.<sup>150</sup>

It is hard to imagine Holmes seeing the reason to require a group to associate with those whom it might prefer to kill, or, for that matter, intervening to protect them from the associations mandated by state law.<sup>151</sup> The core of his work is not about attending to anyone's sensibilities—not the isolated boy or young man excluded from a civic group for boys, not the Jehovah's Witness child made to salute the flag, and not, for that matter, a homophobic Scouting corporate leadership or a religious entity loath to complete a form to opt out of direct involvement with contraception. It is about battle, with ideas doing the work of the martial spirit. Though Holmes's argument for the clash of ideas as a First Amendment charge speaks of a test of truth, Holmes is not suggesting the Miltonian idea of Truth,<sup>152</sup> but rather the solution, or end, certified by the winner in combat. The twentieth century merger of the Holmesian vision of the First Amendment as a conscription of speech for battle with a tender concern for the spiritual vulnerability of a child made to do a stiff-armed salute to the flag leaves the First Amendment in a state of schizophrenia. Holmesian vision began its most vigorous jurisprudential life as a statement of a soldier's attachment to battle and the survival of the fittest. Next, the First Amendment, breathed

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150. Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

151. For the weak individual, Holmes's contempt was scalding. He famously called the Equal Protection Clause "the last resort of constitutional arguments" in the course of upholding the right of the Commonwealth of Virginia to sterilize a young woman who had been labeled a mental defective. See *Buck v. Bell*, 274 U.S. 200, 208 (1927). Gibian explains that Justice Holmes favored protecting labor unions when they had threatened the railroads and, by contrast, the railroads when the government prosecuted them under antitrust law, in both instances as a consistent expression of support for the strong to allow them to fight the "struggle for life." Gibian, *supra* note 137, at 212–13 (contrasting *Vegeahn v. Guntner*, 167 Mass. 92, 106–09 (1896) (Holmes, J., dissenting), and *N. Sec. Co. v. United States*, 193 U.S. 197 (1904) (Holmes, J., dissenting)).

152. John Milton, *Areopagitica*, in AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON 45 (John Alvis ed., 1999) ("And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?").

life by the martial spirit of Holmes, with the old warrior gone from the Court, detoured to protect the inner life of a vulnerable child from state coercion. In old age, the creation of Holmes called upon the ghost of the pacific and silent school child in aid of the strong to reject the weak, and summoned the favorites of Holmes—the hardy, the strong, the robust, the battler—to array their forces in the field of battle.

**D. The First Amendment: From Fearing the King’s Power to License Speakers to Licensing the King’s Fear of Powerful Speakers?**

As we have seen, societies and groups often have an instinct to enforce silence.<sup>153</sup> Counter principles are easy to state about the right of dissenters to speak and publish incendiary ideas, yet so long as a state interest in suppressing some speech as intended, dangerous, and imminent is conceded to exist,<sup>154</sup> there is room for the Court to err in setting the pragmatic balance that Rosenthal argues is embedded in the First Amendment.<sup>155</sup> And once the Court departs from the straightforward purposivist program and begins to forbid state interventions that are motivated to open discursive space to spread social knowledge, it is at risk of scanting First Amendment values in a way that slights other public interests in a free exchange of ideas. Silence inflicts damage on those who fear a group and those in society who would benefit from its insights and presence. The Supreme Court is formally protective of speakers and the Court is vigilant to stop regulations that may prefer certain speakers over others.<sup>156</sup> Yet

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153. See generally ELISABETH NOELLE-NEUMANN, *THE SPIRAL OF SILENCE: A THEORY OF PUBLIC OPINION—OUR SOCIAL SKIN* (1984) (examining the complex social forces that lead to individuals to fall silent).

154. *Brandenburg*, 395 U.S. 444.

155. Rosenthal, *supra* note 8, at 1. In his book on jurisprudence, Richard Posner has explained that there is space in jurisprudence between the dictates of logic and the judge’s personal will, as Holmes intimated were the only alternatives, and it lies in “science and practical reason.” Summarizing Holmes’s core view that Holmes did not have the patience to execute, Posner writes: “Science can make law more rational by enabling the weight of competing considerations to be measured more precisely than the existing methods of legal inquiry permit.” RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 251–52 (1990) [hereinafter POSNER, *JURISPRUDENCE*].

156. See, for example, Justice Kennedy’s discussion in *Citizens United v. FEC*:

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to

the effect of the silence doctrine is unexamined for the production of an engaged, empowered citizenry, and the distribution of silence versus speech. The silence doctrine of the Court becomes an influence on a process by which voices are lost to discourse.

The history of suppression of expression is a story of the state seeking to impose silence to maintain uniformity of belief in a period when truth could not be subject to difference.<sup>157</sup> Given the strength of belief in religious truth, and the eventual designation of the King of England as the head of the established church, “nonconformity and heresy” were conflated with “sedition and treason.”<sup>158</sup> While the suppressive impulse was directed against the individual conscience,<sup>159</sup> the technique was to impose a widely shared and accepted, instinctual, customary demand for silence. As Leonard Levy lays out the history of “freedom of speech,”<sup>160</sup> it was a slowly dawning realization among human beings that group understandings, expressed through state power to silence non-conforming citizens, were not properly immune from contact with other expressions imbedded in the expressive activities of carriers of a distinctive identity.<sup>161</sup> The habit of the state, accepted as a natural expression of communal consensus through the person of a monarch or a self-governing body, was to guard the formation of community by insisting upon “Reserve and Respect” in speech about the state orthodoxy.<sup>162</sup> The elevation of enforced silence, demanded by large private associations, to that of a constitutionally protected barrier against forms of state regulation that bring into the association carriers of an identity thought to express “nonconformity and heresy,” provides a strange echo of the silencing power once assumed to belong to the state. Instead of state suppression, the power is

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establish worth, standing, and respect for the speaker’s voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and the speaker, and the ideas that flow from each.

*Citizens United*, 558 U.S. at 340.

157. LEVY, *FREE PRESS*, *supra* note 81, at 5.

158. *Id.*

159. *Id.*

160. *Id.*

161. LEVY, *FREE PRESS*, *supra* note 81, at 5.

162. *Id.* at 4–5 (noting Machiavelli’s phrase regarding the correct manner to speak of the Prince when exercising his grant of “liberty to have and sustain the opinions which please him best”) (internal citations omitted).

assigned to groups under the principles of “freedom of speech” joined to free association to become freedom of expressive association. The path from the King’s fear of subversive speech, which supported both licensing and criminal prosecutions for seditious libel, to a constitutional principle “licensing” large groups to demand silence out of distaste for difference is one mapped out by the human instinct to avoid open discourse and to isolate and ignore minorities and outsiders. But the First Amendment’s mandate is to stand as a fortification protective of those whom the powerful wish to silence or disable from full participation in societal exchange. It is at least anomalous for the First Amendment to help build a barrier to access by the weak to the speech and associational resources of the strong. Though some group-protective cases protect organizations that existed for the defense of outsiders,<sup>163</sup> the free floating principle of silence as a First Amendment value is not reliably protective of weak voices or the dignitary benefits of access to community assets.

It is worth noting that the frequent refrain about weaker groups is that forcing them to admit hostile outsiders is a disabling violation of their associational rights and their right of solidarity in which to form and communicate ideas. The concern is that weaker groups need a doctrine at hand to protect them from being molested by majoritarian intruders intended to crush their capacity to form and send messages—the threat of what we might term “associational identity theft.” Marginalized groups often wish to claim “our place” as a protected haven for building confidence and identity, and maintaining privacy about views of the majority, when desired. In effect, such an impulse argues for solidarity over engagement.

Herbert H. Denton, Jr., a Harvard College student in 1963 and later a distinguished journalist, opposed the formation of an exclusive African and Afro-American Society there, in these words:

Negro students coming to the University are likely to be overwhelmed with the idea, promoted by the only “official” Negro organization on the campus, that even the most liberal and interesting white students they may meet cannot possibly understand them, and may even be hypocrites—that the only place they are truly among friends is in an all-Negro organization strongly influenced by black nationalism. Such an outcome

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163. Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1541 (2001).

drastically curtails their ability to benefit from the central Harvard experience of association with and exposure to the broadest possible spectrum of people, ideas and movements. One may seriously ask whether an organization that so functions is in anyway compatible with the educational ideals of this University.<sup>164</sup>

Harvard chose in 1963 not to permit the exclusion of other students from the African-American organization on the basis of race.<sup>165</sup> The decision was a private one, but it was made by a university committed to the values of free expression, an open environment for engagement and peer learning, and exchange of ideas.<sup>166</sup> The University is generically committed to maintaining a university community.<sup>167</sup> In such a community, the wish of groups for the right to enforce formal exclusions in support of solidarity and against counter speech within the group necessarily lacks normative support from those guiding the life of the university. The aspiration of universities to foster a rich community of engagement is a good model for a societal aspiration to great contact among disparate groups and identities. Further, marginal or weaker identity groups have a rich array of private forums for forming solidarity—the family, the church, the voluntary private gathering, the enclaves of geographic segregation, and so forth. The threat of invasion tends to be minor.

Churches are heavily segregated by race.<sup>168</sup> Gay and lesbian centers do not find themselves inundated by anti-gay advocates who

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164. Randall Kennedy, *Introduction to BLACKS AT HARVARD: A DOCUMENTARY HISTORY OF AFRICAN-AMERICAN EXPERIENCE AT HARVARD AND RADCLIFF*, xxv (1993) (quoting Herbert H. Denton).

165. *Id.* at xxvi.

166. The Houses at Harvard are carefully planned and renewed to create a community experience for undergraduates, with involvement by the Faculty of Arts & Sciences in the design of a learning community for students. See *House Renewal Ready for Launch*, HARVARD GAZETTE (July 12, 2012), <http://news.harvard.edu/gazette/story/2012/07/house-renewal-ready-for-launch/> (“The Houses have been and must continue to be carefully curated communities, evolving as our students and the world around them change. As we change the buildings to meet the current and future needs of our students and programs, we recommit ourselves to Harvard’s House system, a truly life-changing institution rooted in people and what they can learn from each other. The Houses are the heart of the student experience at Harvard.”).

167. *Id.*

168. Michael Lipka, *Many U.S. Congregations Are Still Racially Segregated, But Things Are Changing*, FACTTANK (Dec. 8, 2014), <http://www.pewresearch.org/fact-tank/2014/12/08/many-u-s-congregations-are-still-racially-segregated-but-things-are-changing-2/>

spend large amounts of time attempting to take over the mechanisms for gay solidarity. There is not a known instance of outsiders converting a gay haven into a dating service for Christian singles. Much segregation by identity occurs informally and is supported by historic legal and economic systems that have sorted people into separate spaces over time and thereby limited the opportunities for engagement across identities.

The tendency toward separation into identity silos, caused by habit and the continuing effects of sorting in space, provides large opportunities for the creation of close-knit communities built around identity and immune to proximity and engagement with differing identities and perspectives, all achieved by the voluntary sorting choices of people. Further, within such silos, self-censorship plays a role in limiting the challenge to identity-focused consensus. Hence, the First Amendment is not a critically needed support for communitarian bonds to be formed. The silence doctrine, applied without a sociological consideration of the balance between solidarity and engagement, by context, inverts the purposivist jurisprudence of the First Amendment, which seeks to guard the individual or group against improperly motivated state censorship. Here, it permits the powerful to step in for the state and do the suppressive work of hostile motivation. As formal state silencing of gay people, often through mandated invisibility, became obsolete as law, the work has been preserved in civic organizations. Silence as an affirmative First Amendment right of large civic organizations lies a large conceptual distance away from the gradual rejection, over time, of the deeply rooted power of the state to suppress dissent, and thereby to mandate silence on matters of state.<sup>169</sup>

Civic space is the neglected concern of the Supreme Court's First Amendment jurisprudence. If the right of associational free expression is robustly enforced across organizations of many kinds to permit exemption from anti-discrimination law, the civic space for engagement is made small, with less supplementation to the informal segregationist tendencies of groups. Intergroup knowledge dwindles. The majority suffers from self-imposed narrowness of social

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(summarizing data from the National Congregations Study that show that “while about eight-in-ten American congregants still attend services at a place where a single racial or ethnic group comprises at least 80% of the congregation, one-in-five now worship in congregations where no single racial or ethnic group predominates in such a way”).

