
THE CONSTITUTIONAL PERILS OF MODERATION: THE CASE OF THE BOY SCOUTS

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Oftentimes it is tricky business to predict decisions of the United States Supreme Court in close cases. In recent times, perhaps, that task has been somewhat easier because of the five-to-four split in the Court that has characterized many of its decisions on federalism¹ and the Commerce Clause.² But it was something of a surprise that the Court's recent decision in *Boy Scouts of America v. Dale*³ reinforced this ever-hardening divide, and perhaps even more notable that the five conservative justices arguably slipped again into activist mode by holding that the Boy Scouts had a First Amendment right of "expressive association" that allowed them to exclude an avowed homosexual from their ranks. The casualty in this case was New Jersey's "Law Against Discrimination," at least insofar as it forbade the Scouts from discriminating against Dale on grounds of his sexual orientation.⁴

Dale gains significance because of the bluntness with which it presents the central question: Is the Boy Scouts within its First Amendment right to dismiss an adult troop leader solely because he is an avowed homosexual? Stated in a nutshell, this case presents a classic conflict between two principles of the highest import. On the one side stands the freedom of expression, including the freedom of association to express, as

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1. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999).
2. *See, e.g., United States v. Morrison*, 120 S. Ct. 1740 (2000).
3. 120 S. Ct. 2446 (2000).
4. N.J. STAT. ANN. § 10:5-1 to -49 (West 1993 & Supp. 2000).

enshrined in the First Amendment.⁵ On the other side stands freedom from discrimination, including, most emphatically, discrimination by other private parties, as embodied in the various civil rights laws that populate our statute books. Freedom of association, in speech as elsewhere, requires that people be free to associate, or not associate, with others, no questions asked. Freedom from discrimination requires that private individuals and groups exclude from their decisionmaking calculus those characteristics that are held irrelevant by the state. In a regime of freedom of association, all agreements require unanimous consent, and any individual can withhold consent at will. Under a regime of freedom from discrimination, refusal to deal may be arbitrary, but it cannot be for those reasons declared illegal by statute. The Constitution accords both rights the highest status. Strict scrutiny is the norm for statutes that limit the freedom of expressive association. A compelling state interest is said to exist in eliminating all discrimination, public or private. The irresistible force inevitably collides with the immovable object. In this case the new activist wing of the Supreme Court held that the principle of freedom of association was an immovable object, while the dissenters found the antidiscrimination principle an irresistible force—or at least a compelling state interest.

As a matter of outcomes I think that the majority reached the right decision. But its grounds for decision were too narrow. Any constitutional imperative worth its salt has to occupy a large portion of the legal terrain. But constitutional acreage, like all territories, is a scarce resource that can accommodate only a finite number of discrete principles. The right outcome in this case should not depend on a delicate balance of what kinds of organizations count as expressive organizations under the First Amendment. Rather, any proper decision must recognize that the state has no interest in counteracting discrimination by private associations that do not possess monopoly power. The fine-spun efforts to shoehorn freedom of association into some ill-defined expressive box will breed only pointless and arcane distinctions. What must be recognized is that freedom of association is “derivative” not only of speech, but also of liberty and property as ordinarily conceived. The upshot is that all private associations, regardless of their internal structure and stated purposes, should receive the same freedom afforded the Boy Scouts in this case.

5. *E.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Freedom of association is “among the preferred rights derived by implication from the first amendment’s guarantees of speech, press, petition, and assembly.” LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1010 (2d ed. 1988).

As a matter of basic theory, the outcome ought to differ only in those cases where claims for freedom of association are asserted by firms or institutions that occupy some monopoly position. Quite simply, the instinct runs as follows. The monopolist leaves his customers with no choice save that of doing without. To offset that powerful advantage, he is therefore obliged to take all customers and to do so at reasonable and (perhaps) nondiscriminatory rates. The precise rules of regulation are of course very much up for grabs, and I have discussed some of these at length elsewhere.⁶

The difficulty in this inquiry is the identification of those institutions that possess a sufficient level of monopoly power to justify this deviation from the general rule of freedom of association. Certain government bodies clearly have that power because their monopoly is entrenched as a matter of law. All citizens must clear customs through a government-operated facility, for example. Similarly, all individuals must obtain permits to build homes or to cut down timber. On the private side, however, it is harder today to find organizations that qualify as stable, long-term monopolists. In earlier times, common carriers and inns frequently held that position. There could easily be only one stagecoach or railroad that ran between two points, and only one inn on route at which to spend the night. But the advance of technology has weakened these private monopoly chokeholds. Air, bus, train, and livery service may supply transportation between two points. Therefore, the element of monopoly now may be found in those essential facilities that lie at the center of some hub-and-spoke networks, whether they be for transportation or for communication over the Internet. It may therefore be appropriate to consider how these older regimes of regulation carry over to new contexts.

But whatever the precise contours of classical monopolies, it pushes very hard to claim that the Boy Scouts occupies a monopoly position in the market for dealing with youth. To be sure, it occupies a distinctive niche in the marketplace, which helps explain its durability. But for each of the activities it provides, it faces serious competition from a broad range of institutions. Thousands of individuals and institutions offer summer camp and after-school activities, for example, and the astute consumer could easily decide to acquire the full range of child-centered services from a wide range of charitable, religious, and private providers. The Boy Scouts thus competes with everything from Little League Baseball to 4-H Clubs, not to mention the possibility of other new entrants in any portion of its

6. For a discussion, see RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 298–318 (1998).

business. Even if the monopoly rules should apply to some network industries, they hardly seem to apply in this context. Outside the context of network industries, the greatest protection for all individuals lies not in a coercive antidiscrimination law, but in institutional redundancy—the ability for individuals to enter and exit a wide range of organizations as they see fit.

Such then is the ultimate goal. The path by which I shall pursue it starts with narrower matters. Part I gives a brief overview of the opinions in this case. Part II disputes the proposition put forward by the Supreme Court dissenters that expressive rights only belong to those who state clear and unequivocal positions. Part III seeks to outline the correct relationship between freedom of association and the nondiscrimination principle, confining the latter as an antidote to individuals or organizations that have monopoly power. Lastly, Part IV argues that the distinction between expressive associations, which are protected, and nonexpressive associations, which are not, is indefensible both as a matter of political theory and constitutional law.

