

# WARNING: LABELING CONSTITUTIONS MAY BE HAZARDOUS TO YOUR REGIME

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“No answer is what asking the wrong question begets . . . .”<sup>1</sup>

## I

### INTRODUCTION

What do the following cases have in common? In *Boy Scouts of America v. Dale*,<sup>2</sup> the Court upheld the right of a private organization to ignore a generally applicable state statute prohibiting discrimination on the basis of sexual orientation. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,<sup>3</sup> the Court upheld the right of parade organizers to exclude gay-rights banners. In *Zelman v. Simmons-Harris*,<sup>4</sup> the Court permitted government funding of religious schools through vouchers issued to low-income parents. And in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>5</sup> the Court required state funding of the printing costs of a proselytizing religious publication. In each of these cases, a comparatively “conservative” association was pitted against “progressive” ideals. In each of these cases, the Court sided with the association. Do these cases therefore represent a conservative interpretation of the First Amendment? In particular, is a conservative Court overprotecting conservative associations that are intermediate between the family and the state?<sup>6</sup>

I would suggest that labeling these cases as conservative is a mistake. Each can be described in either liberal or conservative terms.<sup>7</sup> It is progressive to

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1. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 103 (1962).

2. 530 U.S. 640 (2000).

3. 515 U.S. 557 (1995).

4. 536 U.S. 639 (2002).

5. 515 U.S. 819 (1995).

6. Cf. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002) (arguing that the enhanced protection of intermediate associations is part of a coherent vision of Tocquevillian democracy adopted by the Rehnquist Court).

7. Throughout most of this Essay, I use “liberal” and “progressive” interchangeably to mean a left-leaning political preference associated with Democrats like Edward Kennedy, and “conservative” to refer to the views of Republicans like Orrin Hatch and George W. Bush. As others have noted, it is

allow citizens to come together in smaller communities that define their own goals and values, even if—or maybe especially if—those values are at odds with those of the larger polity.<sup>8</sup> The state should not be permitted to impose its own values on such communities, whether it does so directly by imposing membership requirements or indirectly by withholding funding. On the other hand, it is conservative to allow individuals to segregate themselves from those they consider inferior or offensive because such segregation diminishes the equal citizenship status of the excluded groups. It is also conservative, in a religiously pluralist society, to use coercively raised monies to fund organizations whose primary mission is the teaching of specific religious doctrine.

A better way to approach these cases, and to discuss their common failures, is to recognize that there are important, non-ideological values at stake on both sides of each of these cases. In *Dale* and *Hurley*, the liberty of individuals and associations to choose their own communities, to take stances in opposition to the polity's values, and to define themselves as they see fit conflicted with the polity's interest in ensuring equality for all citizens. In *Zelman* and *Rosenberger*, the positions are reversed: The interest in equal treatment of religious and nonreligious organizations conflicted with an individual liberty interest in not being forced to subsidize another's religion. The critical question, then, is how we resolve the frequent tension between liberty and equality.<sup>9</sup> The answer depends not on politics, but on the weight we give to each value in the particular context of each case.

This analytical framework allows us to draw some conclusions about the Supreme Court's First Amendment jurisprudence. In the context of speech and association, the Court has, for almost half a century, been steadfast in its strong protection of liberty. But it has sometimes erred in undervaluing the countervailing interest in equality. In the context of religion, by contrast, the Warren Court tended to protect liberty, and the Rehnquist Court favors equality—and each Court's decisions slight the opposing interest.

Asking whether these or other cases that afford broad protection to intermediate associations are progressive or conservative, then, is asking the wrong question. Ultimately, these cases present difficult choices among competing constitutional values. It is both disingenuous and dangerous to hide behind labels, or to minimize the importance of one value or the other, instead of directly confronting the tensions inherent in the Constitution.<sup>10</sup>

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not clear that any particular philosophy underlies these political preferences, and thus, I do not mean to evoke philosophical meanings of the two terms. In Part IV, I discuss the possible differences between the terms "progressive" and "liberal."