169. LEVY, *FREE PRESS*, *supra* note 81, at 4 (noting the absence of evidence that “even the most libertarian among the Greek suffered oral or written sedition to exist with impunity”).



knowledge, with the most damaging effects being imposed on those whom majorities most often isolate or reject.

**E. The First Amendment Today: *Dale's* Iconography as a Doctrine Calling the Strong Weak, To Keep Them Strong, and Other Doctrines**

The hardest contemporary growths of the right not to express anything occur as a group-protecting doctrine that enables organizations to resist inside difference or outside inspection of their messages and their membership and to fend off coerced associations that affect expression.<sup>170</sup> *Dale* both typifies and advances the doctrine by applying First Amendment “silence” analysis to disallow state laws that force the Scouting organization either to welcome open gayness without protest or, in the alternative, to prove to the government that Scouting’s core message cannot tolerate the expressive pressures of openly gay Scouts. Forcing an organization into such a choice compromises its right to not speak on a subject about which it chooses to remain silent.<sup>171</sup> The positioning of a powerful organization as in need of protection from an identity deemed inherently expressive is compatible with other Court doctrines in defense of the speech of the powerful. The Court’s willingness to protect the strong and weak alike through the rubric of associational rights, thereby shielding

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170. The right of organizational silence is a gloss on a number of cases that have arisen in various contexts and have been explained by commentators using various frameworks. The common element in the cases is a libertarian insistence by the Supreme Court that an organization may not be conscripted by the state to carry a message that it dislikes. See OWEN FISS, *THE IRONY OF FREE SPEECH* 68 (1996) (explaining the rationale for *Pac. Gas & Elec. v. Pub. Utils. Comm.*, 475 U.S. 1 (1986)). In *Pacific Gas*, the Court held that a power company may not be required to carry a public service announcement in a mailing, even though the regulation requiring it did not impose a cost on the utility. *Id.* at 20–21. Because the claimed risk to the power company of requiring the mailing is one of “forced association” or “false attribution,” the ruling is generally described as a right against forced association or a right against false attribution and not one of the right not to speak. See FISS, *supra* note 170, at 68. However, given that the power company could avoid false attribution by printing a disclaimer, a gloss developed to explain *Dale*, and with origins in earlier right-not-to-speak cases, is useful to explain *Pacific Gas*. *Id.* at 69. The power company is given the right not to speak at all on the subject of the mailing: It need not disclaim sponsorship of the view to avoid false attribution or apparent association. It can remain silent. Professor Carpenter has explained the *Dale* case in a similar fashion: The Boy Scouts are not required under the Court’s holding to account for their organizational policy on homosexuality in order to claim a right to exclude gay Scouts. They can be entirely silent on the matter. Carpenter, *supra* note 163, at 1541. They need not justify their policy to any regulator nor need they respond to the presence of gay Scouts by discussing with Scouts or the public their organizational stance on Scouts.

171. Carpenter, *supra* note 163.

those with the means to create powerful, in-group associations, transforms *Barnette* into something very different than merely protecting the powerless minority against majoritarian sentiment.

The transformation of the eloquence of the *Barnette* opinion, solicitous of a minority religious sect, into a capacious doctrine protective of powerful organizations is only one piece of the doctrinal trend, with exceptions, of course, to choose organizational control over individual expression. In cases concerning the right of a public employer to suppress employee speech, the Court has, recently, consistently favored both employer control over employee First Amendment expression and other powerful claimants over weaker ones.<sup>172</sup> As discussed in Part II.A, *Hobby Lobby*, a for-profit corporation, using a congressional statute, claimed a right to total non-expression on issues inconsistent with the faith of the corporate owners.<sup>173</sup> Religious groups further claim a right to silo themselves from any contact whatsoever with the provision of contraception, even if not paid for by the religious group.<sup>174</sup> In a case involving the objection of the University of Notre Dame to providing notice that it would not administer or pay for certain contraceptives under the Affordable Care Act,<sup>175</sup> the Supreme Court may be giving credence to a demand for the doctrinal merger of a right to avoid a distasteful, expressive contact with statutorily heightened protection for religious freedom. A merger with a generously framed religious claim thus

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172. LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 139 (2014) (summarizing four recent cases, which presented hard choices, and in which the Court “advantaged the powerful over the comparatively powerless: students, prisoners, public employees, and human rights activists”). For an important differing view of the logic of cases limiting the speech rights of public employees, see Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 *FORDHAM L. REV.* 33, 113 (2008) (explaining how managerial prerogative over the speech of subordinates enables public institutions to achieve “both managerial control and managerial accountability”).

173. *Hobby Lobby*, 134 S. Ct. 2751. See *supra* notes 19–49.

174. “Silo” has become a term describing barriers to communication among groups, as within a business, that would benefit the overall enterprise if the members of the groups were not separated from exchanging perspectives and information. The Oxford Dictionary offers this definition: “system, process, department, etc. that operates in isolation from others.” See *OXFORD DICTIONARY* for a discussion of the meaning of the “silo” metaphor in organizations. See also MICHAEL A. DIAMOND AND SETH ALLCORN, *PRIVATE SELVES IN PUBLIC ORGANIZATIONS: THE PSYCHODYNAMICS OF ORGANIZATIONAL DIAGNOSIS AND CHANGE* 49–70 (2009) (devoting a chapter to exploring the meaning and psychological basis of the metaphor as used in the workplace and concluding with a suggestion that “silos” contribute to “deficiencies and conflicts in organizational performance”).

175. *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 562 (7th Cir. 2015).

deepens the silence permitted under the *Dale* principle and raises the volume of silence as a constitutional precept. The claimed right, apparently one that may require reconsideration in light of *Hobby Lobby*, not to be required to express an intention not to administer contraceptive services,<sup>176</sup> requires elaborate explanation by theologians to become expressive association, rather than trivial paperwork.<sup>177</sup> The silence of the large organization diminished the autonomous life of employees, which is a right of expressive development. In its garb of associational freedom, this silence principle as expressed in *Dale*, in whatever manifestation within the silos of law, might be called *the cooties doctrine* of associational freedom.<sup>178</sup> For older readers whose grade school days are forgotten, here is some definitional help. The taunt of *cooties* served as a grade school bogeyman that allowed children to mock and prejudice/silence undesirable individuals (e.g., yucky girls and boys). In its less explicit form, that of permitting organizations to penalize speech—and having the effect of silencing—the trend might be called the “shut up” theory.

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176. *Id.* at 562. On March 9, 2015, the Supreme Court granted Notre Dame’s writ of certiorari, vacated the judgment of the Seventh Circuit, and remanded the case for further consideration in light of *Hobby Lobby*. See Order List: 575 U.S., Granting Certiorari and Remanding, 14-392 (Mar. 9, 2015), [http://www.supremecourt.gov/orders/courtorders/030915zor\\_3e04.pdf](http://www.supremecourt.gov/orders/courtorders/030915zor_3e04.pdf). For a description and analysis of *Hobby Lobby*, see *supra* Part II.A.

177. For a skeptical tour by Judge Richard Posner of all the arguments that were used by Notre Dame in connection with seeking a preliminary injunction to avoid any “taint” by association with a form disclaiming their intent to provide contraceptive services, see *Univ. of Notre Dame*, 743 F.3d at 562 (denying a preliminary injunction with respect to “self-certification” provisions of Affordable Care Act), *vacated*, 135 S. Ct. 1528 (2015).

178. The “cooties” term is a negative characterization of Carpenter’s well-framed explanation of the way a disfavored identity might contaminate the general understanding of an organization resistant to including persons with that identity. In Carpenter’s words, “[t]he [*Dale* dissenters] also ignore an important lesson of the gay civil rights experience, which teaches that coming out of the closet is a profoundly expressive act affecting not only the person who comes out but everyone around him. . . . [The Scouts’ exclusion of openly gay members] is, less charitably, a message of personal revulsion, a denial of the basic humanity and dignity of gay people.” Carpenter, *supra* note 163, at 1549–50. For Carpenter, the Scouts have a right to avoid the inclusion of those for whom they harbor a revulsion that makes association with them intolerably damaging to their organizational self-image.

## II. The Sociology of Speech and Silence: Building Civic Capacity

Professor Carpenter argues that, while the image of coerced speech features the figure of the lone individual exercising a perilous right to speak, much of the need for protection from state interference has been located in similarly<sup>179</sup> vulnerable organizations. Professor Carpenter's take on the Court's opinion is elegant and incisive, yet it lacks the element of sociology<sup>180</sup> that might refute abstractions concerning the risk of harm to expressive interests if the New Jersey statute were enforced. The *Dale* case, and even the most sophisticated commentary on it, relies upon a theory of social life that is uninformed by the empirical observations available through sociology.<sup>181</sup> The *Dale* framework assumes that a right of

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179. See Carpenter, *supra* note 163, at 1519 ("While the image of the lone citizen enjoying his First Amendment sovereignty is powerful and accurate as far as it goes, it misses much of the history of government's efforts to regulate the flow of information and ideas. Those efforts have frequently concentrated on harassing organizations and have often only incidentally or instrumentally targeted individuals.").

180. My use of the term "sociology" is relatively loose, in that in jurisprudence, the term has been used without precise reference to any particular school of sociology as an academic discipline. The term has been used broadly to refer to schools of judging. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 129–30 (2007). Richard Posner notes the use of the term "method of sociology" by Justice Benjamin Cardozo and suggests that the word choice is unfortunate because sociology lacks "a distinctive and fruitful methodology." RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 26 (1990). Judge Posner interprets Cardozo's meaning as: "Laws ought to be guided by consideration of the effects of its decisions, rules, doctrines, and institutions on social welfare." *Id.* Judge Posner has suggested that formalism was only in hibernation for a period and has experienced a return. *Id.* This Article suggests that the First Amendment has moved toward formalism, but with bromides packaged as containers for roughly empirical insights. The problem is that bromides foreclose the kind of analytic breadth needed for the assessment of the effects of decisions and other legal products and usages. Bromides find a natural home in the desire by "a professional caste" for "conceptual tidiness" within judging as "craftsmanship." For discussion of these terms, see *id.* at 28.

181. Certain Justices have flirted with the possibility of informing or framing Court opinions by and within empirical evidence rather than on abstract principles of Constitutional interpretation. In the Court's reliance on abstraction about the requirements of identity formation by a large group with a dominant community footprint as a spur to richness of discourse, the Court has entirely departed from any lesson pressed upon the art of judicial decision by Justice Brandeis. Brandeis sought to orient lawyers and courts to the task of measuring, with data, the empirical effects of a policy. See generally WHITE, *supra* note 180. For Justice Brandeis's less idealistic judicial partner, Justice Holmes, abstractions devised by the Court, such as liberty of contract, interfered with the proper consideration by the Court; namely, of whether a legislative act "was grounded on some rational basis or tied to the achievement of some important public purpose." *Id.* at 142. For Brandeis, a pre-existing ideological commitment to a set of beliefs, in Roscoe Pound's words, is developed "in the teeth of actual facts." *Id.* at 140

organizational silence, as a general rule for any organization claiming an expressive commitment,<sup>182</sup> enhances the robustness of social expression by enabling groups to develop and advance a cohesive view of individual issues or of the correct social meanings and understandings among the group, many unspoken and fragile.<sup>183</sup> This view assumes that silence is a socially invariant, and reliably valuable, phenomenon with positive effects on discursive exchange within and between groups. Under associational First Amendment privacy, many groups thereby attain the standing of the nuclear family: a site for fostering values in an intensely protected cocoon of expressive control.<sup>184</sup> *Dale* and the jurisprudence of silence do not recognize that silence may not be an unmitigated good in social life. Indeed, the Supreme Court has not undertaken any inquiry at all into the social manifestations and effects of silence. Yet a variety of sociological and literary treatments could provide insight into the texture of silence in the world.<sup>185</sup>

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(citing Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 462 (1909)). In the case of the First Amendment, the claim that the Court should not consider the purpose of the anti-discrimination ordinance as a possible contribution to First Amendment values is manifestly weak, given that the Court's analysis arises from a judicial construct built around ideas about the purpose and effect of the First Amendment. The New Jersey consensus, reflected in the passage of the anti-discrimination ordinance and its application by the New Jersey Supreme Court to the Scouts, indicates that New Jersey viewed it as a net positive for citizenship in New Jersey. *But see* Carpenter, *supra* note 163, at 1535 (arguing that any First Amendment purpose for the anti-discrimination law is an attempt by the government to impose its values on citizens). As noted, Justice Cardozo advocated a form of reasoning that consulted the effects of legal mandates and institutions. POSNER, CARDOZO, *supra* note 180, at 26.

