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BORN IN DISSENT: FREE SPEECH AND GAY RIGHTS

*Dale Carpenter**

But when 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. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.¹

A government can suppress a newsletter, a book, a man. But men of good intentions are standing. They close ranks. It will produce a strange migration of souls. And the just, noble, necessary Belief will bring forth, probably larger numbers, better disciplined where the adversary least expects them.²

IN 1924, Illinois issued a charter for a non-profit corporation, the Chicago-based Society for Human Rights (SHR).³ The group's founder, Bavarian-born Henry Gerber, borrowed its name from a gay rights group in 1920s Germany, where the cultural climate was better for gay people than in the United States.⁴ Although it nowhere explicitly referred to homosexuals, the charter declared the group's purpose "to promote and to protect the interests of people who by reasons of mental and physical abnormalities are abused and hindered in the legal pursuit of happi-

* Judge William Hawley Atwell Chair of Constitutional Law and Professor of Law, SMU Dedman School of Law. This article is adapted and updated from Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1525–31 (2001). I'm grateful to my research assistant, Nita Hight, for her help in researching and preparing this essay.

1. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

2. SUKIE DE LA CROIX, *CHICAGO WHISPERS: A HISTORY OF LGBT CHICAGO BEFORE STONEWALL 77* (2012) ("Un government peut supprimer un journal, un livre, un homme. Mais les homme de bonne volanté sont debout. Ils serreront les rangs. Il se produira d'étranges migrations d'ames. Et l'Idée juste, noble, nécessaire, surgira, probablement plus nombreuse, mieux disciplinée, où l'adversaire l'attendait le moins."). The passage is taken from a review of *Friendship and Freedom*, the first American gay rights newsletter that appeared in the French journal *L'amitie* in 1925.

3. *Id.* at 76.

4. JONATHAN NED KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 388 (1992). There was a burgeoning gay life in major metropolitan areas, most notably in New York. See generally GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940* (1995).

ness which is guaranteed them by the Declaration of Independence.”⁵ It promised “to combat the public prejudices against them by dissemination of facts according to modern science among intellectuals of mature age.”⁶ Sodomy was then a crime in every state. In fact, several states had passed laws allowing the incarceration of “sexual psychopaths,” understood to include gay men, for undetermined periods of time in mental institutions.⁷ The group pledged to comply with the law and forswore any advocacy, much less incitement, to violate it.⁸

Just five years before Gerber founded SHR, Justice Holmes breathed life into what would become the foundational principles of First Amendment doctrine. Writing for a unanimous Court in *Schenck v. United States*, he granted that government had broad power in wartime to suppress subversive speech.⁹ But broad power is not boundless power. It was limited to circumstances in which the speech presented a “clear and present danger” to the war effort.¹⁰ If even war could not justify unlimited power, what further limitations on state regulation of speech might apply when a lesser threat was present?

More importantly, in dissent in *Abrams v. United States*, Holmes doubted the ability of government to determine “truth” about “ultimate good.”¹¹ Rather, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹² History showed that such conclusions were better left to a free exchange of ideas. A willingness to suppress speech based on absolute certainty—what Holmes called “fighting faiths”—was the real enemy of political and philosophical truth. How seriously would the Court and the nation take this deep skepticism?

The answers to these questions would unfold in the decades to come—too late for SHR. Founded at a time when gay Americans were not acknowledged to exist and were misunderstood and hated where acknowledged, SHR was the first gay political organization in the United States. Faced with overwhelming resistance from dominant opinion—the fighting faiths of traditional sexual morality, misunderstanding, and fear—the Society was a short-lived experiment in political organizing. It never had more than ten members. But it planted the seeds on American soil of what would become a broad and broadly successful LGBT-rights movement. Like Holmes’s conception of free speech itself, it was a movement born in dissent but grounded in the nation’s profound commitment to liberal and pluralist principles.

5. KATZ, *supra* note 4, at 387.

6. *Id.*

7. MICHAEL BRONSKI, A QUEER HISTORY OF THE UNITED STATES 124 (2012).

8. KATZ, *supra* note 4, at 387.

9. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

10. *Id.*

11. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

12. *Id.*

I

Much of the history of the suppression of speech is really the story of state-sponsored suppression of expressive associations: groups of people who combine their efforts to advance and to inculcate, either internally or externally, their ideas and values.