I. BACKGROUND

The dispute in *Dale* arose when the Boy Scouts decided to expel James Dale from membership because he was an avowed homosexual. As so often happens with test cases, the aggrieved party was the perfect plaintiff.⁷ By all other standards, Dale fit the bill of the model Scout. He worked his way up through different Scout troops under the jurisdiction of the Monmouth Council, starting at age eight as a Cub Scout in 1978 and ending as an Eagle Scout (the highest scouting rank) in 1988. Along the way he garnered some twenty-five merit badges. After finishing with the Scouts, he became an adult member of the Scouts in 1989. While a student at Rutgers University he recognized that he was gay and openly acknowledged his homosexuality to family and friends. His story was written up in the *Newark Star-Ledger*. When it came to the attention of Monmouth Council Scout Officials, Dale was asked to resign. That decision was subsequently upheld by a Review Committee of the Northeast Region. Dale thought it would be futile to appeal the decision to the National Council, so he chose instead to challenge the expulsion decision under New Jersey's Law Against Discrimination (LAD), which provides in part: "All persons shall have the opportunity . . . to obtain all the

7. The facts of the case are summarized here from the majority opinion. See *Dale*, 120 S. Ct. at 2449.

accommodations, advantages, facilities, and privileges of any place of public accommodation, . . . without discrimination because of . . . affectional or sexual orientation”⁸

The New Jersey Supreme Court gave the statute a broad reading to effectuate its liberal remedial purposes. For starters, it rejected the Boy Scouts’ claim that it could not be classified “a place of public accommodation” because it did not operate at any fixed location. That determination was, of course, strictly one of statutory construction. It does not raise any broad question of principle, for the statute could be easily amended to include organizations as well as places of accommodation. Indeed the New Jersey Court’s somewhat jarring reading of the term “place of public accommodation” may well be more in keeping with the legislative intention than the rival interpretation that has also garnered substantial support in the reading of other statutes.⁹

The Scouts fared no better in trying to shoehorn its case into the narrow exceptions allowing for discrimination under the LAD. More specifically, after its sweeping definition of public place of accommodation, the LAD contains three separate exemptions from the general statutory command. The first reads, “nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private.”¹⁰ I confess that I do not have an ideal interpretation of the phrase “distinctly private.” Distinctly private in this context could not cover all institutions that were not owned by the state, for that reading would make hash of the general sweep of the basic injunction, which is aimed at countless kinds of private activities including “any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp,”¹¹ and the list goes on. Rather, the phrase has to refer to those private organizations that are, as the Supreme Court intimated in *Roberts v. United States Jaycees*, highly selective in their admissions and recruitment programs.¹² The Boy Scouts could not claim to be a “distinctively private” club or organization because it did not exercise the requisite “selectivity” in choosing its membership.

8. N.J. STAT. ANN. § 10:5-4 (West 1993 & Supp. 2000).

9. For the opposite view that membership organizations do not come within the meaning of “other place of exhibition or entertainment” under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000(a)–(b), see *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1269 (7th Cir. 1993). See also *United States Jaycees v. Iowa Civil Rights Comm’n*, 427 N.W.2d 450, 454 (Iowa 1988) (same interpretation under local statute).

10. N.J. STAT. ANN. § 10:5-5(1)(West 1993 & Supp. 2000).

11. *Id.*

12. 468 U.S. 609, 621 (1984).

Similarly, the Boy Scouts was not an educational facility operated by a bona fide religious or sectarian institution. The New Jersey Supreme Court thus duly relegated this exception to the lowly status of “a narrowly drawn statutory exclusion.”¹³ Finally, the Boy Scouts did not act *in loco parentis*: After all, there are many issues, including those relating to sexuality, that parents discuss with their children but the Boy Scouts as a matter of principle does not. The LAD applied, and the statutory exceptions did not.

In reaching its decision, the New Jersey Supreme Court did not, in my view, make any bold departure from earlier Supreme Court precedent. In *Roberts*, for example, the question before the United States Supreme Court was whether to strike down on First Amendment grounds a Minnesota statute that banned sex discrimination, once again in places of public accommodation.¹⁴ In sustaining that statute, Justice Brennan was not indifferent to the First Amendment claims of freedom of association, and might well have allowed them to prevail if the Jaycees had been the right kind of association to make the claim. However, the types of organizations that received elevated First Amendment protection were limited. The Jaycees (like the Boy Scouts) was not an intimate association to which antidiscrimination laws could be made to apply only with difficulty.¹⁵ In addition, the Jaycees was found not to be an organization with a strong expressive message that would be diluted or distorted by the application of the antidiscrimination laws. Indeed, as a mainstream organization the Jaycees lacked the militant philosophy that would be affronted by a requirement to admit women into its ranks. At bottom, the Jaycees could not overcome a form of behavioral estoppel. The “Jaycees already invites women to share the group’s views and philosophy and to participate in much of its training and community activities.”¹⁶ The upshot there was that any “claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not

13. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1214 (N.J. 1999) (relying on the interpretation of the New York Human Rights Law, N.Y. EXEC. LAW § 292 (Consol. 1995 & Supp. 2000), construed in *United States Power Squadrons v. State Human Rights Appeal Bd.*, 452 N.E.2d 1199, 1204 (N.Y. 1983)).

14. 468 U.S. 609, 612 (1984).

15. As an aside, the question of intimate associations raises difficulties of its own. The traditional “morals” head of the police power allowed for their regulation. Today, the tendency is to hold that these regulations are outside the power of the state, even as economic regulations, however ill-conceived, fall within that power. But even in the new synthesis, the antidiscrimination principle comes out second best here. Even our Supreme Court would chafe at the idea that one person commits a wrong when he or she refuses to marry another because of race, creed, or religion, let alone sexual orientation.

16. *Roberts*, 468 U.S. at 627.

permitted to vote is attenuated at best.”¹⁷ The world is awash in balancing tests. The state interest in eliminating discrimination in private organizations did not dim, so the balance was easy to draw. “We are persuaded,” Justice Brennan concluded, “that Minnesota’s compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members’ associational freedoms.”¹⁸

The Supreme Court’s decision in *Dale* did not overtly challenge the conceptual framework established in *Roberts*; indeed, it self-consciously purported to build on it. Through an adroit use of the balancing test, Chief Justice Rehnquist came out the other way. He found that the First Amendment interest in association was stronger in *Dale* than it was in *Roberts*, and the state interest in applying its antidiscrimination law perhaps was weaker.