182. *Dale*, 530 U.S. 640.

183. Carpenter, *supra* note 163, at 1543 (“Unlike code drafters, people often speak in order to obfuscate, not to illuminate; in order to compromise a web of conflicting interests, not to clear them out. Understanding the speech of a group trying to transmit moral values without unnecessarily offending or hurting people is not like understanding a tax code.”).

184. The idea of the family as an incubator of goods in the form of stable identities has become a target of critical challenge. *See* TAMARA METZ, *UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE* (2010) (generally describing the dangers attendant on family forms and suggesting means by which the liberal state may protect the interests of vulnerable members of intimate associations for care); CAROL PATEMAN, *THE SEXUAL CONTRACT* (1988) (arguing that contract models in liberal societies consistently permit domination of women by males, including in marriage).

185. Erving Goffman is the source of the most theoretically interesting studies of modes of interaction. His method was an acute observation of human interactions. *See, e.g.*, ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959) [hereinafter GOFFMAN, *THE PRESENTATION OF SELF*]; ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963) [hereinafter GOFFMAN,

### A. Distinguishing the Potential Effects of Expressive Silence

Expressive silence has the potential to enhance or inhibit an individual's social development depending on whether her silence is self-elected or imposed by outsiders, respectively.<sup>186</sup> Further, when an individual—and, for a psychology of speech, not a group using silence as a sword against association—chooses expressive silence, the expression has the tendency to produce more speech without the expense of suppressing other speakers.<sup>187</sup> For example, the first great American writer vividly embodies the oxymoronic nature of silence as expressive empowerment for an individual. As a 16-year-old learning to manipulate a writer's persona, Benjamin Franklin used the pseudonym, Silence Dogood, to establish a sly presence as a clever commentator on public affairs and culture in Boston.<sup>188</sup> He ironically manipulated a female character with the chaste name of Silence to speak with the boldness, rendered saucy by the assumed mantle of Silence, of a young male in colonial society.<sup>189</sup> The

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STIGMA]; ERVING GOFFMAN, *BEHAVIOR IN PUBLIC PLACES: NOTES ON THE SOCIAL MANAGEMENT OF GATHERINGS* (1963) [hereinafter GOFFMAN, *BEHAVIOR IN PUBLIC PLACES*]; ERVING GOFFMAN, *INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR* (1967). Topics in sociological treatments have included the forms silence takes and the forms of unspoken coordination that can sustain a conspiracy of silence. See Eviatar Zerubavel, *The Social Sound of Silence: Toward a Sociology of Denial*, in *SHADOWS OF WAR: A SOCIAL HISTORY OF SILENCE IN THE TWENTIETH CENTURY* 32 (Efrat Ben-Ze'ev, Ruth Ginio, & Jay Winter eds., 2014) (arguing that a sociology of denial addresses the “interpersonal dynamics used to prevent information from entering the public discourse” of a group); see also EVIATAR ZERUBAVEL, *THE ELEPHANT IN THE ROOM: SILENCE AND DENIAL IN EVERYDAY LIFE* (2006).

186. Studies of social power demonstrate that dominant groups are able to maintain a subject status and impose on others the status of undifferentiated object. The capacity for speech and personal control over identity is located in those who have a subject status, and is limited in those who occupy the status of object, or socially imposed irrelevance, which resembles imposed silence. “Those who dominate, subjects, even conceive of themselves as outside of any particular category, because they are members of the category that has discursive power to define, locate, and order others.” Judith A. Howard, *A Sociological Framework of Cognition*, in *SELF AND SOCIETY* 102 (Ann Branaman ed., 2001); see also ROBIN PATRIC CLAIR, *ORGANIZING SILENCE: A WORLD OF POSSIBILITIES XIII* (1998) (explaining that one meaning of the title is the methods by which “marginalized people are silenced”).

187. See CHERYL GLENN, *UNSPOKEN: A RHETORIC OF SILENCE* 4 (2004) (maintaining that “silence reveals speech”).

188. H. W. BRANDS, *THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN* 27–29 (2000).

189. *Id.* at 26–27 (referring to “Mrs. DoGood” and “she”). Brands suggests that nineteenth century readers would not have recognized that “this ironically knowing voice belonged to a sixteen-year-old boy.” *Id.* at 27. Presumably, Brands means that the assumption was that an older commentator had written the contribution, as it was the practice at his brother's paper to present an appearance of multiple contributors. *Id.* at 26.

significance of Silence as his *nom de plume* deepens with the reasons Franklin used a pen name and the clever jibe his chosen name contained. First, Franklin desired anonymity because he feared the ridicule of his printer brother's adult literary circles in Philadelphia if he were known to be the author.<sup>190</sup> Second, the chaste female name contained a command aimed at Cotton Mather, the Boston eminence. Cotton had written *Essays to Do Good*, and hence Franklin called for his readers to silence Cotton in the interests of "a dynamic, open society."<sup>191</sup> Thus, Franklin created a double-edged meaning of Silence—that of a virtuous female carrying the self-effacing name of Silence, and that of a male adult using Silence personified to diminish the entitled but droning voice of Cotton Mather, the representative of Massachusetts conventional speech.<sup>192</sup> Young Ben found a voice that would mature into that of a leading political and intellectual figure.<sup>193</sup> In the social reality of the time, Silence could not speak, unless she was understood to be a mask for a male speaker.<sup>194</sup> Silence could only be asserted by one who would one day have the leave to speak—the young Ben Franklin, who deployed a persona as Silence to develop the skills in expression to which his real persona was eligible by virtue of talent<sup>195</sup> and to achieve multiple ironies in manipulating the social rules for participation in public talk.<sup>196</sup> His success in speaking as

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190. BENJAMIN FRANKLIN, *THE POLITICAL THOUGHT OF BENJAMIN FRANKLIN* 1 (Ralph Louis Ketcham ed., 2003).

191. *Id.* at 1. Another author portrays Franklin's use of the pen name differently, describing it as "paying homage both to the book [Bonifacius: Essays to Do Good] and to a famous sermon by Mather, 'Silentiarius: The Silent Sufferer.'" WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN LIFE* 26 (2004).

192. BRANDS, *supra* note 188, at 25–27 (discussing the denunciation by Cotton Mather's family, and likely by Cotton Mather himself, of James Franklin's paper in reaction to its criticisms of Mather).

193. ISAACSON, *supra* note 191, at 326 (describing Franklin's influence in Paris as a diplomat earned by his fame as a literary figure and a scientist).

194. For women in the eighteenth century, heavy convention called for them to avoid "the public gaze," which situated them outside the domestic sphere. "[T]o write, or at least publish, was for the eighteenth century woman a transgressive act." VIVIEN JONES, *WOMEN IN THE EIGHTEENTH CENTURY: CONSTRUCTIONS OF FEMININITY* 140 (1990). The norm against speaking on a public stage was even stronger limitation for women who desired to speak on major issues and gain an audience. ELIZABETH URBAN ALEXANDER, *NOTORIOUS WOMAN: THE CELEBRATED CASE OF MYRA CLARK GAINES* 159 (2004) (explaining the "formidable barriers for women who sought a public platform").

195. *Id.* at 29 (describing the Silence Dogood letters as revealing "emerging genius").

196. *See supra* note 194 and accompanying text.

Silence accorded Ben a sense of intellectual superiority<sup>197</sup> that launched his life as the leading intellect of his American time and set him on his course as a participant in public affairs.<sup>198</sup> For Benjamin Franklin, Silence was his own private mentor for public speech. But Silence was not silence—speaking with a surprising literary force as Silence, Franklin was not powerless, nor was young Franklin as Silence or as Benjamin as yet an expression of power.

The sociology and literature of silence reveals a different landscape for those on whom silence is imposed rather than elected or manipulated. Almost everyone knows the custom of signaling in-group rules on who may speak and what may be said. Extending the custom of social silence in small gatherings to large socially powerful groups as a legal protection against applicable laws for access to civic space becomes a social fact that limits resources for expression and defines the boundaries of possible speech. Individual Scouts are not situated as are writers and speakers; they manifestly lack the resources by which to exploit *Dale* as a net plus for either identity or expression. They have little social power to create counter spaces, comparable in reach and carrying the unremarked diversity of young men, in which a variation in identity may be uncontroversial. For those enveloped in the concrete silence celebrated as a First Amendment value but over which they lack social influence, silence may well have a practical association with lack of social power and the attendant impoverishment of expressive capital.<sup>199</sup> It may further block the locally available paths for flourishing and developing the personal capital that comes from full access to civic space.

For those with a disfavored identity, silence is more likely to be about *circumspection, tact, caution, and fear*.<sup>200</sup> While each of these expressive strategies has a place in the palette of expression, their distribution across the spectrum of potential speakers is not even and can be affected either negatively or positively by the signals about the allocation to speakers of the necessity to observe them, as well as understandings about whether they are entitled to conceal those facts they are not permitted to say.<sup>201</sup> The silence of the Scouting

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197. BRANDS, *supra* note 188, at 33.

198. ISAACSON, *supra* note 191, at 326 (noting his eminence).

199. MORTENSEN, *supra* note 86, at 273–93.

200. MAE KUYKENDALL, *PRESSING THE MUTE BUTTON: RACE SILENCE IN AMERICAN LAW AND CULTURE* 29 (unpublished manuscript).

201. GOFFMAN, *STIGMA*, *supra* note 185, at 64. The military policy that required members of the military to conceal their sexual identity, and which treated any speech



organization is a powerful social tool in the hands of those managing the conventions of group dynamics. Group dynamics, in which powerless carriers of stigma must often exist, draw upon complex phenomena that sociologists have mapped under such categories as the obligation to “fit in”<sup>202</sup> and with attention to the subtleties of unstated rules about face-to-face interactions.<sup>203</sup> For gay Scouts, the rule was, and still is to a significant degree,<sup>204</sup> presented as a norm of silence about a controversial identity. Over time, the social power to enforce the rule has many practical meanings for nuances in the norms of social interaction, as well as ejection from civic group space. From the gay Scouts’ perspective, there is no manageable choice to remain in the group and respect silence, because that choice is at odds with the social rules on personal disclosure in intimate groups.<sup>205</sup>

The bind regarding disclosure and secrecy is well known to gay people. Though demanded from the group of gay Scouts, reticence<sup>206</sup> is also a betrayal of the group interaction norms that, when discovered, is at least as serious as breaching silence.<sup>207</sup> The classic

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about their identity as conduct, and same-sex conduct, even if revealed by an informer, as speech, did not give service members clear permission to have a private life. Concealment was dangerous, and was not a guarantee of safety from group censure and expulsion. “Individuals were separated from military service after confiding in family members, nonmilitary friends, chaplains, doctors, and therapists.” *Developments in the Law: Sexual Orientation & Gender Identity Chapter Five: Progress Where You Might Least Expect It: The Military’s Repeal of “Don’t Ask, Don’t Tell,”* 127 HARV. L. REV. 1791, 1796 (2014). The law was repealed by the “Don’t Ask, Don’t Tell Repeal Act of 2010,” Pub. L. No. 111-321, 124 Stat. 3515 (2010).