Consider the context in which the modern protection of free speech arose. As the country entered World War I, many groups of people were hostile to U.S. involvement. Anti-war organizations such as the Socialist Party of America made strong gains in 1917, and over 330,000 draft evaders or delinquents were reported during the war.¹³ Concerned about these groups, Congress passed the Espionage Act of 1917, part of which made it a crime to obstruct the recruiting and enlistment of military personnel or to attempt to cause insubordination in the military service.¹⁴

Although the Espionage Act itself was directed at individuals, many World War I prosecutions charged conspiracy to violate it, a charge that invariably aimed at stopping expressive association by opponents of the war. In *Schenck v. United States*,¹⁵ the decision that first announced the “clear and present danger” test, the government charged that the defendants, part of a group of anti-capitalist leftists, conspired to violate the Act by mailing to military personnel a document criticizing conscription as “despotism” and urging conscripts to “assert your opposition to the draft.”¹⁶

Even where the government prosecuted a lone individual, instead of a group of defendants, its real aim seems to have been to suppress the expressive activity of a group whose message it disfavored. In *Debs v. United States*, the government charged that Eugene Debs had violated the Act by criticizing the war and the draft in a speech delivered, according to the indictment, “to an assembly of people” at the Ohio Socialist Party Convention.¹⁷ Debs, aware of the ongoing prosecutions under the Act, had intimated in his speech to the convention that he could not say everything he wanted to say about the war. Of course, even this act of self-censorship was not enough to save him from prosecution. Government had succeeded in circumscribing what could be said at a political convention, the prototypical expressive association. The chill on associational freedom had set in.

13. ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA FROM 1870 TO 1976*, at 105–08 (1978).

14. Act of June 15, 1917, ch. 30, tit. I, § 3, 40 Stat. 219 (repealed 1948). Federal authorities prosecuted approximately 2,000 cases charging Espionage Act violations, which carried a penalty of fines of \$10,000, up to twenty years in prison, or both. See GOLDSTEIN, *supra* note 13, at 108–13.

15. 249 U.S. 47 (1919).

16. *Id.* at 50–51.

17. *Debs v. United States*, 249 U.S. 211, 212 (1919); see also *Gilbert v. Minnesota*, 254 U.S. 325, 332–33 (1920) (affirming conviction of the defendant, manager of the organization department of the Nonpartisan League, for giving an anti-war and anti-government speech at a meeting of the League in violation of a state law similar to the Espionage Act).

Viewed in the light of this history, the canonical “free speech” decisions are really cases where the state sought to infringe the freedom of expressive association. Though the target changed—in some times and places, the target was the Socialist Party,¹⁸ in others it was the NAACP¹⁹ or the Ku Klux Klan²⁰—the goal of putting the screws on an expressive association opposed by state authorities was the same. The state is not nearly as concerned with a Eugene Debs spouting radical ideas in his mirror or even to random passersby in the park as it is with a Eugene Debs riling up a group of like-minded folks at a meeting.²¹

Of course, to the extent a Eugene Debs is saying anything harmful at all, the danger is greater when he is saying it to a group predisposed to agree with him. So, the state’s interest in regulation in such cases, to the extent it is a legitimate interest, is inevitably more compelling. The point is, the government recognizes this fact and accordingly concentrates on suppressing organizations, and often only instrumentally on prosecuting individuals, which it views as a threat.

II

The experience of the earliest known gay rights organization in the United States illustrates the destructive consequences of state intrusion into gay association.

Just a year after landing at Ellis Island on the SS *George Washington*, 21-year-old Henry Gerber (née Joseph Henry Dittmar) made his way to Chicago where he enlisted in the army on January 26, 1914. Even joining the army, however, could not save a German-born soldier from the hostility and suspicion aroused when the United States declared war on that country in 1917. The same year Congress passed the Espionage Act, subjecting thousands of people to prosecution for expressing anti-war sentiments, the U.S. also opened internment camps for 50,000 unnaturalized Germans declared “alien enemies.” For his own part, Gerber was briefly institutionalized for homosexuality and was then “offered internment,” which he accepted for the duration of the war.