On the first point, Rehnquist signaled his dissatisfaction with the New Jersey insistence that the Boy Scouts “do not associate for the purpose of disseminating the message that homosexuality is immoral.”¹⁹ In his view, “[a]n association must merely engage in expressive activity that could be impaired in order to be entitled to protection.”²⁰ Second, he refused to probe the intensity with which the Boy Scouts held its particular beliefs. For him it did not matter that the Boy Scouts equivocated on a position that did not receive unanimous internal support, or that the organization was willing to tolerate the defense of homosexual activities by heterosexual Scouts. What he cared about, rightly in my view, was the sincerity of the belief, without being troubled, as were the dissenting Justices and the New Jersey Supreme Court, about either the internal coherence of its position or the ardor with which it was advanced. “The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.”²¹ The contrast between this sentence and the Brennan quotations noted above surely signals, for better or worse, a substantial departure from *Roberts*. Second, Rehnquist was evidently troubled by

17. *Id.*

18. *Id.* at 623.

19. *Dale*, 120 S. Ct. at 2454 (quoting *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1223 (N.J. 1999)).

20. *Id.* Rehnquist here relied on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), to stand for the proposition that a St. Patrick’s day parade was protected even though its purpose “was not to espouse any views about sexual orientation.” *Dale*, 120 S. Ct. at 2454.

21. *Dale*, 120 S. Ct. at 2455.

extending the idea of public accommodation to cover the Scouts. He thus noted that, in its original conception, the term “public accommodation” applied to inns and trains. It was then extended to cover places where the public was expected to be invited, such as taverns, restaurants, retail shops, and libraries. And finally it was, as construed by the New Jersey Supreme Court, extended to cover private operations that are not linked to any particular place at all.²² Rehnquist clearly thought that the state interest in protection against discrimination was not uniform across all these entities, even if they were treated in the same fashion under state law. Thus, in *Dale*, the First Amendment received greater weight, while the state interest in combating private discrimination received less. The combined effect was enough to overturn the statute.

For its part, the dissent by Justice Stevens closely followed the decision of the New Jersey Supreme Court. It is not hard to predict where a Justice will come out when his opening salvo reads, “New Jersey ‘prides itself on judging each individual by his or her merits’ and on being ‘in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society.’”²³ With this perspective (or objective) disclosed, Stevens essentially adopted the constitutional interpretation of the New Jersey Supreme Court. The range of opinions certainly leaves much room for commentary.

II. THE DANGERS OF PROBING DEEPLY

My first quarrel is with the New Jersey Supreme Court and the four dissenters on the Supreme Court who followed its lead. The source of the grievance is easy to state: In the course of their balancing test, these judges have adopted a position that restricts the full protection for expressive liberties only to those organizations that adopt extreme social positions. Of course, this is something of an overstatement. I doubt that Justice Stevens or anyone else thinks that our two mainstream parties are not allowed to exclude individuals whose views do not square with their own. Organizations that are in some sense solely devoted to political activities gain from the purity of their mission some degree of freedom from government control. But organizations like the Scouts and the Ku Klux Klan do not have any single political function, and it is to this class of organization that our analysis should be directed. The implications of the

22. *Id.* at 2455–56.

23. *Id.* at 2459 (Stevens, J., dissenting) (quoting *Peper v. Princeton Univ. Bd. of Trustees*, 389 A.2d 465, 478 (N.J. 1978)).

approach might offer some comfort to the Ku Klux Klan or to various hate groups, only to play havoc with the position of mainstream institutions who are now put to this unnecessary choice: voice extreme positions or choose moderate ones and forfeit your right to manage your internal affairs. I have no direct experience whatsoever with the Boy Scouts, but reading through the record leads me to believe that the Boy Scouts offers a textbook example of the dangers of any position that ties the level of constitutional protection to the articulation of an organizational belief structure.

The Scouts is no penny-ante operation. Started in 1910, the organization has had over 87 million members during its lifetime; as of 1992, it had about four million youths and one million adults as active members.²⁴ It has grown from about 4.3 million members in 1997 to around 5 million members today.²⁵ Natural attrition is a standing peril to all such organizations. To avoid the erosion of this base, the Scouts continuously utilizes intensive campaigns to recruit and retain its members. The use of television and magazine advertisements, the organization of well-conceived drives to attract new members, the collaborations with a wide range of civic organizations, and even the wearing of the Scouts' uniform in public places all help extend its membership base. In looking at this membership, the New Jersey Supreme Court got matters partially right when it noted that "[the Scouts'] success in attracting members is at least partly attributable to its long-standing commitment to a diverse and 'representative' membership, as well as its aggressive recruitment through national television, radio, and magazine campaigns."²⁶

Consistent with the demands of its broad membership base, the Boy Scouts' general philosophy is a model of diffidence, evasion, and restraint. It contains a broad list of general nostrums that right-thinking people would find hard to deny (and, all too often, hard to keep). Thus, Scout Law requires scouts to be Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean and Reverent.²⁷ The Scout's Oath does require Scouts to be "morally straight," but here straight is not in opposition to gay, but means only "[t]o be a person of strong

24. *Id.* at 2476.

25. Andrew Jacobs, *Victory Has Consequences of Its Own*, N.Y. TIMES, June 29, 2000, at A28 (noting that the Boy Scouts risks a backlash for ousting Dale from its membership).

26. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1200-01 (N.J. 1999).

27. *Id.* at 1202. The Scout Oath reads in full:

On my honor I will do my best
To do my duty to God and my country and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong, mentally awake, and morally straight.

Id.

character, [and to] guide your life with honesty, purity, and justice.”²⁸ It is easy to attack this general prescription as yet another empty moral bromide devoid of substantive content, and to argue that the Scouts is guilty of an opportunistic ex post reconstruction of its own principles and policies when it claims in litigation that the term “morally straight” contains an implied condemnation of homosexual behavior. It is also easy to assert that the Scouts cannot have strong principles for internal guidance when it refuses to espouse any single religion and insists on its own nonsectarian nature by holding that “[r]eligious instruction is the responsibility of the home and church.”²⁹ Likewise the Scouts looks weak, diffident, and slightly Victorian on matters of sexuality, when it only endorses two propositions: (1) “for the followers of most religions, sex should take place only between married couples”; and (2) the Scouts does not formally discuss matters of sexuality, because the organization “believes that boys should learn about sex and family life from their parents, consistent with their spiritual beliefs.”³⁰ It makes sense for the Boy Scouts to adopt a strategy of soft avoidance on sex education for the young. If there is no consensus on how it should be done by the Scouts, then it is better to give the issue a low profile within the organization, at least as a matter of explicit statement in fundamental Scout Law.