202. GOFFMAN, BEHAVIOR IN PUBLIC PLACES, *supra* note 185, at 11.

203. *Id.*

204. *Membership Standards Resolution*, BOY SCOUTS OF AMERICA, <http://www.scouting.org/MembershipStandards/Resolution/Resolution.aspx> (“While the BSA does not proactively inquire about sexual orientation of employees, volunteers, or members, we do not grant membership to individuals who are open or avowed homosexuals or who engage in behavior that would become a distraction to the mission of the BSA.”).

205. In small groups, there is an expectation that members have been sincere and open with another about who they are. Identities to be stigmatized are also suspected of surreptitiously infiltrating groups of “normals.” See GOFFMAN, STIGMA, *supra* note 185. The dilemma of such a stigmatized identity is typified in the movie *Philadelphia*. In *Philadelphia*, the attorney defending the dismissal of a gay man challenges the former employee’s character and credibility, asserting “[i]sn’t it true you’ve spent your life pretending to be something you’re not . . . so much so that the art of concealment and dishonesty . . . has become second nature.” PHILADELPHIA (TriStar Pictures 1991).

206. GOFFMAN, STIGMA, *supra* note 185.

207. *Id.* at 177. Reticence has historically taken the form of an implicit agreement among gay people to respect a “right against outing.” LARRY GROSS, CONTEST CLOSETS 169 (1993) (quoting RICHARD MOHR, GAY IDEAS: OUTING AND OTHER CONTROVERSIES 27 (1992)). Yet the power of outing has, until recently, relied on an

dilemma of the closet is imposed on young Scouts—if you disclose yourself, you are flaunting and disrupting a silence. If you conceal yourself, you are dishonest.<sup>208</sup> The trap for gay people at various times and places is shown poignantly by the case in which a school teacher was fired for being “out” through political activism.<sup>209</sup> The trial court held that the firing was justified.<sup>210</sup> The appellate court reversed, holding that firing him for his open expression of his sexuality was a First Amendment violation.<sup>211</sup> The teacher received no relief, however, because at the time of hiring he had failed to disclose his orientation.<sup>212</sup> He could be fired for a misleading job application.<sup>213</sup>

Interestingly, though Dale had a right to be open about his sexual orientation, the ability of the Scouts to punish him for his speech, against applicable New Jersey law, has the perverse effect of shifting the right of censorship to a private entity with a dominant role in Dale’s home community. Notably, the Scouts learned of Dale’s sexual orientation in a publication at Rutgers University away from his home troop in Monmouth County, New Jersey.<sup>214</sup> Thus, though Dale had no need to conceal himself in his life in a university, and was free of government punishment, the Scouts were able to exact a damaging penalty for his relatively quiet exit from the closet. The effect surely chills the speech of others in his circumstances. Moreover, an organizational right of banishment for speech revealing a fact about oneself is a tax on the ability of a stigmatized group to take advantage of available developmental opportunities, such as open participation in other civic spaces where free speech is protected. What the Court gave with one hand in free speech doctrine, it took away with the other hand when it granted the

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underlying homophobia that gave “a special surge of rhetorical force” to “selective utterance of open secrets whose tacitness structures hierarchical enforcement.” *Id.* (quoting EVE SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* 245 (1990)). For *Dale*, the rhetorical force of speech he made did not result from his aiming it at the Scouting community but was provided by the homophobia of the Scouting executives who became aware of his modest gay leadership role noted in a small announcement. In effect, the Scouts created the speech effect from which they then demanded constitutional protection.

208. *Id.*

209. WILLIAM B. TURNER, *A GENEALOGY OF QUEER THEORY* 136 (2000).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Dale*, 530 U.S. at 645.

organizational claim on silence against well-considered state laws designed to build civic capacity.

The message to young Scouts, who are learning the customary norms of groups that silence a subject and the legal hammer behind the demand, is that the mere existence of a gay person is a form of disruptive speech<sup>215</sup> requiring deep silencing achieved by complete withdrawal from a formative space in American youth society. The defunct regulations that required silence by gay members of the military made formal the closet's demand for silence by situating gay soldiers as inherently deceptive if they engaged in any act expressing of their identity, even in private.<sup>216</sup>

In sociological terms, the processes involved in the social management of interactions and thus of silence involve a complex array of situational effects that sociologists who earlier conducted "microstudies of the public order"<sup>217</sup> classified under evocative terms such as "pacification,"<sup>218</sup> "enactment of engrossment,"<sup>219</sup> "routing signals,"<sup>220</sup> and "conversational preserve."<sup>221</sup> Each of these phrases has been deployed to describe territorial claims over who could enter into a group interaction, or in Erving Goffman's terms for an interaction among individuals, a "with."<sup>222</sup> While Goffman focused on the usages that arise spontaneously in conditions of physical presence, the insights provided by such close study of how people, and groups, channel expression are the necessary factual basis for constructing law that is better than a free-form, quasi-empirical construct. The theoretical benefits of the silence principle as an abstract protection for organizations, and as a source of demonstrable rewards it confers

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215. Mark Hager, *Freedom of Solidarity: Why the Boy Scout Case Was Rightly (But Wrongly) Decided*, 35 CONN. L. REV. 129, 161–62 (2002) (arguing that knowledge that there are gay Scouts will create adverse speech in the form of gossip and mockery of the Scouts, like that endured by the YMCA).

216. See *supra* note 201 and accompanying text for a characterization of the lack of safety among any other persons for gay military personnel during "Don't Ask, Don't Tell."

217. See generally ERVING GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* (1972).

218. *Id.* at 5.

219. *Id.* at 4–5.

220. *Id.* at 14.

221. *Id.* at 40 (explaining as part of a conversation preserve "the right of a set of individuals once engaged in talk to have their circle protected from entrance and overhearing by others").

222. *Id.*

on meta-discourse,<sup>223</sup> should be examined in light of the broad goals of the First Amendment as a protection for expressive capacity, tested against the social reality of the realm of silence. Indeed, in his book that focuses more on the tradeoff between the benefits of “enclaves” versus “contact,” than on legal doctrine, Cass Sunstein is explicit about the risks that arise from too many enclaves that cut off contact and thus create and maintain ignorance.<sup>224</sup> The Court’s jurisprudence contains no indication of any awareness of the tradeoff, only seeing the choice as between the First Amendment, as theorized by the Court over time, and a counter value of anti-discrimination. In fact, the tradeoff is internal to the First Amendment.<sup>225</sup>

The key claim that rationalizes *Dale* is the right of expressive associations to avoid contact by membership with identities that are seen as contaminating their message, vetoing their preference for silence, or creating a fear of infection by a stigma through public mockery aimed at the group of what Goffman calls “normals.”<sup>226</sup> Permitting “expressive” organizations such a license is, without empirical evidence, said to foster greater debate by and about the stigmatized group, or about political ground rules generally.<sup>227</sup> But the claim is limited to purportedly enriching debate over ideas. By contrast, the claim does not assert anything about the sociology of knowledge as a subject concerned with the “everyday” lives of people.

Theoretical thought, “ideas,” *Weltanschauungen*, are not that important in society. . . . Only a very limited group of people in any society engages in theorizing, in

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223. See generally SUNSTEIN, *supra* note 11.

224. *Id.* at 158.

225. Compare *id.* at 156 (noting that certain state interventions run afoul of the First Amendment and citing the unconstitutionality of a right-of-reply law to be included in newspapers, as held in *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974)).

226. Goffman defines “normal” with reference to his relational definition of “stigma.” A stigma, in Goffman’s glossary, “an attribute that is deeply discrediting [in] . . . a language of relationships, not attributes. An attribute that stigmatizes one type of possessor can confirm the usualness of another, and therefore is neither creditable nor discreditable as a thing in itself.” In a given situation, a stigma is: “an undesired difference from what we had expected.” Goffman thus defines “normals” as “those who do not depart negatively from the particular expectations at issue.” GOFFMAN, *STIGMA*, *supra*, note 185, at 2–5.

227. Carpenter, *supra* note 163, at 1518 (“the freedom of expressive association contributes to equality by allowing people in groups to find strength and confidence in numbers, bolstering their civic and political power and contributing to the flow of ideas so needed for democratic government”).

the business of “ideas,” and the construction of *Weltanschauungen*. But everyone in society participates in its “knowledge” in one way or another. Put differently, only a few are concerned with the theoretical interpretation of the world, but everybody lives in a world of some sort. Not only is the focus on theoretical thought unduly restrictive for the sociology of knowledge, it is also unsatisfactory because even this part of socially available “knowledge” cannot be fully understood if it is not placed in the framework of a more general analysis of “knowledge.” . . . It is precisely this “knowledge” that constitutes the fabric of meanings without which no society could exist.<sup>228</sup>

The focus by the Court and by commentators on a right of organizational exclusion as a means to enhance debate about ideas is, in many respects, self-referential. The Court’s coin of the realm is debate as a form of intellectual discourse. It is easy enough to project the world of debating teams and legal advocates into the realm of everyday knowledge—to ignore the sociology of knowledge.<sup>229</sup>

The words of Stanley Cavell are worth revisiting:

It is not a voice that will be heard by villains. This means that to discover our community a few will have to be punched out, made speechless in their effort to usurp or devalue the speech of others . . . It is a fantasy of a reasonably well ordered participatory democracy. It has its dangers; democracy has; speech has.<sup>230</sup>

Cavell suggests that contributions to democratic speech can be measured “somewhere between two cents and the largest fortune in the world.”<sup>231</sup> In the Court’s First Amendment jurisprudence, two cents is in competition with the largest fortune in the world. And losing.

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228. PETER L. BERGER & THOMAS LUCKMAN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 15 (1967).

229. *Id.* (“To exaggerate the importance of theoretical thought in society and history is a natural failing of theorists.”).

230. See CAVELL, *supra* note 75, at 207.

231. *Id.* at 207.

## B. Imposed Silence and Internalized Stigma

Erving Goffman is, as noted, the key writer on the subtleties of “presentation of self in everyday life.”<sup>232</sup> Goffman’s writings on the implications of “dramaturgical circumspection,”<sup>233</sup> as well as general techniques of presentation of self, sharpen the analysis of the expressive meanings of silence as they may differ depending on setting and the “performer.”<sup>234</sup> In addition, Goffman’s appreciation of the subtle performance issues presented by social context and social conventions help sort out the effects on performance choices—either multiplying or reducing “dramaturgical”<sup>235</sup> choices and hence expressive richness—that are created by the Supreme Court’s First Amendment rulings.

Depending on the sophistication of the performer,<sup>236</sup> a performance may contain conscious responses to the dramaturgical cues provided by the Supreme Court’s writings that affect the implicit premises of her performance; her performance may also be infused with the subconscious internalization of new staging prompts that demand dramaturgical circumspection and impose rather than permit forms of “tact” in giving and watching performances.<sup>237</sup> Discussed below are the implications of the Supreme Court’s dramaturgical cues<sup>238</sup> in opinions such as *Dale*, and in its continuing jurisprudence of legally protected rights to establish a zone between an organization claiming a protected right of expressive association and either a stigmatized identity (excluded persons) or a stigmatized function

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232. GOFFMAN, THE PRESENTATION OF SELF, *supra* note 185.

233. *Id.* See Peter Kivisto & Dan Pittman, *Goffman’s Dramaturgical Sociology* (2007), available at [http://www.sagepub.com/upm-data/16569\\_Chapter\\_10.pdf](http://www.sagepub.com/upm-data/16569_Chapter_10.pdf) (“For Goffman, the subject matter of dramaturgical sociology is the creation, maintenance, and destruction of understandings of reality by people working individually and collectively to present a shared and unified image of that reality.”).

234. GOFFMAN, THE PRESENTATION OF SELF, *supra* note 185, at 15. Goffman defines “performance” in social settings as “all the activity of a given participant on a given occasion which serves to influence in any way any other the other participants.” *Id.* Hence, a performer is someone engaged as a participant on a given occasion. The same person does performances of different kinds in different settings. *Id.*

235. *Id.*

236. *Id.* at 32 (suggesting variations in time and skill for “performing” to create an impression).