In 1919, the year *Schenck* and *Abrams* were decided, Gerber reenlisted in the army and was paradoxically sent to join U.S. occupation forces in Koblenz, Germany. There, he worked as a proofreader and printer for *Amaroc*, the daily military newspaper serving U.S. armed forces. It was his first formal experience in writing and publishing.

The occupation years in Germany were formative for Gerber. There he encountered the work of Magnus Hirschfeld a pioneering homosexual

18. *Whitney v. California*, 274 U.S. 357, 359, 363 (1927).

19. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 451 (1958).

20. *Brandenburg v. Ohio*, 395 U.S. 444, 444–45 (1969) (per curiam) (reversing conviction of a Ku Klux Klan member prosecuted under the Ohio Criminal Syndicalism statute).

21. That’s not to say the state is unconcerned with the speech of isolated individuals. An example of this is *Cantwell v. Connecticut*, 310 U.S. 296, 300, 303–08 (1940), involving the conviction of a member of Jehovah’s Witnesses for inciting a breach of the peace, though even in such cases the state’s concern with dissident sects is evident.

sexologist who campaigned tirelessly for the repeal of Germany's Paragraph 175, which criminalized sex between men. Gerber recalled in 1962 that during the post-war years he had "subscribed to German homophile magazines" and made several trips to Berlin.²² "I had always bitterly felt the injustice with which my own American society accused the homosexual of 'immoral acts,'" he wrote.²³

What could be done about it, I thought. Unlike Germany, where the homosexual was partially organized and where sex legislation was uniform for the whole country, the United States was in a condition of chaos and misunderstanding concerning its sex laws, and no one was trying to unravel the tangle and bring relief to the abused.²⁴

Gerber did not return to the United States until January 1923, when the last of the American occupation forces left Koblenz and *Amaroc* ceased publication. By summer 1923, he moved back to Chicago and took a job with the post office in the Lakeview station. But the restive and cantankerous Gerber would never be satisfied with life as a postal clerk.

The key to overcoming inequality, in the eyes of the earliest organizers of the gay civil rights movement, was to form groups devoted to that goal. "One of our greatest handicaps was the knowledge that homosexuals don't organize," Gerber observed.²⁵ "Being thoroughly cowed, they seldom get together."²⁶

In early 1924, he solicited the support of sex-law reformers to establish what would eventually become SHR. Among others, he met the American birth-control advocate Margaret Sanger, but the two did not like each other. No other prominent person seemed interested. Gerber and a group of friends decided to go it alone with the filing of their Illinois charter. Its stated goals were:

To promote and to protect the interests of people who by reasons of mental and physical abnormalities are abused and hindered in the legal pursuit of happiness which is guaranteed them by the Declaration of Independence, and to combat the public prejudices against them by dissemination of facts according to modern science among individuals of mature age. The Society stands only for law and order; it is in harmony with any and all general laws insofar as they protect the rights of others, and does in no manner recommend any acts in violation of present laws, nor advocate any matter inimical to the public welfare.²⁷

All of the members were homosexual males.²⁸ However, there were a

22. DE LA CROIX, *supra* note 2, at 75.

23. *Id.*

24. *Id.* Gerber's recollections were published in 1962 in the early gay rights magazine *ONE*.

25. KATZ, *supra* note 4, at 389.

26. *Id.*

27. DE LA CROIX, *supra* note 2, at 76.

28. Significantly, the group adopted an exclusionary membership policy, allowing only gay men to join. Even bisexuals would be kept out "for the time being." KATZ, *supra* note 4, at 390. As it happened, Meininger was married with children. *Id.*

mix of races, religious devotion, and professions. Indeed, the president was a black man, the Reverend John T. Graves, whom Gerber described as “a preacher who preached brotherly love to small groups of Negroes.”²⁹ The vice president was Al Meininger, derided by Gerber as an “indigent laundry queen.”³⁰ The treasurer was Ellsworth Booher, “whose job with the railroad was threatened when his homosexuality [later] became known.”³¹ Gerber appointed himself secretary.