This same wimpy, middle-of-the road outlook is reflected in other portions of the Scouts’ credo. The Scouts is nondenominational because it does not wish to drive away Catholics and Jews, or perhaps it is Mormons and Southern Baptists, or perhaps Methodists and Episcopalians. As an outsider, I could not hazard a guess as to which faction of the Scouts is tolerant of which other faction; probably there is a commendable reciprocity in the spirit of cooperation. That said, a sappy nondenominationalism may serve the Scouts as a global organization far better than any hard-edged dogma or creed. Any close alliance with one religion will drive away believers in other faiths.

In light of the demands on its organization, no one should think for a second that the Scouts’ bland declarations represent a lack of understanding, conviction, or foresight. Rather, they represent the kind of studied compromise that a large and successful organization must make to stave off schism or disintegration. And it does take a certain courage to resist devoted loyalists who want a stronger edge to the organization. Noncommodifiers should admire the way in which the Scouts has

28. *Id.* (quoting BOY SCOUTS OF AMERICA, THE BOY SCOUT HANDBOOK 551 (10th ed. 1990)).

29. *Id.* at 1203 (quoting Scoutmaster training manual).

30. *Id.* (quoting BOY SCOUTS OF AMERICA, THE BOY SCOUT HANDBOOK 528 (10th ed. 1990)).

organized its affairs and they should recognize the dangers of state intervention that would force the Scouts to take hard-edged positions.

This same equivocal attitude carries over to the issue of homosexuality. The Boy Scouts is dedicated to the training of young, sometimes impressionable boys. It takes little imagination to think that the parents of scouts might well be concerned about the identity of the individuals who supervise and care for their children. They might even fear an increased risk of child molestation when these youths would go off on camping trips with avowed homosexual young men. These anxious parents might not be assured by argument that these forms of aberrant behavior are unprotected by the civil rights laws, that they are not likely to occur in the Scout setting, and that they are subject to harsh punishment after the fact, which serves as a strong deterrent before the fact.

Taking a stand against homosexuality appears, then, to come at a relatively low price. It is doubtful that scouting draws much of its membership from the children of homosexual parents. But we can be confident that the underlying social reality is far more complex. Many of the Scout families who are uneasy about homosexual practices—especially as it relates to their own children—do not regard themselves as bigoted or prejudiced, just worried, troubled, and confused. That population will not take kindly to strong declarations that overstate the level of their uneasiness and force them to publicly defend strident anti-gay and lesbian positions to which they cannot give full-throated endorsement. Such members, however, may be able to identify activities that they are prepared to tolerate at a distance but that they would not wish to see or condone close at home. In order to hold their complex coalition together, it may make sense for the Boy Scouts to gravitate toward a compromise that proves more stable in practice than coherent in theory. Go soft on the formal and explicit denunciations of gay practices, but nonetheless keep those practices out of the Scout troops in order to meet these parental demands. That position of course will cause it to lose some hard-line members who will migrate to fringe organizations that take harder lines against homosexual behavior. But that limited exodus from the Scouts has the virtue of reducing the span of opinions within the Scouts so as to ease its internal governance position. Muddling through has real benefits.

If I have read the tea leaves correctly, it is no surprise that the Boy Scouts refused to take a hard line against homosexuality in the abstract, and chose not to voice all the fears and concerns of its membership either in its officially prepared written materials or in the course of litigation. The Supreme Court dissenters and the New Jersey Supreme Court went to great

lengths to castigate the Scouts for lacking the courage of its ostensible principles. If it had its way, the Scouts' studied equivocation and retrenchment would have set it up for the judicial coup de grace. The group that does not care about its beliefs enough to take extreme positions cannot prevail in a contest with a state nondiscrimination imperative that does not show similar equivocation and restraint. The New Jersey Supreme Court did not have to break a sweat in order to show that the Scouts apparently lacks the courage of its own convictions in its refusal to make explicit its apparent belief in the immorality of homosexual behavior. And Justice Stevens took up the party line when he lamented: "In light of [the Scouts'] self-proclaimed ecumenism, furthermore, it is even more difficult to discern any shared goals or common moral stance on homosexuality."³¹ In his brief opinion, Justice Souter echoed the same theme: "[N]o group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way."³²

Nothing could be more destructive of the rights of expressive freedom than these ill-considered statements. It is a first-class blunder to think that moderate organizations really do not object to external discipline and thus can be cheerfully coerced into doing things against their will. The key question is this: Why force the Scouts to express a strong, consistent position from the outset on the immorality of homosexuality in order to preserve its decisional autonomy?³³ Why should the First Amendment protect only the extremes of the political distribution, but not the associational preferences of large, mainstream organizations?

This anomaly is especially odd when set against the background of First Amendment law generally, which reserves its greatest suspicion for content-based distinctions.³⁴ But just those distinctions are invoked when dissenters in *Dale*, like the Court in *Roberts*, look first at the views of the

31. *Dale v. Boy Scouts of Am.*, 120 S. Ct. 2446, 2462 (2000) (Stevens, J., dissenting).

32. *Id.* at 2479 (Souter, J., dissenting).

33. *See Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1224 (N.J. 1999). On the price of equivocation, note that the New Jersey Supreme Court wrote:

Boy Scouts also points to a 1978 position paper in support of its argument that it associates for the expressive purpose of advocating the immorality of homosexuality. We observe that the position paper was not disseminated to Boy Scout members, and decline, therefore, to view it as representative of the members' shared views.

In addition, Boy Scouts refers to four other position papers, all written after Dale's expulsion. The self-serving nature of these papers is apparent.

Id. at 1224 n.12 (citation omitted). Justice Stevens wrote in a similar vein. *See Dale*, 120 S. Ct. at 2463-64 (Stevens, J., dissenting).

34. *See, e.g.*, Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

Scouts or Jaycees directly, and then conclude that their pallid content means that the statutory limitations on their freedom of association should count for more than similar restrictions on organizations with more emphatic, prejudiced, and bigoted views. The obvious incentive is for organizations to take extreme positions in order to avoid the heavy hand of state regulation.

Unfortunately, even that chilling option is not available under the Stevens test. To see why, it is instructive to focus on Justice Stevens' evasive response to the question raised by the Boy Scouts in its brief: Could New Jersey amend its Law Against Discrimination to force the Boy Scouts to admit girls into its ranks, and the Girl Scouts to admit boys? To his credit, Justice Stevens was obviously troubled by his own fierce loyalty to the antidiscrimination laws. But in good lawyerly fashion, he refused to answer this question on principle. Instead he took refuge behind the procedural point that the New Jersey statute contained an exemption for "any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex," including all camps and bathing facilities.³⁵ But now suppose that a majority of the New Jersey Legislature decides that the statute makes sense for baths and toilets, but not for camps. By Justice Stevens's own test, it looks as though the separate scout organizations are no more immune from state regulation than all-boys or all-girls schools. After all, the Boy Scouts does not think that girls are immoral per se: It is willing to invite them onto its premises for dances and cooperate with them on nature walks. How then can it obtain a First Amendment right of association if the state decrees that integration by sex is the order of the day to prevent, of course, the rampant sexism that parallel organizations induce in society? That reasonable minds could differ on this point is for Stevens a reason for the courts to defer to the legislature. Rightly understood it is the decisive reason for the legislature to defer to the men and women who run the Scouts. That Stevens' test demands such odd results should encourage us to reexamine the basic relationship between freedom of association and the antidiscrimination principle. Rightly understood, the latter comes out second best.