237. *Id.* at 9 (generally explaining how an individual in a performance before a group sends and receives “definitions of the situation” that create a “veneer of consensus”). Though Goffman bases these observations on a formal description of individual instances of interaction, he also explains that “these situational terms can easily be related to conventional structural ones.” *Id.* at 16.

238. See Kivisto & Pittman, *supra* note 233.

arising from a neutral programmatic requirement.<sup>239</sup> Unanticipated consequences for associational openness in genuinely public spaces for free and vigorous interaction may emerge from the lack of a sociological grasp of how stigmas form and may shift over time, and of the effects on expressive richness of First Amendment values<sup>240</sup> approving exclusions and enforced buffer zones.<sup>241</sup>

The cues provided by the Supreme Court are likely to have an effect on the assumptions about strategies for “interactions between stigmatized and non-stigmatized individuals.”<sup>242</sup> The format of the Supreme Court’s reasoning about the need to guard expressive resources by exclusion of those inimical to one’s associational expressiveness undercuts the sociological perspective<sup>243</sup> on creating “interactional-level strategies” and “societal-level strategies” to reduce the awkward moments in interactions between stigmatized and non-stigmatized individuals.<sup>244</sup> Indeed, the implicit methodology of the Court—concern with the potential to degrade an expressive identity through enforced contact with an undesirable or rejected identity—is at odds with the underlying methodology of social psychology, which assumes that “stigmas” derive from stereotype and call for forms of intervention.<sup>245</sup>

The right of persons to be afforded public accommodations, rather than being excluded from a general exposure to the variety of settings, cultures, and forms of knowledge, is a means of transmitting cultural knowledge and decreasing the kind of isolation that societies predicated on a practice of creating *out-castes*<sup>246</sup> generate. Out-castes

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239. *Hobby Lobby*, 134 S. Ct. 2751.

240. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1197 (4th ed. 2013) (reviewing theories of the various values underpinning the First Amendment).

241. By buffer zones, I intend to convey the function of the doctrine of expressive associational freedom to indicate the creation of a zone of separation from disapproved identities as one product of the doctrine. That is, separation from the disdained identity creates a buffer that also protects the group claiming the right from input that might be provided by the speech or communicative identity of the rejected type.

242. Michelle R. Hebl, Jennifer Tickle, & Todd F. Heatherton, *Awkward Moments in Interactions Between Nonstigmatized and Stigmatized Individuals*, in *THE SOCIAL PSYCHOLOGY OF STIGMA* 273 (Todd F. Heatherton, Robert E. Kleck, Michelle R. Hebl, & Jay G. Hull eds., 2003).

243. *Id.* at 276 (presenting firsthand accounts and empirical research to investigate Goffman’s model of interactions between stigmatized and non-stigmatized individuals).

244. *Id.* at 292–99.

245. *Id.* at 298 (describing in favorable terms progress in dispelling the stigma surrounding homosexuality).

246. The term “out-caste” is devised here to combine the sense of outcast as a pariah or outsider, and the idea of caste as a group that is socially distinct from other groups. An

are the product of a society built on customs that target some groups, based on a characteristic that gives that group some common, ascribed identity.<sup>247</sup> In a society with doctrines enforcing the right of exclusion generously, targeted groups are less likely to thrive on the basis of general acculturation achieved through robust engagement with the discursive capital of the whole society.<sup>248</sup> For example, the virtually total exclusion of black persons from white society—including institutions of learning, literary and scholarly circles, and venues for nineteenth century lectures and other events designed to improve general literacy—prevented the flourishing of the black population as participants in the benefits of free expression.<sup>249</sup> The exclusion was particularly frustrating for black intellectuals, who were cordoned from experience with forms of expression that they prized.<sup>250</sup> Human contact is a basic building block of personality formation, self-presentation, and progression into a social world as constituted by the whole range of public and quasi-private associations.<sup>251</sup> At its most extreme, those deprived of human contact

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outcast may be an individual ejected from society because of a history or behavior that isolates him. Such a condition may well be properly deemed a stigma, but the personal flavor of specific individual reasons for rejection has an informal tone, whereas a caste is a formal designation within certain societies. Hence, out-caste conveys a deepened meaning that designates a wholesale assignment of stigma to individuals who may not conceal their stigma.

247. See Hebl, Tickle, & Heatherton, *supra* note 242, at 273.

248. In the context of racial segregation, Richard Posner captures the effect on those excluded from cultivated circles by educational segregation: “Apart from the psychological damage segregation may have caused blacks, it denied them the opportunities for valuable associations with whites—associations actually more valuable for blacks than for whites.” POSNER, JURISPRUDENCE, *supra* note 155, at 303. For a minority, the opportunity for wider contacts with a majority provides an advantageous exposure to a large percentage of the total cultural capital available; exclusion imposes significant damage on the process of acculturation for a small subset of a society.

249. MICHAEL C. DAWSON, BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN-AMERICAN POLITICAL IDEOLOGIES 27 (2003) (discussing the exclusion from “participation in the American bourgeois public sphere” and from progressive “subaltern counterpublics”). Note that such exclusions from a “public sphere” were the sum of associational exclusions that hampered the access of black intellectuals to knowledge, as well as their contribution to either “everyday knowledge” or “ideas.”

250. Even those ex-slaves who joined the abolitionist movement to serve as witnesses to audiences receptive to hearing about the facts of slavery found themselves excluded from genuine association with the white sponsors of their appearances. WILLIAM M. BANKS, BLACK INTELLECTUALS: RACE AND RESPONSIBILITY IN AMERICAN LIFE 24 (1996). See also *id.* at 25 (noting the dependence of black intellectuals on influential whites, without whose approval they “found themselves on the margins of cultural and political discourse”).

251. Judith Howard provides a sociological elaboration of a social context for building identity. She argues that North American social psychology is prone to “extreme



in infancy suffer losses of capacity for expression that can never be recovered.<sup>252</sup> By extension, the narrowing of *associational* outlets imposes costs on human development of a gradually more severe form, as the limitations increase and limit the accumulation of valuable contacts and experiences.<sup>253</sup> Hence, anti-discrimination law supports expressive capacity and consequent freedom for a citizenry capable of contributing to knowledge.<sup>254</sup>

When large groups such as the Boy Scouts assert organizational costs associated with compliance with a particular anti-discrimination law, the benefits of exemption are hypothetical but the costs land on the included, the excluders, and the excluded. The group may persuade the Court of a speculative harm to an organizational message. By contrast, noncompliance with an antidiscrimination law inflicts concrete social harm on those excluded, as well on those passing<sup>255</sup> within the organization, and inhibits the underlying basis of the First Amendment—production of informed citizens with a capacity for engagement and contribution to speech. Given the aid that an anti-discrimination law provides to the disempowered, to civic engagement, and to the production of knowledge, the Court should be cautious in freezing the First Amendment into a framework valorizing the good of silence over the challenge of expressive interactions.

It is worthwhile to note here that the eminent constitutional scholar Laurence Tribe attempted to avoid discussing the values of

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individualism,” an intellectual stance that causes the field to spend too little effort to the study of the ways in which “intergroup relations are *central* to cognitive processes.” Howard, *supra* note 186, at 116. Interestingly, the American legal system also focuses on the individual and, in analyzing a group’s claim of legal rights, attributes to it the needs of an individual. In addition, the First Amendment theory constructed by the Supreme Court relies on theories about individual cognition without investigating the “everyday knowledge” of its society.

252. The example of the damage done to orphans held in Romanian institutions and deprived of human contact is an extreme example of the effects of deprivation of human interaction. Jon Hamilton, *Orphans’ Lonely Beginnings Reveal How Parents Shape a Child’s Brain*, NPR (Feb. 24, 2014), <http://www.npr.org/blogs/health/2014/02/20/280237833/orphans-lonely-beginnings-reveal-how-parents-shape-a-childs-brain>.

253. See *supra* notes 247–51 and accompanying text.

254. See generally SUNSTEIN, *supra* note 11. See also ISAIAH BERLIN, *LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY* 345–47 (Henry Hardy ed., 2002) (explaining the importance of replacing stereotypes about others with “real knowledge” resulting from “observation and experiment and free discussion among men”).

255. Passing refers to a practice of concealing one’s identity for the purpose of being accepted within a group disdainful of one’s underlying characteristic. GOFFMAN, *STIGMA*, *supra* note 185, at 73–91.

silence, either by the Boy Scouts or by the Scouts excluded from participation, by arguing that *Dale* embodied the anti-commandeering principle that the Rehnquist Supreme Court had been developing.<sup>256</sup> Specifically, in a passage that substituted as a doctrinal label “the right not to be commandeered” for the right to enforce an organizational silence, Tribe argued:

The right that all of these cases affirm is better understood as a right not to be used or commandeered to do the state’s ideological bidding by having to mouth, convey, embody, or sponsor a message, especially the state’s message, with one’s voice or body or resources, on one’s personal possessions, through the composition of the associations one joins or forms, or in their selection of teachers, exemplars, and leaders. The right not to be appropriated or conscripted as a means to the state’s speech-related ends ought to be a particularly potent right: Whatever legitimate goals the state seeks to achieve when it restricts speech are goals the state is often hard-pressed to achieve by any other means. In contrast, any legitimate goals the state seeks to achieve by using individuals or associations to convey or endorse its views are likely to be achievable by the state speaking with its own voice, at the expense of all taxpayers rather than just those few who are singled out to bear the burden of serving as the state’s megaphone.<sup>257</sup>

Here, Tribe sought to say that the Scout organization was not necessarily claiming a right of silence about homosexuality. Rather, the claim was about the right of a group not to be used by the state to convey an ideological message that the state itself could effectively advocate.<sup>258</sup> Yet all the language Tribe uses invokes speech acts. One should not have to “mouth, convey, embody, or sponsor a message”<sup>259</sup> under state compulsion. But the substitution of the term “commandeer” for the idea of forced speech through association,

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256. Laurence Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 28 PEPP. L. REV. 641, 645 (2001).

257. *Id.* at 645.

258. *Id.*

259. *Id.*

which either conveys the state's message or forces the organization to speak to rebut the impression that it agrees with the embodied message, does not appear to do any analytic work. It is a synonym more than it is a distinction. Moreover, the flaw in Tribe's analysis is once again that the idea of how speech might be invigorated, and serve just as well or better if made directly by the state, is an abstraction unrelated to the sociology of civic capacity.

Tribe appears to agree with the analysis in this Article that the state is attempting to enhance some aspect of expression.<sup>260</sup> Tribe calls it requiring an organization to "convey or express [the state's] views."<sup>261</sup> It is not entirely clear, though, that the state is pressing a view so much as breaking down barriers to civic engagement, which strengthens First Amendment values not by conveying a specific message but by preventing the isolation of a segment of the population from engagement with the primary civic outlet available for acculturation. Tribe's argument seems to be saying that the state would be forcing the Scouts to carry a specific message about homosexuality, which is different than breaking their silence. But, presumably, if any organization is ordered not to discriminate, as against women, or against Catholics, the message is one of non-discrimination, not one containing any particular view of women or Catholics. Anita Bernstein has captured the importance of civil rights law for expressive freedom. "Legislatures that enact civil rights legislation have put the imprimatur of democratic deliberation on a progressive stance."<sup>262</sup>

Notably, no such commandeering argument could become a basis for racial discrimination in the Court's First Amendment jurisprudence. Although speakers retain the right to express views about race that disfavor racial minorities, they cannot effectuate that right against applicable anti-discrimination law by laying claim to a First Amendment right not to embody a message of racial harmony and acceptance, or to follow a religious belief in racial separateness uncontaminated by racial minority membership.<sup>263</sup> General doctrine on race makes that plain; the Court rejects racial classifications by the

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260. *Id.*

261. *Id.*

262. See Bernstein, *supra* note 114. See also Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895, 933-34 (2010).

263. See generally *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

state as toxic, with the narrowest exceptions.<sup>264</sup> Thus, the Court would not endorse a classification by inserting race into its First Amendment doctrine as a basis for claiming exemption from anti-discrimination laws. There is no need to speculate whether the Court would agree with a First Amendment claim that whites-only membership carries a message about race and is protected. In 1983, the Court rejected the argument by Bob Jones University that its rule against interracial dating was an exercise of religious liberty, and that to deprive it of its tax-exempt status because of its rule against an internal association it regarded as sinful violated its First Amendment rights.<sup>265</sup>

Nor can racially exclusionary groups succeed by changing their location to argue that the state is commandeering them to convey its message when it applies anti-discrimination ordinances to preclude exclusion of selected groups from membership on the basis of race. The change in phrasing has no force. Further, protecting black citizens from general exclusion by community organizations may not be exclusively about conveying a message about race, but rather about ending the isolation that impaired a racial minority's full participation in the marketplace of ideas<sup>266</sup> by enabling them to join a full range of community groups.<sup>267</sup> Thus, arguing how best to allow the Scouts' preferred message to be intact from interference by state conscription to broadcast its own message misses the import of anti-discrimination law as a First Amendment support that does not carry a message, but rather enhances civic capacity by softening community insularity. "Conscription" analysis is formal and un-sociological. Further, it is contrary to a favored First Amendment bromide: More speech is always better.<sup>268</sup> Again, Justice Brandeis tells us: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."<sup>269</sup> As discussed above, community insularity is a substantial force in American life. Maintaining such insularity needs no help from First Amendment

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264. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2014); *see also Johnson v. California*, 545 U.S. 162 (2005).