This was a ragtag band in comparison to the gay rights movement in Germany, which included distinguished politicians, doctors, scientists, and artists. “The only support I got was from poor people,” he lamented four decades later.³² “The average homosexual, I found, was ignorant concerning himself. Others were fearful. Still others were frantic or depraved. Some were blasé.”³³

The group drew up a plan to attract members and to achieve its goals, including the elimination of sodomy laws. Gerber recalled:

The outline of our plan was as follows:

1. We would cause the homosexuals to join our Society and gradually reach as large a number as possible.
2. We would engage in a series of lectures pointing out the attitude of society in relation to their own behavior and especially urging against the seduction of adolescents.
3. Through a publication named *Friendship and Freedom* we would keep the homophile world in touch with the progress of our efforts. The publication was to refrain from advocating sexual acts and would serve merely as a forum for discussion.
4. Through self-discipline, homophiles would win the confidence and assistance of legal authorities and legislators in understanding the problem; that these authorities should be educated on the futility and folly of long prison terms for those committing homosexual acts, etc.³⁴

Members wrote to legislators. They published two issues of a newsletter, *Friendship and Freedom*, the first gay rights publication in the United States. Unfortunately, there are no extant copies. But according to a review of *Friendship and Freedom* in the French magazine *L'amitie* in 1925, the opening page of the newsletter consisted of an article on self-control, a poem by Walt Whitman, and an essay about the nonconformity of Oscar Wilde. The *L'amitie* review went on:

Friendship and Freedom is the issue of the Society for Human Rights which proposes, by subscriptions, to establish an assistance fund. The members' intent to use this money for helping their fellow homosex-

29. DE LA CROIX, *supra* note 2, at 76.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 76–77.

34. KATZ, *supra* note 4, at 389.

ual friends (whom they call “intermediates”—of the intermediate sex—according to the word usage of Carpenter).³⁵ They also propose to find positions for their friends, to assist them with every possible means. Finally, but with all sorts of precautions (“We don’t publish under this heading what has already appeared in other newsletters, etc.”) what they wish above all, is to lead the way towards modifying the unjust law which oppresses them. Free America!³⁶

Members knew they had long years of work ahead. “Yet,” Gerber wrote later, “I was willing to slave and suffer and risk losing my job and savings and even my liberty for the ideal.”³⁷ It would not be long before his resolve was tested.

Within six months, police clamped down on SHR. The group’s vice president, Al Meininger, the “indigent laundry queen,” had a wife and four kids. Meininger’s wife discovered a copy of *Friendship and Freedom* and reported it to a social worker, who alerted police. They raided Meininger’s apartment and found him in bed with another man, according to Gerber’s account.³⁸ They quickly learned about Meininger’s circle of friends at SHR.

At 2 a.m. on July 12, 1925, without a warrant but with a newspaper reporter in tow, authorities arrested Gerber in his home. According to the next day’s story in the *Chicago American* headlined, “Girl Reveals Strange Cult Run by Dad,” the police “began investigation of a weird cult brought to light when 12-year-old Betty Meininger, 532 N. Dearborn St., appeared and asked the policemen to find out ‘why her father carried on so.’”³⁹ The story continued:

They found Meininger, who is 37, married, and the father of four children; the Rev. John Graves, self-declared pastor of a church, and one Henry Gerber, 1710 Crilly Court, publisher of the cult paper, *Friendship and Freedom*. Meininger, Graves and Gerber, arraigned in court today, were given continuances until Thursday. Meantime the police intend to see if federal action can be taken as a result of sending the paper through the mails.⁴⁰

Police seized Gerber’s typewriter, the literature of SHR, his personal diaries, and his bookkeeping records.⁴¹ At Gerber’s arraignment, a social worker read aloud from his diary—out of context—the words, “I love Karl.”⁴² The detective and the presiding judge “shuddered over such depravity.”⁴³

35. This is a reference to Edward Carpenter, a British poet, anthropologist, gay rights activist, and author of *The Intermediate Sex: A Study of Some Transitional Types of Men and Women* (1908).