35. *Dale*, 120 S. Ct. at 2468 n.13 (Stevens, J., dissenting) (quoting N.J. STAT. ANN. § 10:5-12(f)).

III. FREEDOM AND DISCRIMINATION RECONSTRUCTED

One striking feature of both *Roberts* and *Dale* is the ease with which these opinions hold that the antidiscrimination principle counts as a compelling state interest that limits the ability of voluntary associations to determine their own membership. On this count, Justice Stevens repeats the standard conclusion from *Roberts*: “We found the State’s purpose of eliminating discrimination is a compelling state interest that is unrelated to the suppression of ideas.”³⁶ He then picks a refrain of the New Jersey Supreme Court that the Law Against Discrimination is needed to get rid of the “cancer” of discrimination.³⁷ But he offers no explanation of why this should be that case.

The New Jersey Supreme Court, however, did take a stab at explaining why the elimination of discrimination receives its high place in the constitutional firmament. It led off with the obligatory recitation of *Bradwell v. Illinois*, a discredited opinion which held that it was proper for the state to ban women from the practice of law because of their delicate condition and out of respect for their natural destiny as wives and mothers.³⁸ But at no point did the New Jersey Court note that a legal ban by the state has very different properties than a private decision by an individual law firm not to hire a female lawyer for these or any other reason. So long as the market is open, she can still join some other firm or indeed start her own practice. The firm is not coterminous with the market. Some firms may well discriminate against women, but others will discriminate in their favor. For whatever it is worth, there is probably more affirmative action to help women (at least at the entry level) than there is discrimination against them, and it is very hard today to put together any coherent set of data that points to some system-wide disadvantages that women suffer under the current system.³⁹ The range of options that are left open to women (or indeed to men as well) are far greater when they are spurned by a single firm operating within a competitive industry with free entry than when a state rule forces them out of the market altogether. The same conclusion is still more true of gays and lesbians who have notable

36. *Id.* at 2467 (Stevens, J., dissenting) (citing *Roberts*, 468 U.S. at 623–26).

37. *Dale*, 120 S. Ct. at 2459 (Stevens, J., dissenting) (echoing the theme of the New Jersey Supreme Court in *Dale*, 734 A.2d at 1208).

38. 83 U.S. 130, 141 (1872). I have addressed this theme at greater length in Richard A. Epstein, *Liberty, Patriarchy, and Feminism*, 1999 U. CHI. LEGAL F. 89, 99–100.

39. For one convenient collection of data, see DIANA FURCHTGOTT-ROTH & CHRISTINE STOLBA, *WOMEN’S FIGURES: AN ILLUSTRATED GUIDE TO THE ECONOMIC PROGRESS OF WOMEN IN AMERICA* (1999).

success in labor markets, in part because their relative lack of family entanglements makes it easier for them to focus on their work. Indeed, the New Jersey Court's evident confusion on this issue was marked by its own conclusion:

The sad truth is that excluded groups and individuals have been prevented from full participation in the social, economic, and political life of our country. The human price of this bigotry has been enormous. At a most fundamental level, adherence to the principle of equality demands that our legal system protect the victims of invidious discrimination.⁴⁰

This overbroad proposition conveniently relies on the passive voice ("excluded groups") without stating who does the excluding. It thus obscures the critical distinction between state and private action. To be sure, any form of public discrimination that prevents any adult from fully participating in the social, economic, and political life of our country is indefensible. But that argument only goes to show that the common restraints that limited the legal capacity of any individual to vote, to enter into contracts, to give testimony in court, and otherwise to participate in the legal system should be removed as quickly as possible.⁴¹ Here, however, the New Jersey Supreme Court did not even make an effort to explain what additional social harms have occurred from the private refusal to deal. Yet in all these situations, transaction costs between the parties are low, so that a bargain could be arranged if membership in the organization was worth more to the individual than exclusion was worth to the organization to refuse them membership. In practice, we should not hold our breath on this point because the deep difference in philosophical position probably makes it impossible for individuals with strong and explicit differences in worldviews to come together. But in itself that gulf should caution against allowing one side to impose its will on the other, and encourage us instead to allow for the efficient self-sorting that only voluntary organizations can provide. To be sure, there are always social losses that follow from exclusion, whether we speak of private property or voluntary organizations. But by the same token it cannot be assumed that rejecting the presumption in favor of freedom of association improves overall social welfare solely because it eliminates this one form of social loss. The overall picture is far more complicated because it must take into account the decline in utility that current members derive from their affiliation once the rules of

40. *Dale*, 734 A.2d at 1227 (footnote omitted).

41. I have defended this position in Richard A. Epstein, *Two Conceptions of Civil Rights*, 8 SOC. PHIL. & POL'Y 38 (1991).

admission are altered. Some individuals could be so upset that they withdraw from the organization; others could decide to remain, but only with lower levels of satisfaction and involvement. Owing to the subjective values involved, it is difficult to quantify the relative size of these losses from the outside. But recognizing these measurement difficulties makes it all the more important to cut beneath the organizational veneer to recognize that the interest of the organization consists of some aggregation of the self-defined interests of its membership. Yet nowhere are the losses from forced association taken into account in striking the appropriate constitutional balance.

The New Jersey Court was similarly uninformative in its failure to give any content to the term “invidious discrimination.” Does affirmative action count as invidious discrimination? Sometimes? Always? In fudging on the term, that court ignores the possibility that the voluntary segmentation of the population into groups that have greater internal coherence may be advantageous for their members.⁴² So long as civil capacity is assured, no individual has to be the victim of discrimination as each is free to forge private associations that it values. In private markets, sober and sensitive people can—and do—migrate away from bigots and zealots. They do not have that exit option in a state-dominated system in which the strength and worth of various beliefs is decided not by the parties, but by the courts, who rely on their own stereotypical vision to decide what forms of discrimination are appropriate and what are not.