265. *Bob Jones Univ.*, 461 U.S. at 574.

266. For a racial minority generally excluded from majority community groups, the loss of access to the general culture and the ideas within the culture that might be learned through associations is substantial and across the board. *See supra* notes 246–54 and accompanying text.

267. *See KUYKENDALL, supra* note 200, at 29.

268. *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

269. *Id.*

abstractions that posit a need for protecting and further entrenching such features of everyday life.

At the level of meta-First Amendment discourse, the Court's teaching about civic engagement legitimizes the expression of what would be classified in sociological writing, with a scientific patina, as stereotype in need of intervention.<sup>270</sup> An element of the First Amendment claim contains the seeds of the substantive due process doctrine protecting parental rights that the Supreme Court once anchored to the right to practice a trade.<sup>271</sup> As such, the right of the Boy Scouts organization to exclude an openly gay person confers on the corporate speaker the borrowed claims of parental substantive due process rights.<sup>272</sup> As an example, one writer argued that one unarticulated basis for the Court's holding is the right, grounded in substantive due process, of parents to protect their children from intimate situations that might encourage sexual contact at an early age with others their age.<sup>273</sup> While couched in a logical format—the mixing of teenage boys, a subset of whom are openly gay, is analogous to mixed-sex settings and thus likely to lead to intra-teen sexual activity<sup>274</sup>—the argument nonetheless focuses on the salient features of the gay stigma by emphasizing a discomfort with a detail of the stigma and attributing to gay boys a propensity to seduce straight boys. And the logic further bestows on the large Scouting organization, built through wide public support and accommodations by government, the mantle of parental control and family privacy.

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270. The "contact hypothesis," generally attributed to Gordon Allport, proposes that contact with a group that others stereotype will moderate the prejudice carried by the stereotype. Since Allport originated the hypothesis, and attached conditions to it that suggested only long-term personal contact in a positive environment reduced prejudice, Thomas Pettigrew has made findings that suggest the conditions are not necessary and that contact has net positive effects under varying conditions. See GORDON ALLPORT, *THE NATURE OF PREJUDICE* (1954). For the later analysis, see Thomas Pettigrew, *Intergroup Contact Theory*, 49 ANN. REV. PSYCHOL. 49, 65–85 (1998).

271. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

272. Sadly, the Supreme Court validates the parental right to control his or her child's formation of core values, which may include forcing upon one's child invalid, prejudiced views. See *Meyer*, 262 U.S. at 390; *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

273. Hager, *supra* note 215, at 161–62. Hager is not entirely clear about whether the Scouts directly hold parental rights, *in loco parentis*, or that the right of parents to control the upbringing of their children would be frustrated if non-discrimination could be applied to deprive them of single-sex associations for their children's education and social development. *Id.*

274. *Id.*

Thus, the Supreme Court's methodology does more than affirm support for freedom of expression as having an associative component generally. It specifically sets up a framework for the intensification and justification of stigma about a group and for the maintenance of restrictive social mechanisms, conceived in a loose association with *Lochner* precedent about parental control. The protection-from-stigma framework blunts the working of the "contact hypothesis," an empirically tested sociological claim that certain forms of contact reduce the awkwardness of contact between stigmatized and non-stigmatized individuals.<sup>275</sup> The Court's format of reasoning, drawn from abstractions about exclusion to develop group cohesion,<sup>276</sup> tends to favor the status quo in everyday life by impeding interactions that instigate change. While change is certain to occur over time, the overall health of free expression might best be measured by the extent of opportunities for silences to be negotiable, rather than endorsed by constitutionally normative reasoning. The power of the First Amendment is in the challenge it poses to custom, instinct, and social habit.<sup>277</sup> The instinct, common even in groups organized around the production of knowledge, is to control forums to the exclusion of counter speech,<sup>278</sup> unpleasant speech,<sup>279</sup> or even

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275. See Hebl, Tickle, & Heatherton, *supra* note 242, at 298; see also Pettigrew, *supra* note 144.

276. See Hebl, Tickle, & Heatherton, *supra* note 242, at 297 (evaluating evidence of the persistence of stereotypes and presenting tentative data showing that "close social and personal contact" may reduce stereotyping to the benefit of both non-stigmatized and stigmatized individuals by reducing awkwardness). For purposes of increasing overall social knowledge and civic capacity, the benefit to non-stigmatized individuals is important, as is the presumed benefit to those handicapped by a stigma from experiencing a full range of social experience.

277. *Dale*, 530 U.S. at 648 ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.").

278. In a recent incident at a law school, a program at the school sponsored a speech on academic freedom by a speaker involved in a controversy. A group of professors from another department arrived with flyers about the speaker's controversial statements and placed them in the room. The flyers were confiscated by law professors, who told their inter-departmental colleagues that the flyers were "inflammatory." Confidential conversation with a witness, Jan. 3, 2015. Despite strong norms favoring the free circulation of counter-speech in a law school, the reaction of some persons with whom I spoke was, "I would not want anyone distributing flyers about me if I were a speaker." Though stating the specific law governing the right in the particular circumstances of listeners to provide flyers to others requires parsing of various elements of First Amendment law, the prevalence of an impulse to rationalize suppression of academic speech in a forum about academic freedom illustrates that groups, and individuals, often prefer to silence critics within their near presence. See *supra* notes 153-63 and accompanying text.

melodrama by Oprah Winfrey about eating hamburgers.<sup>280</sup> To the extent the silence principle gives legal backing to organizations' impulses to silence dissenting speakers, or to make invisible those who embody difference, the public culture of open exchange may well be damaged—thus obstructing, rather than advancing, the goals of the First Amendment.<sup>281</sup>

Silence as an idea can be manipulated to good advantage in discourse about *Dale*, but only by those with the resources to make capital of silence as a topic of discussion or as a tactic. The merits of silence can be best appreciated by those socially situated to discuss silence in the abstract, to enforce silence by others, to project strength through silence, or to claim a socially accepted “right to reticence.”<sup>282</sup> Generalizations about the value as a First Amendment precept of the right not to speak about a subject at all are given voice by the Justices and rationalized by other legal professionals. The context for these positive generalizations is the social knowledge and speech resources of opinion-makers situated to engage in playful experimentation with the tropes of selective disclosure and meaningful silence that *Dale* offers, or to idealize the benign effects of a right to exclude disfavored groups from membership in large civic groups.

The enacting of discourse about *Dale* among legal academics is like a play in which the players are given new tools by which to create and signal meanings and in which they find mutual delight. The advantage to law professors of the opportunity to try out voices in which they control the vector of their own silences and thus enjoy both “talk about talk” and an expressive “silence about silence” is a benefit that also encourages a potentially costly habit of ironic distance in cultural discourse among opinion-makers. In the borrowed terms of insistent empirical sociologists concerned to describe “the reality of everyday life,” First Amendment doctrines may have their hardest manifestation as “theoretical constructions of

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279. *Cohen v. California*, 40 U.S. 15 (1971) (jacket worn to court bearing the words “FUCK THE DRAFT” found to be protected). Elsewhere, police arrested Robert Rudnick, whose van bore images of aborted fetuses. *Thomas More Society Wins Defense of Pro-Life Advocate’s Free Speech Rights*, THOMAS MORE SOCIETY (Feb. 3, 2015), <https://www.thomasmoresociety.org/thomas-more-society-wins-defense-of-pro-life-advocates-free-speech-rights/>.

280. *Tex. Beef Grp. v. Winfrey*, 201 F.3d 680 (5th Cir. 2000).

281. *See infra* Conclusion.

282. GOFFMAN, *STIGMA*, *supra* note 185, at 64.

intellectuals and other merchants of ideas.”<sup>283</sup> The effects occur at a level of intellectual discourse that helps maintain openness of exchange but with a problematic connection to maintaining similar robustness at the ground level and in social life in communities and in institutions that seize for institutional advantage conceived by executives the management of silence.<sup>284</sup> Indeed, a lack of critical assessment of the effect of First Amendment doctrine on “everyday life” may be the ultimate silence, one brought about by the apportionment of intellectual focus, including that of law, to different disciplinary sectors. Thus, in a silo created by prevailing judicial techniques that contain a considerable element of formal doctrine<sup>285</sup> powered by a metaphor about a market, the judicial craftsmen of First Amendment doctrine participate in silence about unchosen, imposed Silences in everyday life. The doctrine that makes these silences seem both plausible and unheard is that of “the mere rational automaton . . . espousing a bare scholasticism.”<sup>286</sup> The result is a failure to “divine the form of what lies confused and unexpressed . . . and to bring to light the substance of what is half surmised.”<sup>287</sup>

### III. First Amendment Analysis and Silence: Why Sociology Matters

#### A. Sociology First—An Empirical Paradigm for Jurisprudence

The view that empiricism is irrelevant has ample support in prevailing First Amendment analysis, which gives first priority to government neutrality in the regulation of speech.<sup>288</sup>

That view involves a crimped understanding of the regulatory role that the First Amendment, as theorized by the Court over time,

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283. BERGER & LUCKMAN, *supra* note 228, at 19. Baker also comments on the odd popularity of the marketplace of ideas, given its “dependence on incorrect assumptions,” and notes that “[s]ome cynics have suggested that really its popularity is primarily limited to writers, academics, and other intellectuals who have a professional interest in supporting faith in rational discussion and the intellectual pursuit of knowledge.” BAKER, *supra* note 105, at 17.

284. Mae Kuykendall & Charles Adside, *Unmuting the Volume: Fisher, Affirmative Action Jurisprudence, and the Legacy of Racial Silence*, 22 WM. & MARY BILL RTS. J. 1011, 1026 (2014).

285. See POSNER, JURISPRUDENCE, *supra* note 155, at 41 (1993) (noting how “positive law formalism . . . spares the lawyer or judge from a messy encounter with empirical reality”).

286. HAND, *supra* note 78, at 17.

287. *Id.*

288. See FISS, *supra* note 170, at 19–22.



plays in structuring speech distribution. If the Court blocks off avenues to the creation of speech capital through access to greater community engagement that legislators have sought to open up, the Court is participating in allocating speech power.<sup>289</sup> It is not simply neutral. Large organizations, including the Scouts, gather economic and social power through interactions with public resources and informal assistance. In fact, the Boy Scouts has enjoyed considerable assistance over time from government at every level, starting with the chartering of the Boy Scouts as one of the only federally chartered foundational civic groups in the United States, such as the American Legion and the Red Cross.<sup>290</sup> The distribution of such associational power is not pre-political. It is a product of complex behavioral interactions over time between the state and organizations, customary power allocated to sectors of society and often based on existing hierarchies, and the mobilization of rules of inclusion and exclusion that law has supported over time.<sup>291</sup> Indeed, with the Scouts, as the formal laws excluding gay people from open service in government and the military, and effectively confining gay people to the closet in much of society, have been repealed or held unconstitutional, First Amendment law as announced by *Dale* allows for a large, unselective arm of majoritarian identities to maintain exclusion of gays on the basis that the identity constitutes stigmatized expression. As a factual matter, *Dale* privatizes the once *de jure* insistence upon silence.