36. DE LA CROIX, *supra* note 2, at 78–79.

37. KATZ, *supra* note 4, at 389.

38. DE LA CROIX, *supra* note 2, at 82–83.

39. *Id.*

40. *Id.*

41. KATZ, *supra* note 4, at 391.

42. *Id.*

43. *Id.*

A postal inspector testified that the three men deserved long prison sentences “for infecting God’s own country.”⁴⁴ Gerber later wrote in *ONE* magazine: “In the Chicago Av. police court, a detective triumphantly produced a powder puff, which he claimed he had found in my room. That was the sole evidence of my crime. I have never in my life worn rouge or powder.”⁴⁵

One of the organization’s leaders pled guilty to the disorderly conduct charge. Gerber, who had also been threatened with a bogus federal obscenity charge for mailing *Friendship and Freedom*, hired a lawyer. The disorderly conduct charge against Gerber was dismissed because of the warrantless search, and no obscenity charge was ever filed. It was a small victory.

On Gerber’s way out of the courthouse, the detective who investigated him sneered, “What was the idea of the Society for Human Rights anyway? Was it to give you birds the legal right to rape every boy on the street?”⁴⁶

Gerber’s personal diary was never returned. He was promptly fired from his job at the post office, which advised him by letter that he had been terminated for “conduct unbecoming a postal worker.”⁴⁷ Although his attorney offered to sue to get the job back, Gerber “had no more money for fees and took no action.”⁴⁸ The litigation had financially ruined him.⁴⁹

Gerber moved to New York in 1927, where he again reenlisted in the army and served another seventeen years as a proofreader. In 1942, he spent several weeks in the guardhouse for suspicion of homosexuality, but a review board concluded Gerber was not homosexual because he told the panel he practiced only mutual masturbation with men over twenty-one. He retired in 1945 as a staff sergeant with an honorable discharge after having served during both World Wars I and II.

While Gerber continued to write about homosexuality over the years, he soured on trying to organize homosexuals politically. “Most bitches are only interested in sex contacts, not challenging legal and social stigmas of homosexuality,” he later wrote.⁵⁰ “[L]et me tell you from experience it does not pay to do anything for them,” Gerber advised Manuel Boyfrank, the future *ONE, Inc.* president, by letter in 1940.⁵¹ Boyfrank had suggested starting a new organization to work for gay rights.

I once lost a good job in trying to bring them together. Most men of that type are too scared to give their names or to join any association trying to help them; the other half are only interested in physical

44. *Id.* at 392.

45. DE LA CROIX, *supra* note 2, at 83.

46. KATZ, *supra* note 4, at 392–93.

47. *Id.* at 393.

48. *Id.*

49. *Id.* at 392–93.

50. DE LA CROIX, *supra* note 2, at 84.

51. *Id.* at 86.

contacts and have not the slightest interest to help their cause. I found that out to my own sorrow.⁵²

In any event, the arrests in 1925 doomed the Society for Human Rights. It would be a quarter-century before gays in the United States would again form an association dedicated to advancing their civil rights. But the historical significance of the group lay in the connections between it and the modern gay rights movement:

Although his fledgling organization was crushed by a cabal of social control agents, Gerber sowed the seed of gay pride and the idea of fighting for gay rights in scores of correspondents, directly and indirectly influencing Harry Hay, Jim Kepner, Tony Segura, Donna Smith, Fred Frisbie, Manuel Boyfrank, and others who worked to establish the homophile movement of the 1950s. Gerber is also a clear link between the German movement to remove Paragraph 175 of the German penal code and the 1950s' law reform movement that still remained extremely high-risk activism for people who were not just stigmatized but whose relations—even nonsexual associations—were criminalized.⁵³

III

Two early gay rights groups followed in the 1950s: the Mattachine Society (mostly men) and the Daughters of Bilitis (DOB) (women). The FBI closely monitored their activities, beginning an internal security investigation of Mattachine in 1953 and of DOB in 1959. Neither group, of course, represented a credible internal security threat. “Nonetheless,” William Eskridge writes, “FBI agents infiltrated both organizations, archived their declarations and publications, reported their meetings and activities, recruited informants, compiled lists of members whom they could identify, and speculated on the organizations' influence and future activities.”⁵⁴ Agents interviewed the staff of the Mattachine's publication, *ONE*, and notified their employers. Group members resorted to using pseudonyms to protect their identity. Similar monitoring and harassment of gay groups by state and federal authorities occurred throughout the country.⁵⁵ Police harassment and spying on gay organizations continued into the 1970s.⁵⁶