Having said all this, the question then arises, is there any reason ever to recognize antidiscrimination as an offset against the freedom of association? One possible answer to that question takes refuge in one of the fine points of First Amendment law, which holds that the Court should ignore the “incidental” effect that the application of general legal principles has on the regulated party.⁴³ In this context, the argument might be that an antidiscrimination law is a general regulation without a content-specific target, and should therefore be allowed to pass muster in much the same fashion as the National Labor Relations Act,⁴⁴ the Fair Labor Standards Act,⁴⁵ the antitrust laws,⁴⁶ or, in at least some contexts, the zoning laws.⁴⁷

42. For my discussion of this point, see RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 60–72 (1992).

43. *See, e.g.,* *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (allowing promissory estoppel theory to be brought by informant against newspaper that published information supplied in confidence).

44. *See, e.g.,* *Associated Press v. NLRB*, 301 U.S. 103 (1937).

45. *See, e.g.,* *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946).

46. *See, e.g.,* *Associated Press v. United States*, 326 U.S. 1 (1945).

But in these cases the use of incidental impact adds nothing to the analysis to show why indirect regulation is more acceptable than direct forms of content restriction. A restriction on speech, for example, may be justified consistent with a theory of individual freedom if it is designed to prevent the occurrence of a nuisance that itself would be actionable if it came to pass. But in a case such as *Dale*, it becomes hard, if not impossible, to treat the formation of a voluntary organization as falling into that category. To say that the restriction is incidental on speech therefore does not explain why or how that restriction is consistent with any general theory of freedom, of which freedom of speech is a part.⁴⁸

The overall picture, however, is more complex because it is possible to identify justifications for limitations on freedom of association that do not rely on conventional, ad hoc explanations of invidious social exclusion. The basic clue follows from the undisputed point that the antidiscrimination principle offers one means to control the excesses of state action. The state that must treat *A* in the same fashion as *B* loses the ability to single out one person for special treatment. As applied to coercive state action, the antidiscrimination principle helps counteract the actions of factions to shift wealth and opportunities around from one group of individuals to another. The most obvious risk of government misbehavior is the outright confiscation of the property of *A* which is then transferred over to *B*. But a system of state regulation could achieve that same result by imposing burdens solely on the *A*'s of the world for the exclusive benefit of the *B*'s. Indeed, frequently the state may craft rules that look formally neutral, but that have disparate impact upon members of different groups. A rule that requires uniform premiums for medical insurance regardless of age transfers wealth from the young to the old even if the contractual terms of coverage are identical for all required enrollees. Some judicial counterweight, whether we call it takings or substantive due process, becomes a sensible corrective for a dangerous tendency, even if it introduces some risks of its own.⁴⁹

47. See, e.g., *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 73 (1976) (Powell, J., concurring) ("I view the case as presenting an example of innovative land-use regulation, implicating First Amendment concerns only incidentally and to a limited extent.").

48. For a longer discussion of this point, see Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1023–32 (2000).

49. For an able, historical defense of substantive due process, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENTARY 315 (1999).

It would be a serious mistake to assume that only public bodies fall prey to the dangers of factionalism and favoritism. Private monopolies create a similar source of danger by creating the opportunity to distinguish between the services rendered and the prices demanded from different classes of customers. The regulation of common carriers, which include both transportation and communication carriers, starts from the premise that any private firm with a legal or de facto monopoly could engage in pricing or business practices that deviate from some social optimum.⁵⁰ The impulses for regulation in this context are two. First, the economic dangers of monopoly are easy to document in theory. The quantity of goods sold will be lower than in a competitive market, but the price charged per unit will be higher. As price exceeds marginal costs, there is good reason to believe that the monopolist not only secures a transfer of wealth from customers to himself, but also reduces the total amount of social welfare. A system of regulation that stops these practices may help to improve social welfare. Accordingly, a duty of nondiscrimination is one weapon in the arsenal to control the behavior of these firms.⁵¹ Because the individual customer has no other place to turn, our legal tradition has long stated that a common carrier cannot refuse individuals services without cause. If exclusion is not possible, then the firm cannot be allowed to charge whatever rates it sees fit to some segments of the markets who are willing to pay more for products and services of identical prices. Hence, long before the rise of the modern antidiscrimination principle, it was understood that common carriers could not draw arbitrary price distinctions between customers of a given class. Exactly how this normative command is put into practice is not our concern here. Suffice it to say that the legal regimes have often fallen short of the conceptual ideal, which would be to make the monopolist behave as though it were in a competitive industry.

In the present context, a second point reinforces the weakness of the case for applying the monopoly model to the Boy Scouts. Regulated industries typically supply standard commodities—electrical power,

50. The lineage is long. See, for example, *Allnutt v. Inglis*, 104 Eng. Rep. 206 (K.B. 1810), which relied on the earlier writing of Sir Matthew Hale. For the confused transfer to the United States, see *Munn v. Illinois*, 94 U.S. 113 (1876). For my analysis of the matter, see EPSTEIN, *supra* note 6, at 286–89.

51. See H.W. Chaplin, *Limitations Upon the Right of Withdrawal from Public Employment*, 16 HARV. L. REV. 555, 556–57 (1903).

Underlying the entire law of carriers, from the Year Books down to the present day, are three fundamental duties: first, to carry for any member of the public at all times and not merely when the carrier is so disposed; second, to give to each applicant exactly the same terms and accommodations as are given to every other under the same circumstances; third, to perform the services of the carrier's employment at reasonable rates.

Id.

telephone service, railroad transportation—and only work because the firm is largely indifferent to the identity and personal characteristics of its customers. No one looks to the power company for the moral development of the child, and no one thinks that the individuated provision of energy offers any long-term social good. The apparent need for regulation is matched with the sensible possibility for regulation. Yet once the traditional class of common carriers is expanded to cover the exhaustive statutory list of “places of public accommodation,” then the law seeks to regulate the provision of sensitive goods and services that are not close to fungible commodities. Camps and schools, for example, do not supply standardized services to passive consumers whose main task is to sit in a seat or to munch a sandwich. Individuation and moral development are key for these organizations, and therefore the model of the inn or the common carrier on the King’s Highway provides a very poor precedent.

This statement of these two constraints indicates just how far removed the Boy Scouts is from the appropriate use of the antidiscrimination principle. First, as argued earlier, the Boy Scouts does not have monopoly power. To be sure, the Scouts is a large organization with millions of members. But it has no ability to restrict any other private organization with either a religious or a secular orientation from entering into the market of providing programs that allow young people to navigate the bumpy road to maturity. Overtly religious organizations are, for example, actively involved in this business, as are all sorts of community groups. In line with general antitrust theory, size should not be regarded as tantamount to a monopoly power. The ACLU or the *New York Times* could, if it chose, decide to enter into the business directly with its chosen norms for membership. The politically correct do not have to sit on the sidelines while the Scouts advances its agenda.