Sociological investigation of the empirical significance of legally protected organizational silence sharpens the legal analysis of the silence principle. The jurisprudence of enforced silence in a group

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289. BAKER, *supra* note 105, at 15.

290. *Government Funding of Boys Scouts' Discriminatory Policies Unacceptable*, SECULAR COALITION FOR AMERICA (July 19, 2012), <https://secular.org/news/government-funding-boys-scouts-discriminatory-policies-unacceptable> (listing forms of government assistance to the Boy Scouts).

291. Hierarchies that persist in private interactions through stereotyping were once official government policy. Women were generally excluded from public life. The obvious example of such formal exclusion is the refusal to admit women to practice as lawyers, notoriously held constitutional in the famous case of *Bradwell v. Illinois*, 83 U.S. 130 (1873). After slavery ended, African Americans lived subject to a pervasive legally mandated segregation of housing, schooling, public parks, restaurants, hotels, and other generally accessible accommodations for convenience, personal development, and leisure. WILLIAM H. CHAFE, RAYMOND GAVINS, & ROBERT KORSTAD, REMEMBERING JIM CROW: AFRICAN AMERICANS TELL ABOUT LIFE IN THE SEGREGATED SOUTH (2014). For gay people, the exclusions from public life involved the need to conceal themselves and to conform to the expectations of the majority, with constant threats to their liberty and dignity from their exposure to criminal liability for associating with one another. DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2013).

comes with a dilemma internal to the conception of the First Amendment. The speech and associational rights asserted by an organization, such as the Scouts who claim a silence shield, confront speech counter values on the side of the state interest in regulating the Scouts' membership rules. The state interest is not only to support anti-discrimination values.<sup>292</sup> Rather, the state, in promulgating anti-discrimination rules, is also supporting critical First Amendment values that advance a robust citizenry prepared to exercise autonomy as individuals and to express civic courage in preference to helping enforce uniformity and fear within groups.<sup>293</sup> In the conception of the state as a promoter of First Amendment values through anti-discrimination rules, the ideal social setting for the production and transmission of expression is a free citizenry possessed of speech capacity, confident of free access to widely inclusive community groups, and unmarked by designations of caste.<sup>294</sup> A community with powerful, dominant groups empowered to create out-castes is not a vital setting for the free and independent citizenry that the First Amendment envisions.

Proponents of the "cooties doctrine" would assert that by forcing the Scouts to accept members who impair their associational free

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292. See FISS, *supra* note 170, at 15–26 (explaining that in contemporary free speech controversies, such as hate speech, pornography, and campaign finance, free speech interests as well as equal protection concerns constitute countervalues in support of state regulation that augment other values, such as equal protection, that the state often cites in support of regulation of speech).

293. Again, the theory of Erving Goffman on the social construction of reality and hence of "fronts" that allow people to function in ways that seem to them to preserve their self-esteem comments on how a robust citizenry might emerge from the complicated interactions that a society organized in community groups and private associations generates. In an interpretation of Goffman by Charles Lemert and Ann Branaman, a key idea is that people are dependent on "access to structural resources and possession of traits deemed desirable by the dominant culture. . . . [S]ustaining a desirable self also depends on possession of traits and attributes deemed by the dominant society to be requisite of full-fledged humanity."). Ann Branaman, *Goffman's Social Theory*, in THE GOFFMAN READER XLVI (Charles Lemert & Ann Branaman eds., 1997). While law cannot necessarily intervene to corral the dominant society into integrating those whom it stigmatizes into participation in the social understanding of "full-fledged humanity," the efforts of legislatures can expand interactions in which those carrying a salient stigma may develop a mastery of what Goffman calls "interaction ritual" and to contribute to what I am calling civic capacity. The First Amendment has no mandate to prevent a greater social range of experiences for constructing "a viable self" for citizenship. Rather, its mission is to challenge the human instincts of revulsion against difference in identity or expression.

294. BAKER, *supra* note 105, at 14 (explaining the importance for progress of "new experiences and changes in everyday practice" and "the existence of a realm in which people can have new or changed experiences").

expression, the state is threatening First Amendment values. By contrast, opponents assert that state deference to the expressive silence of an organization inhibits the development of expressive capacity in a segment of the citizenry. Although failing to interfere with the Scouts' expressive choices is not state action and therefore not a violation of the First Amendment,<sup>295</sup> the broader view holds that "fostering full and open debate . . . is a permissible end for the state."<sup>296</sup> At a minimum, the claim that legally mandated silence in local domains of organizational dominance enriches expression deserves close scrutiny. Viewing the analytic structure of the asserted right of organizational silence as a balancing of one First Amendment claim against other expressive interests directs attention to neglected questions about the distributional impact on overall expressive capacity of legal protection for the silence principle and stresses the need for an empirical investigation of the tradeoffs between the expressive interests of an organization versus the interest in developing expressive skill and confidence in the citizenry at large.<sup>297</sup> The notion that the silence principle is a protection for the expressive society may falter, thus suggesting that whatever principles justify the Boy Scouts decision are not deeply rooted in the First Amendment as a protection for expressive capacity in the citizenry. Rather, the roots are located in an ideologically mandated treatment of state power as

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295. *Id.* at 16–17 (noting that claims that hate speech, pornography, and the domination of political discourse by the rich in a manner that drowns out other voices does not involve state action and thus cannot be treated as "inherently a violation of the First Amendment (a claim that would require, as a purely technical matter, a showing of state action)"). While state action is ordinarily attributed to the executive or the legislature, the Supreme Court has on occasion treated the action of a state court as state action. See *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that court enforcement of a racially restrictive covenant constitutes state action). The Supreme Court, as a logical matter, could not hold its own doctrine to be state action that infringes on constitutional rights. Yet the Court's veto of legislative measures intended to provide some aid to the development of a robust citizenry competent to engage in First Amendment activities might be seen as the Court frustrating the mission of the First Amendment by intervening with an unempirical theory of the Amendment, thereby preventing the enhancement of free expression through enhanced structural access for more citizens to constructing "a viable self" for civil participation. For a judicial appeal to a constitutional basis in the First Amendment for a constitutional right to an education, see Justice Marshall's dissent in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

296. BAKER, *supra* note 105, at 17.

297. FISS, *supra* note 170 (arguing for a richer understanding of contemporary First Amendment problems, with an understanding that in many instances, state power can be an aid to the First Amendment values of fostering open debate).

dangerous,<sup>298</sup> and, at least in part for the *Dale* case, a specific concern about the social volatility transmitted in the world of voluntary associations by the cultural distaste (in 2000) for homosexuality.

The silence principle fits comfortably as a core rule about government neutrality toward speech, which courts deploy as a decision principle without regard to empirical effects.<sup>299</sup> Neutrality of the state is so critical, in this view, that it must not be judged by identifying winners and losers in the silences protected on one side and promoted on another. Before accepting that view, there should be an understanding of the possible weight of the speech components in the counter value and an understanding of the skewing of elite opinion in assessments of the high First Amendment value of associational expressive silence.

### **B. Winners and Losers: Talking about *Dale* and Being Dale in Everyday Life**

*Dale* illustrates the Court's attempt to manage silence by imposing categorical legal rules that treat silence as a fixed and desirable feature of social life, without an accompanying sociology of silence.<sup>300</sup> Recognizing expressive silence as a positive First Amendment value has a whole range of specific consequences illustrated by *Dale*. These consequences include the gain of those with discursive richness and outlets at their disposal to experimenting with the expressive power of selective, chosen silence about identity and with the symbolic significance of a constitutionally significant expressive claim on silence. For others there is the raw presence of "culturally destructive silence"<sup>301</sup> as a social force with meanings and effects on everyday social life that block access to tactics for managing silence as an expressive resource that are available among the most articulate and well positioned to speak and be answered.

The Boy Scouts' choice of silence, as an abstraction, is expressive and empowering to the Scouts—who already hold social power. The silence is a conscious choice to present the Scouting organization in a

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298. See *Citizens United*, 558 U.S. at 340 (Kennedy, J.) (emphasizing that the First Amendment is "[p]remised on mistrust of governmental power").

299. See FISS, *supra* note 170.

300. See STEVEN H. SCHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 5 (1990) (critiquing commentary on the First Amendment as "present[ing] organizing visions that lack substantial connections to the demands of social reality").

301. Richard L. Johannesen, *The Functions of Silence: A Plea for Communication Research*, 38 W. SPEECH 25, 28 (1947) (referring to George Steiner's view that there is a breakdown in communication between and within fields of study).

certain light—“conveying a view of the situation”<sup>302</sup> and “safeguard[ing] [the] impression.”<sup>303</sup> Silence at the corporate, or elite, level is a form of expression through a tactic of meaningful silence.<sup>304</sup> In the everyday life of the members, the “silence is expression” principle may well shut down the expressive capacity of Boy Scouts members, all of whom are drafted into a “dramaturgy”<sup>305</sup> of silence. In these circumstances of discursive richness, shared in large part by Scout executives, Supreme Court Justices, and academic commentators, the complaisance about a view of silence within the Scouts as a means of encouraging speech recalls a concern about the need of legal institutions to accommodate newly expressed interests. The concern was that the legal profession—judges and lawyers—is a propertied class that was required in the mid-twentieth century after long insulation to hear “other classes . . . [whose] demands are vocal which before were dumb.”<sup>306</sup> The insulated profession, it was suggested, might fail to reach “an understanding of and sympathy with the purposes and ideals of those parts of the common society whose interests are discordant with its own.”<sup>307</sup> For the *Dale* case, the propertied are those with forums and outlets for expression—the legal and judicial professions. Those who before were “dumb”—silent—are those for whom a stigma remained a barrier to social contact, as it was before *Dale* and as it may remain for many living unnoted in a society of discursive wealth.

The *Dale* case was a great success as a stimulus for the forum of lively debate—indeed, in an unusually rich sense—but it is partly useful in that way because of its lack of clarity and its failures in everyday life either to generate associational experiences or to release expressive energy. At the level of public debate and

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302. GOFFMAN, THE PRESENTATION OF SELF, *supra* note 185, at 9, 14 (differentiating from Goffman’s use of the terms as directed at face-to-face interactions). Here, my usage refers to impression management by an organization to facilitate wider consumption.

303. *Id.* at 14.

304. See GOFFMAN, THE PRESENTATION OF SELF, *supra* note 185 (discussing Goffman’s sociology of dramaturgy).

305. *Id.*

306. HAND, *supra* note 78, at 17.

307. *Id.* In her perceptive article about the disproportionate online targeting of women who participate in social media, Anita Bernstein queries the lack of concern for the silencing of women speakers on the internet by a barrage of threatening abuse, “[w]hy has the trammeling of free speech gone so unnoticed?” She suggests that the many sayings in various cultures calling for women to “shut up” has a connection to the lack of interest by those not traditionally asked to shut up—males. Bernstein, *supra* note 114, at 122–25.

exchange, the case throws the closet open for exit and offers it to all comers for a managed retreat as well, showering discursive strategies on scholars of every stripe, who may manipulate new choices about claiming and deploying the hypothetically manifold expressive identities harbored by all who speak. It symbolically affirms the closet for spoiled identity but endorses its transparency and its open doors for both entry and exit. In the immediate aftermath, as the public culture made capital of a new topic, anyone with discursive access could symbolically affirm that her identity was under siege, construct a word portrait describing the conditions of confinement, and enrich the public forum with the construction of a new claim to an identity at risk or with a newly pregnant silence.