State intrusion on gay expressive association took many forms. Congress tried to revoke the Washington, D.C. Mattachine Society's license as an educational group on the ground that government should not support association by people whose acts were ungodly and illegal. The IRS initially refused to grant tax-exempt status to groups that “promoted” homosexuality. States like Ohio, New York, and Florida (which barred rec-

52. *Id.*

53. JIM KEPNER & STEPHEN O. MURRAY, BEFORE STONEWALL: ACTIVISTS FOR GAY AND LESBIAN RIGHTS IN HISTORICAL CONTEXT 25, 33 (2002).

54. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 75 (1999).

55. *Id.* at 76.

56. *Id.* at 114.

ognition of “organized homosexuality”) disallowed the articles of incorporation of gay rights groups on public policy grounds.⁵⁷

As the Court developed stronger protection for the freedom of association of unpopular groups in the late 1950s,⁵⁸ gay political organizations, bars, and other groups benefited. For example, courts overturned many state decisions to deny corporate status to gay groups, often on freedom of association grounds.⁵⁹ The associational freedom shielding the confidentiality of a group’s membership list was extended to gay groups, even in the context of private civil litigation.⁶⁰ When public university administrators attempted in the 1970s and 1980s to deny school recognition and funding to gay student groups, their decisions were almost invariably reversed by courts applying the freedom of association precedents that had protected black civil rights organizations from state harassment.

One early federal district court decision, *Gay Students Organization of University of New Hampshire v. Bonner*,⁶¹ stands out:

The [Gay Student Organization’s] efforts to organize the homosexual minority, “educate” the public as to its plight, and obtain for it better treatment from individuals and from the government thus represent but another example of the associational activity unequivocally singled out for protection in the very “core” of association cases decided by the Supreme Court. . . . Moreover, the activity engaged in by the GSO [sponsoring social events for members] would be protected even if it were not so intimately bound up with the political process, for “it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.”⁶²

This reasoning placed gays solidly inside the emerging First Amendment tradition protecting the freedom of association.

Even First Amendment freedom claims that have started out protecting organizations hostile to gay equality have been applied by courts evenhandedly to protect gays as well. In *Rosenberger v. Rector & Visitors of University of Virginia*, the Supreme Court held that a public university could not refuse to give funds from a student activities fee to a controversial student newspaper espousing anti-gay views.⁶³ Yet *Rosenberger* was soon applied by a federal court to reverse the decision of another public

57. *Id.* at 114–15.

58. Two cases of particular importance in this regard were *Yates v. United States*, 354 U.S. 298, 303–38 (1957) (reversing convictions of fourteen Communist Party members for conspiracy to violate the Smith Act), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–67 (1958) (protecting the NAACP’s membership list from compelled disclosure).

59. See, e.g., *Aztec Motel v. State*, 251 So. 2d 849, 854 (Fla. 1971); *In re Gay Activists All. v. Lomenzo*, 293 N.E.2d 255, 256 (N.Y. 1973) (per curiam).

60. *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 207–10 (N.D. Cal. 1983) (denying discovery of gay group’s membership list in civil litigation by Coors).

61. 509 F.2d 652 (1st Cir. 1974). For a collection of cases, see ESKRIDGE, *supra* note 54, at 116 n.61.

62. *Gay Students Org.*, 509 F.2d at 660.