Indeed the concern with monopoly, far from bolstering the antidiscrimination norm to private competitive firms, cuts precisely in the opposite direction. Justice Stevens makes much of the point that the Scouts has prized diversity and broad representation within its ranks.⁵² Diversity looks like the negation of monopoly power. But diversity is exactly what a nondiscrimination law thwarts. Make no mistake about it, when the state commands that no person or private organization shall discriminate on the basis of X, it has imposed a uniform, monopoly position on how all private organizations should be organized. The control of many diverse

52. See *Dale*, 120 S. Ct. at 2462–63 & n.3 (Stevens, J., dissenting) (citing Brief of Amicus Curiae Deans of Divinity Schools and Rabbinical Institutions at 8).

organizations is necessarily ceded in part to the state by the imposition of the antidiscrimination laws. Let the members of the organization decide that *X* is a bad role model for whatever reason, and their decision is now overridden by the state on the strength of a general pronouncement that has never been tested in the particular context to which it is now applied. The Hayekian insight about the importance of “local knowledge” holds as true in charitable and voluntary organizations as it does in firms.⁵³ Indeed, if anything the case is even stronger in this context, for in the absence of any obvious profit-maximizing metric, all sorts of subtle social and behavioral issues will determine organizational success and these factors are utterly beyond the power of the state with its “one-size-fits-all” regime to control.

It might well be argued in reply that a given organization is better off because of the diverse nature of its membership. In many cases that will be true, but presumably those who are in charge of its internal operation can make that decision for themselves without the benevolent intervention of the state. Once, however, the state sets the policy of what counts as appropriate grounds for the exclusion of this individual from that group, then this mandated diversity within organizations necessarily reduces diversity across organizations. The full range of private options is now displaced by a state monopoly—one that cannot be justified by the need to constrain private monopoly forces. No longer is it possible to establish a new all-boys or all-girls school or college; nor is it possible for parents to pick between rival scouting organizations, one of which will admit gay troop leaders into its ranks and another that will exclude them. The regulatory costs imposed are not limited to the countless individuals who must yield to a state-monopoly in determining the governance and membership in their private organizations. In addition, the public insistence on the one, true answer (a “cancer” cannot be a correct answer) to matters of social organization necessarily cuts off society-at-large from valuable information as to which kinds of organizations succeed with which constituencies and why. Competition and experimentation are thereby suppressed.

With all this said, the proper legal regime should run as follows. The initial rule allows all private organizations the power to select their own members and to set their own rules. All that dissenters should have is the exit option if their voice fails to persuade the organization to move in some desired direction. The rationale for this principle follows the general

53. See FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944); Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519 (1945).

rationale for any exercise of the principle of freedom of contract. The values expressed by the contracting parties have an inescapable subjective component that makes it wholly improper for outsiders to attach values and weights to the goals and aspirations of the parties for regulatory purposes. For its part, the antidiscrimination norm should be applied at most as a counterweight to monopoly in standardized markets when potential customers of a business have no alternative place to go.

IV. THE PROTECTION OF NONEXPRESSIVE ASSOCIATIONS: OF PROPERTY AND DUE PROCESS

Chief Justice Rehnquist's opinion should be commended insofar as it resists, on First Amendment grounds, the application of the antidiscrimination laws to expressive associations such as the Boy Scouts. But the question immediately arises whether it makes any sense to limit this protection to expressive associations, or whether it should be extended in principle to all associations generally. As matters now stand, the expressive/nonexpressive- (or in other cases the intimate/nonintimate-) association line is invoked to police a constitutional chasm. Let an association be expressive or intimate, and a high level of state justification is needed for its regulation—higher for Rehnquist than for Stevens. But let it be an ordinary economic association, and state regulation in derogation of property and economic liberties proceeds without pause. Only the bold and foolhardy would claim that current law allows business associations, large or small, public or private, out from under the thumb of the antidiscrimination laws.

That said, this ostensible divide cannot be defended on either political theory or constitutional law grounds. If the reasoning underlying *Dale* is applied correctly, then Title VII is flatly unconstitutional on three interrelated grounds: It violates the basic conceptions of liberty, property, and speech, all in a single blow. One clear caution sign is that the line between expressive and nonexpressive organizations does not leap out. The core illustration of a nonexpressive organization has to be the profit-making corporation that ships goods, provides services, and cares only for its bottom line. But it is sheer fantasy to assume that any successful organization fits this odd caricature of the firm, and is wholly indifferent to how it is perceived in the external world or by its own staff. It is commonplace to speak of "corporate cultures" and to understand that these refer to the way in which particular firms position themselves in the many markets, internal and external, in which they do business. Firms are acutely aware of the importance of maintaining good employee and

community relationships, and this in turn will influence the ways in which firms will seek to engage its members in voluntary community activities. It makes a huge difference whether a large firm confines its gifts to secular organizations or whether it offers financial support or personal assistance to churches, or for that matter the Boy Scouts once it has reaffirmed its determination to exclude gay members from its ranks. The decision whether or not to boycott South Africa before the end of apartheid, to refuse to permit smoking on the job, to voluntarily clean up a dumpsite, or to promote fat-free food all contain a strong expressive dimension. A business firm that refuses to hire workers that have criminal records, or who lack certain religious affiliations, also makes a statement as to how it views itself.

The list goes on and on. If the First Amendment applies, as Rehnquist insists, so long as the organization “merely engage[s] in expressive activity that could be impaired,”⁵⁴ then it follows that every organization engages in expressive activity when it projects itself to its own members and to the rest of the world. The theory of “social meaning,” as it were, assumes a constitutional significance that may not be welcomed by its champions. Alternatively, if it is urged that some less-generous reading of expressive behavior is appropriate, then we can ask first how this test is to be formulated, and next how it applies to the literally thousands of organizations that engage in business, charitable, religious, or recreational endeavors, or some mixture thereof. To take but one illustration among many, does a religious university have protection against the antidiscrimination laws in the choice of its faculty and its employees? If so, when its internal conception requires that everyone from the President to the janitor partake in morning prayers, does the First Amendment permit it to exclude nonbelievers from its ranks? If this option is given to religious organizations, can it be denied to an institution that is dedicated to diversity and gender equity? The short, unhappy truth is that the phrase “expressive association” does not function well as a term of exclusion. Quite simply, it cannot bear the weight that is thrown onto its fragile shoulders. It is not the byproduct of any general theory. It came into use, purely and simply, on the ground that the associational right is derived from the free speech right, and from the free speech right alone.