*Dale* helps maintain customary rules for managing social silences. The affirmation of a silence strategy about homosexuality provides support for re-imposing silence about well-known individuals who have disclosed their sexuality: only they may speak of it, and they may insist on the restoration of a silence to which their social power lays claim.<sup>308</sup> One can say, “I am gay,” in public discourse, and survive socially. But one should avoid saying, “You are gay,” except with clear permission. The *Dale* principle confirms extraordinary expressive choice to those speakers with the power to speak and then to reclaim silence. They may speak while bowing to *Dale*’s celebration of silence and thus avoiding the charge of flaunting, and additionally using its silence teaching as an offensive weapon to manage and suppress subsequent discourse that may disrupt their preferred management of a public “with” that unfolds over time.<sup>309</sup> With the silence principles, discursively rich speakers can play with revelation and concealment with little risk. In doing so, they may indeed expand the range of their creative voice and deepen their sense of possessing a confident persona through experimentation with presentation of self. Indeed, public debate, in which the participants deploy subtle changes in persona, may well have therapeutic effects for the niche of speakers able to manipulate the silence principle in forms of selective disclosure and concealment.

By contrast, in everyday life, the Scouting case reinforced the walls of the closet that contain and restrain the developing expression

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308. See Michael Laris, *Mention of Gay Daughter a Cheap Trick, Lynne Cheney Says*, WASH. POST (Oct. 14, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A31310-2004Oct13.html>.

309. GOFMAN, RELATIONS IN PUBLIC, *supra* note 217 (explaining a “with” is a party of more than one whose members are perceived to be “together”).

of young Scouts, the social knowledge<sup>310</sup> of their peers, Scoutmasters discovering a sexual identity contrary to the expressive claims of the Scouts' corporate organization, and families that contain gay members. A family, learning of the sexual identity of their young Scout, may decline to discuss the news with neighbors, for fear of its being made public and causing the expulsion of their child from a social group critical to his emotional life. The *Dale* doctrine squelched speech and reinstated the simplicity of former times, when average gay people had only the discursive strategy of the closet, the associated forms of "camp," and the silence of isolation, deepened by depression and fear. *Dale* may well have validated unchosen strategies of silence by leading those discovering that they carry a stigma to internalize a notion that disfavored identities should be kept under wraps.<sup>311</sup> Recently, assertions have arisen that a new "political correctness" has overwhelmed many settings and thereby requires self-censorship by those with a core sense of identity or a set of ideas that differ from the enforcers of correctness.<sup>312</sup> Moreover, the social preference for silence and conformity may creep into critical, formative public settings—universities,<sup>313</sup> law schools,<sup>314</sup> and corporate boards who enforce a strict script and respond to pressures to oust anyone whose opinions receive wide, public, negative attention.<sup>315</sup> As to gay people, the nearness of a universal right to marriage is fueling a backlash, one presumably coming from those in enclaves that have

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310. SUNSTEIN, *supra* note 11, at 158 (referring to "pluralistic ignorance" as a consequence of legal protection for "sanctuaries" in which gay people share experience, and hence knowledge, "unknown to many or most citizens").

311. See GOFFMAN, *STIGMA*, *supra* note 185.

312. Jonathan Chait, *How the Language Police are Perverting Liberalism*, N.Y. MAG. (Jan. 26, 2015), <http://nymag.com/daily/intelligencer/2015/01/not-a-very-pc-thing-to-say.html>.

313. Colleen Flaherty, *The Problem with Civility*, INSIDE HIGHER ED (Sept. 9, 2014), <https://www.insidehighered.com/news/2014/09/09/berkeley-chancellor-angers-faculty-members-remarks-civility-and-free-speech> (describing a trend among university administrators to demand "civility" as a faculty norm and the concern of faculty that the vague claims about proper expression in a university are "Orwellian").

314. See Confidential conversation with a witness, *supra* note 278 (describing an incident in a law school in which faculty members reportedly prevented the circulation of flyers on the grounds that they could be "inflammatory").

315. David Crary, Rachel Zoll, & Michael Liedtke, *Mozilla CEO Resignation Raises Free-Speech Issues*, USA TODAY (Apr. 4, 2014), <http://www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/> (describing the resignation under pressure of Brendan Eich as CEO of Mozilla because of his support for the anti-gay marriage campaign in California several years before).

used social custom and legal protection to seal themselves off from contact with fellow citizens.<sup>316</sup>

Despite such concerns, in discussions by legal elites, the *Dale* case and its qualified holding on associational freedom has been praised for fostering discursive richness. Before *Dale*, Professor William Eskridge described a brilliant strategy that helped channel debate usefully away from denigration and toward having “contending groups . . . demonstrate their respective appeals by forming their own communities or cooperative projects.”<sup>317</sup> Yet the concrete effect in everyday life of encouraging competition and separation does not clearly enhance either individual freedom of expression or its cousin, open social interchange. With respect to Professor Eskridge, his law review article praising as brilliant the Supreme Court’s channeling of discourse into “silos” consumed 85 pages of closely set type<sup>318</sup>—proving his point by admirable example! As discussed above, it is likely that more people in local settings choose to be silent or concealed as a result of the policy than choose to be expressive. If so, they fall into an American tradition—that of the outsider learning the lesson taught in the small enclaves of our early life<sup>319</sup> or that of a more general paranoia and caution in an alienated common life.<sup>320</sup> Indeed, one key argument is that the Scouts’ organizational silence is First Amendment expression, thus placing on the scales of “expression” the total silence chosen by the Scouts, against the silence demanded of gay Scouts by the Scouting

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316. Jonathan Rauch, *Red America’s Anti-Gay Backlash*, DAILY BEAST (June 15, 2015), <http://www.thedailybeast.com/articles/2014/06/15/red-america-s-anti-gay-backlash.html> (“Every day, it seems, brings another news story about a prominent anti-gay statement or legal effort. If opponents of gay rights are supposed to be retreating into oblivion, they missed the memo.”). Despite assurances from religion-and-law expert Doug Laycock, many have interpreted recent state laws written to protect religious beliefs of business owners as a license for discrimination against newly visible, empowered gay people. Michael Barbaro & Erik Eckholm, *Indiana Law Denounced as Invitation to Discriminate Against Gays*, N.Y. TIMES (Mar. 27, 2015), <http://www.nytimes.com/2015/03/28/us/politics/indiana-law-denounced-as-invitation-to-discriminate-against-gays.html>.

317. William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1407 (2000).

318. *Id.*

319. *See supra* notes 161–63.

320. Joseph Heller, *The Office in Which I Work*, in ROBERT COLES & ALBERT LAFARGE, *MINDING THE STORE: GREAT WRITING ABOUT BUSINESS FROM TOLSTOY TO NOW 65* (2008) (“I have a feeling that someone nearby is soon going to find out something about me that will mean the end, although I can’t imagine what that something is.”).



organization's exercise of the rights conferred in *Dale* and the habit of silence taught by the principle of the case, as relayed to those on the ground. If the heavy silence of local banishments counts as speech, the scales are set against expression in everyday life.

### Conclusion

This Article has resurrected the *Dale* opinion in order to explore the broader concerns the Supreme Court's First Amendment jurisprudence raises. A number of scholars have suggested that the Court too often supports the interests of the powerful in controlling discourse and, either indirectly or directly, allows their speech to impose actual silence on the less powerful, or the weak, or to drown out weak voices to create something very like silence. The Court often pays tribute to the idea of "more speech" as the good sought by the framers of the First Amendment, and by the jurisprudence of the Court. Yet the principle of *Dale*, a right of a large civic organization to reject disfavored associations and cast those rejected into a silence imposed by isolation, comes to the aid of those with discursive power and inflicts injury on the everyday life of those lacking power. This aid to the powerful is a strange inversion of free speech jurisprudence given its modern rationale in the fierce philosophy of life as being worth little except as a battle, as embraced by Justice Holmes.

Notably, Justice Holmes envisioned a fair fight. He may have had little sympathy for the losers in a battle, or for the weak, but the old soldier would likely have viewed the aid to the powerful, allowed to pose in the garb of the weak, as unsporting and unmanly. Justice Holmes was not one to be seduced by a pleasing rhetoric that promised a fight could work out well for everyone if the Court sometimes worked one of the corners, and sometimes refereed. If it was a fight, someone would, and should win. Holmes would not have tried to handicap a fight—either by helping the powerful gain advantage by posing as weak, or by lending a hand to the weak. Needless to say, First Amendment law today is not a perfect reflection of Holmes's personal philosophy. The market is not conceived by the Court in the fierce language of battle, but one of debate and deliberation. The market the Court envisions consists of equally endangered carriers, both weak and strong, of expressive needs and messages needed for democratic deliberation. An individual's vulnerability is no longer at the core of the doctrine.

Unlike Justice Holmes, Justice Stevens imagined the plight of the weakest. In his dissent from a case permitting as constitutional a

prison regulation depriving certain inmates of all secular written materials and photographs, Stevens invoked the “the sovereign’s duty to treat prisoners in accordance with ‘the ethical tradition that accords respect to the dignity and worth of every individual.’”<sup>321</sup> He also invoked the mission of the First Amendment to protect access to ideas as “central to the development and preservation of individual identity.”<sup>322</sup> In a brief passage in defense of core rights of prisoners as human beings, Stevens combined a sociology of knowledge and human development with an ideal untethered to ideas of battle. Lamenting that “the rule comes perilously close to a state-sponsored effort at mind control,” Stevens proceeded to celebrate a First Amendment that is not about battle, but rather one that owes its provenance to the message on behalf of the weak when the Court extended protection to a school child in *Barnette*.<sup>323</sup> Stevens quoted the ode of Justice Jackson in *Barnette*,<sup>324</sup> also quoted in *Wooley v. Maynard*,<sup>325</sup> to the dignity and vulnerability that belong uniquely to the individual: “The State may not “invas[e] the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control.””<sup>326</sup> Stevens thus, unlike the Court’s majority, would have allowed a precedent about silence as dignity for a private individual sphere of thought and spirit to protect the human need of powerless prisoners for access to expressive materials. Also unlike the Court’s majority, he would have permitted the anti-discrimination law of New Jersey to serve its purposes of helping to expand the civic space in which a young Scout might strive to develop for himself and share with others “the sphere of intellect and spirit” in which all might thrive.<sup>327</sup> In *Dale*, he did not detect a danger to the human dignity of the Scouting enterprise.

In the *Dale* world, Silence is blessed as speech, protection of association is skewed toward maintaining barriers, and the rules in everyday interactions for “talk” are intimidating. A less open society provides us a vivid glimpse of silence wedded to identity segregation as a cultural strategy: A portrait of female students in Saudi Arabia

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321. *Beard*, 548 U.S. at 553 (Stevens, J., dissenting) (citing *Overton v. Bazzetta*, 539 U.S. 126, 138 (2003) (Stevens, J., joined by Souter, Ginsburg, and Breyer, J., concurring)).

322. *Id.* at 552.

323. *Barnette*, 319 U.S. 624.

324. *Beard*, 548 U.S. 552.

325. *Wooley*, 430 U.S. at 714.

326. *Barnette*, 319 U.S. at 642.

327. *Id.*

watching a male professor in another room and allowed to ask questions only by telephone call to the professor. A professor reported: “Sometimes the silence was so unsettling . . . that I’d shout out, ‘Hello, is anyone there?’”<sup>328</sup>

The broadest commitment of the American experiment, as captured in the eloquence of Justice Robert Jackson on behalf of a tiny minority threatened by power using forced speech to drive them from a civic space, is to the open society. The open society is one in which civic space is broadly shared, Silence is a name for a personal election to preserve the spirit of a vulnerable individual from coercive power, and expressive freedom advances a shared citizenship among all who would speak, join, and learn. We, American citizens, are here, above all, to engage with one another, to deepen our shared knowledge, and to support the flourishing of civic capacity.

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328. Elizabeth Rubin, *A Saudi Response on Reform: Round Up the Usual Dissidents*, N.Y. TIMES, Mar. 21, 2004, at § 4, p. 3.

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