63. 515 U.S. 819, 828–37 (1995).

university to deny funding to a gay student group.⁶⁴ Additionally, Congress passed the Equal Access Act of 1984⁶⁵ at the urging of social conservatives who wanted religious student groups to be able to meet in public schools. Later, the very same law, along with associational freedom claims, was used by gay student groups to secure access to public facilities.⁶⁶

Not surprisingly, gay political organizations, bars, and other institutions flourished since recognition of the freedom of association in the late 1950s. For example, by 1981, 80% of all public colleges had recognized gay student groups.⁶⁷ The Gay, Lesbian and Straight Education Network, which filed an amicus brief against the associational freedom of the Boy Scouts to expel a gay scoutmaster⁶⁸ and bitterly criticized the result in *Boy Scouts v. Dale*, estimates there are now more than 700 gay-straight student alliances in high schools,⁶⁹ few of which would exist without strong protection for associational liberty. The rise of gay equality and public visibility coincided—not coincidentally, however—with the rise of vigorous protection for First Amendment freedom sketched in the early opinions of Justice Holmes, in *Schenck* and *Abrams*, and eventually in later decisions protecting the freedom of association.

It's no stretch to say that Justice Holmes created the modern First Amendment. It's equally true that the First Amendment created gay America. For advocates of gay legal and social equality, there has been no more reliable and important constitutional text. The freedoms it guarantees protected gay cultural and political institutions from state regulation designed to impose a contrary vision of the good life. Gay organizations, clubs, bars, politicians, journals, newspapers, radio programs, television shows, web sites—all of these—would have been swept away in the absence of a strong and particularly libertarian First Amendment. It shielded gay political efforts when most of the country thought homosexuals were not just immoral, but also sick, dangerous, and criminal.⁷⁰

64. *Gay Lesbian Bisexual All. v. Pryor*, 110 F.3d 1543, 1550 (11th Cir. 1997).

65. 20 U.S.C. § 4071 (1994).

66. Brief Amicus Curiae of Gays and Lesbians for Individual Liberty in Support of Petitioners at 13–14, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), 2000 WL 228588, at *13–14.

67. ESKRIDGE, *supra* note 54, at 116.

68. See generally Brief of Amici Curiae Parents, Families, and Friends of Lesbians and Gays, Inc. et. al. in Support of Respondent, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), 2000 WL 339886.

69. Harriet Barovick, *Fear of a Gay School*, TIME (Feb. 21, 2000), <http://content.time.com/time/magazine/article/0,9171,39182,00.html> [<https://perma.cc/3YPG-QJVA>].

70. As of 1967, two-thirds of Americans reported they looked upon homosexuals with “disgust, discomfort, or fear.” CHARLES KAISER, THE GAY METROPOLIS 162 (1997) (based on a poll conducted by CBS News and presented on national TV during a special report, “The Homosexuals,” which aired March 7, 1967). Homosexuality was listed as a mental disorder by the American Psychiatric Association until 1973. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 186 (1st ed. 1997).

In the era of unrelenting hostility in which the gay rights movement came blinking out of the shadows, “the right to associate was an appealing normative argument in both the political and judicial arenas.”⁷¹ The shelter afforded by this right allowed gays to organize for the purpose of accumulating and applying political power, a precondition for the effective exercise of other important liberties. For gay America, it truly is the *First Amendment*.⁷²

By contrast, the Due Process Clause (in its substantive dimension) was faithless until 2003.⁷³ The Equal Protection Clause was largely impotent until 1996, and its effectiveness as a weapon against state-sponsored discrimination remains in doubt.⁷⁴ The Ninth Amendment has been missing in action.⁷⁵ And the Fourteenth Amendment’s Privileges and Immunities Clause has not been seen, except in scholarship and in the concurrences of Justice Clarence Thomas,⁷⁶ since it was banished at the age of five.⁷⁷

In its procedural dimension, the Fourteenth Amendment’s Due Process Clause is the First Amendment’s only serious constitutional competitor for pride of place in assisting gay equality advocates. The criminal proce-

71. ESKRIDGE, *supra* note 54, at 114.

72. I am hardly alone in recognizing the centrality of the First Amendment to the struggle for LGBT equality. Most extensively, Carlos Ball has traced the importance of the First Amendment to gay rights. CARLOS A. BALL, *THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 2* (Harvard 2017); *see also* ESKRIDGE, *supra* note 70, at 111 (concluding that “the main legal protections [for the developing institutions of early gay subculture] were the [F]irst [A]mendment’s rights to associate, publish, and speak” and that “[F]irst [A]mendment litigation was relatively successful”); H.N. Hirsch, *Levels of Scrutiny, the First Amendment, and Gay Rights*, 7 *LAW & SEXUALITY* 87, 100 (1997) (“Danger to our [gay] world, for the most part, did not come from laws outlawing sexual acts. Instead, the danger came from censorship and cultural repression. In cultural and social space protected by the First Amendment, I discovered a way of life and a community, rather than how to subvert the sodomy laws. . .”).

73. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down state sodomy laws), *rev’g* 478 U.S. 186, 190-96 (1986); *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

74. The Supreme Court has not decided the question whether sexual orientation is a suspect classification under Equal Protection analysis or whether such discrimination might properly be analyzed as a form of sex discrimination justifying intermediate scrutiny under *Craig v. Boren*, 429 U.S. 190, 199-210 (1976). In *Romer v. Evans*, 517 U.S. 620, 626-36 (1996), the Court used rational basis scrutiny to invalidate a state constitutional amendment forbidding state and local officials from enacting or enforcing policies protecting gays from discrimination. The Court likewise decided that Congress could not target same-sex marriages in *United States v. Windsor*, 570 U.S. 744, 744-47 (2013). Though neither *Romer* nor *Windsor* formally decided the level of scrutiny applicable to sexual-orientation discrimination, the decisions suggest the Court will look especially closely at government policies targeting gays as a form of animus, even if that close look comes under the guise of rational basis review. *See* Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 *SUP. CT. REV.* 183, 284. On the other hand, the unusual sweep of the law challenged in *Romer* may limit the holding to its facts.

75. Justice Goldberg started to sketch a role for the Ninth Amendment in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 486-99 (1965) (Goldberg, J., concurring). But the Court has done nothing with it.

76. *McDonald v. City of Chicago*, 561 U.S. 742, 805-59 (2010) (Thomas, J., concurring).

77. The Slaughter-House Cases, 83 U.S. (1 Wall.) 36, 78-83 (1872). Several valiant search parties have turned up little. *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST* 22-30, 98 (1980); Phillip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round at Last”?*, 1972 *WASH. U. L.Q.* 405, 405-20.

dure protections guaranteed by the Due Process Clause were powerful weapons against state prosecutions of gay people for a variety of criminal offenses, including the violation of sodomy laws.⁷⁸ The Fourth Amendment also deserves an honorable mention for preventing police from barging into private gay spaces, such as homes, without sufficient justification.⁷⁹ The dismissal of the charges against Henry Gerber was based on the warrantless search, after all.

Yet even these protections did not significantly reduce arrest rates of gay people for consensual sexual crimes “until gay political power forced police departments to consider their interests.”⁸⁰ The development of gay political power, however, has depended in the first instance on the liberty of gays to organize in groups free of state regulation impinging on their internal affairs, including the content of their message and the composition of their membership. This freedom, in turn, depends on a strong and principled First Amendment committed to protecting unpopular expression and association.

IV

Oliver Wendell Holmes never met Henry Gerber. Holmes would have found the Society for Human Rights incomprehensible, something more akin to the bizarre sex cult Chicago police thought they had discovered rather than the noble experiment Gerber thought he was launching. But if it’s true that the best test of truth is the power of the thought to get itself accepted in the competition of the market, the idea of freedom and equality for LGBT people has attained the status of Holmesian truth.

The norms the state enforces are as changeable as culture itself. When LGBT advocates defend the role of the state as enforcer of social norms at the expense of speech and expressive association, I think about the painful gay ordeal with the caretaker state. In Gerber’s Germany, there were nightclubs for gays in the 1920s and concentration camps for them in the 1940s. The relative tolerance of Gerber’s pre-Depression New York gave way to the repression of the 1930s.⁸¹

There is a cautionary lesson in this. Somewhere, someday we may again hear the state’s call to heel. Comes that day we will look for sanctuary. We will be relieved to find the constitutional experiment known as the First Amendment still going strong, large enough to accommodate dissent about ultimate good and sturdy enough to fend off the state’s long and ready list of worthy causes.

78. ESKRIDGE, *supra* note 54, at 101–04.

79. *Id.*

80. *Id.* at 104.

81. CHAUNCEY, *supra* note 4, at 331–54.