Yet this point cries out for a response. What the Boy Scouts sought was the right to exclude certain individuals not only from their ranks, but from their facilities. That right to exclude resonates, however, at least as

54. *Dale*, 120 S. Ct. at 2454.

well with the right to property and the rights of liberty generally as it does with the right to speech. After all, the Supreme Court has reminded us on countless occasions that the essence of private property is the right to exclude,⁵⁵ and surely that right is necessarily implicated when an association (which holds property in common) wishes to exclude someone from participating in activities that take place on its premises.

Likewise, the Due Process Clause protects the life, liberty, and property of all individuals. Here I think that a good case can be made for the principle of substantive due process. I shall not argue that point here, except to say that it does not seem necessary to hold that the process in question simply refers to the procedures on such matters as bias and notice that courts invoke to try individual cases, but also extends to cover the rules that legislatures fashion for the trial of individual cases. If the legislature cannot manipulate burdens of proof without restraint, then surely it does not supply due process when it conclusively presumes that individuals owe money whether or not they have borrowed it, or that individuals do not own property even though they have occupied or purchased it. Indeed, it is worth remembering that the protection afforded for educational liberties in *Meyer v. Nebraska*⁵⁶ and *Pierce v. Society of Sisters*⁵⁷ both stemmed from the Due Process Clause and not from the emanations or penumbras of the First Amendment.⁵⁸ At this point, it follows that we can put together a

55. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). The Court equivocated on the strength of its convictions in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), when it refused to allow the exclusion of demonstrators who claimed a First Amendment right to protest in the Pruneyard Shopping Center. For my criticism, see Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v. Robins*, 64 U. CHI. L. REV. 41 (1997). The position that the First Amendment guarantee on speech operates against the Fifth Amendment guarantee against takings shows a major misunderstanding of both, which reminds me of the old Archie joke:

Jughead: Archie, do you believe in free speech?

Archie: Sure, Jughead.

Jughead: Then you won't mind me using your phone for a long distance call!

56. 262 U.S. 390 (1923).

57. 268 U.S. 510 (1925).

58. Professor Tribe notes:

At the height of the *Lochner* era, this limitation on state power was found to derive from the "liberty" guaranteed by the due process clause of the fourteenth amendment, with particular emphasis upon the teacher's liberty to pursue a vocation and the liberty of parents and the school of their choice to conclude a contract for the education of their children.

TRIBE, *supra* note 5, at 1318 (footnote omitted). Tribe places the word "liberty" in scare quotations to hint that its use is somewhat illegitimate. But it is not given that liberty includes at the very least the right to enter into all lawful callings, i.e., those that do not pose the threat of force or fraud against another human being. What is instructive about both *Meyer* and *Pierce* is how they integrate the economic with the personal and the spiritual. Liberty is an indivisible concept, and should be treated as such by the courts. And remember it was Justice McReynolds who wrote:

single harmonious theory which allows three clauses of the Constitution to work in the sort of intellectual harmony that even Ronald Dworkin in his search for the best moral theory could praise. I see no reason why we should try to carve up the constitutional universe to undercut the obvious intellectual unity of the common law rules that treat private property, freedom of contract, and freedom of speech as being cut from the same cloth. That decision, of course, leaves the state free to regulate property and contract on the familiar police power grounds including the control of monopoly behavior that sometimes applies within the free speech area, as with access to telephone lines. A broad protection of associational freedom—one which sees it as derivative of property, contract, and speech—should be praised for facilitating a proliferation of private voluntary organizations, so that those who are excluded from some can gain entry into others. The relative balance between exclusion and inclusion does not shift as we move from expressive to nonexpressive categories, assuming that we can draw an intelligible line between them. That said, the strength of Chief Justice Rehnquist's majority opinion only reveals the indefensible nature of the two-tier constitutional system he implicitly accepted. No theory of associational freedom that places speech on a pedestal and leaves other forms of collective behavior to the tender mercies of the state can endure. Someone might reply that this calls for the constitutional invalidation of much of the Civil Rights Act, including Title VII insofar as it relates to employment. And so, thankfully, it does. But before we gnash our teeth at that conclusion, it should also be noted that this position does nothing to prevent voluntary affirmative action (freed of the threat of civil rights actions) in the private sector, and may well allow (as I would argue) that limited race- and sex-conscious decisions could be made in the public sphere as well.

To state the position in this form is, of course, to open myself to the charge that the decision in *Dale* should be condemned for what has become the most compelling of reasons: that it introduces through a First Amendment backdoor the now-discredited doctrine of *Lochner v. New York*,⁵⁹ which countenanced a wide-spread usurpation of power by unelected and unaccountable judges who themselves are utterly unable to

Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer, 262 U.S. at 399 (citations omitted).

59. 198 U.S. 45 (1905).

evaluate the competing interest's involved in any complicated legislative scheme.⁶⁰ That point might have force if it were utterly impossible to develop a comprehensive theory to explain which conditions do and do not override the presumption in favor of liberty established under the First Amendment. But if the critics of *Lochner* were correct, then they would have to explain why the entire edifice of First Amendment law should not be undone as well, for it too requires judges to make difficult judgments about the complex legislative schemes that govern, for example, the complex area of telecommunications. But on balance the intervention has proven successful in the preservation of limited government even if occasional mistakes mar the overall performance.

I have no doubt that the same overall interpretive structure that applies to the First Amendment carries over to the other substantive provisions of the Constitution, and that judges who work to understand the theory will be more likely to get it right than judges who think that the rational basis standard of review is sufficient reason for them to take off their thinking caps during any constitutional argument. These weighty issues of institutional competence are, of course, not unique to *Dale*, but pop up in any discussion of judicial review. Their final resolution awaits another time and day. For the moment it is quite sufficient to point out that *Boy Scouts of America v. Dale* rightly opens Pandora's Box. The case is not just about whether the Boy Scouts can refuse to admit homosexuals into its ranks. It is really about whether the antidiscrimination norm can trump the norm of free association. Most of the time it cannot, and it should not, both as a matter of political and of constitutional theory.

60. Even some thoughtful detractors of *Lochner* do not challenge its broad definition of liberty, but claim instead that it is wise to use a deferential standard of review "in testing whether alleged infringements of economic liberties are justifiable." GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 467 (13th ed. 1997). But there is no intellectual coherence in announcing a grand prima facie case which can then be engulfed by trivial exceptions.