8. Cf. STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 91-97 (1999).

9. Cf. DOUGLAS RAE, *EQUALITIES* (1981).

10. As I have argued elsewhere, ignoring or de-emphasizing one half of a conflicting dichotomy is an all-too-frequent phenomenon. See Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793 (2003); cf. William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 102 (1986) (suggesting that the Court is prone to similarly defining away conflicts).

## II

## SPEECH AND ASSOCIATION

The argument that the First Amendment does not lend itself to “conservative” or “progressive” interpretations suggests that, despite much academic commentary to the contrary, *Boy Scouts of America v. Dale* is not based on a conservative interpretation of the First Amendment.<sup>11</sup> Instead, the political coloration of *Dale* and other First Amendment decisions turns entirely on context and competing values. I explore this idea first in the context of speech, and then in the context of associational rights.

## A. Freedom of Speech

The point may be seen most clearly in cases involving freedom of speech. Since at least the 1960s, the Supreme Court has adopted a strong (or thick) reading of the protections afforded by the Free Speech Clause.<sup>12</sup> Uniform application of such a speech-protective position will take on either a progressive or a conservative cast depending on context—that is, on whose ox is being gored. When speech-protective principles are applied to conservative attempts to regulate progressive speech, we get progressive results: Schoolchildren can neither be forced to pledge allegiance,<sup>13</sup> nor be forbidden from wearing black armbands to protest the Vietnam War;<sup>14</sup> communists and anarchists cannot be silenced;<sup>15</sup> and flag-burners cannot be punished.<sup>16</sup> But those same principles produce conservative consequences when progressives try to prohibit hate speech<sup>17</sup> or pornography,<sup>18</sup> to reduce the influence of money on politics,<sup>19</sup> or to

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I am not the first to notice that the American constitutional regime is a mass of internal tensions, nor that resolution of these tensions must be contextual and pragmatic. See, e.g., ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995); Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007 (2001).

11. It might be more accurate to say that an idealized *Dale* does not represent a conservative interpretation of the First Amendment. That is to say, the Court so distorted the facts in the case that the First Amendment analysis has hardly any role to play. But had the Boy Scouts’ publicly avowed policy been as the Court disingenuously described it, the case would have embodied a neutral, or even slightly progressive, interpretation of the First Amendment’s implied right of expressive association. For a thoughtful analysis of the Court’s treatment of the Scouts’ avowed position on homosexuality, see David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT. 121 (2001).

12. See, e.g., Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459 (1997).

13. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

14. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969).

15. *Noto v. United States*, 367 U.S. 290 (1961); *Yates v. United States*, 354 U.S. 298 (1957); *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

16. *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

17. See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (intent to intimidate must be proven); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

18. See, e.g., *Reno v. ACLU*, 521 U.S. 844 (1997); *Hudnut v. Am. Booksellers Ass’n*, 475 U.S. 1001 (1986).

19. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976).

protect judicial independence.<sup>20</sup> The details may differ, but the principle is the same: Protect vigorously anything that even looks like it might qualify as expression.<sup>21</sup>

It is certainly possible to imagine a consistently progressive or conservative interpretation of the Free Speech Clause. Indeed, when one side or the other criticizes the latest Supreme Court decision, it is usually for a failure to adopt a politically correct attitude toward the First Amendment. Each side wants to protect the speech it likes and to exclude from the Amendment's reach the speech it dislikes. That different factions are displeased each time the Court invalidates restrictions on speech is evidence of the political neutrality of the Court's interpretation. One might label this speech-protective stance liberal insofar as it favors individual autonomy over government censorship, but it is liberal in the broad philosophical sense rather than in the narrow ideological sense.

Freedom of speech presents an easy case for political neutrality because the countervailing values are either very weak themselves or only weakly implicated.<sup>22</sup> For example, the interest in fostering patriotism (in the flag-burning cases) or morality (in the obscenity cases) does not rise to the level of a constitutional value. Censorship premised on one of these two goals cannot withstand much scrutiny when balanced against the strong constitutional protection of expression. The argument made most often in the context of campaign finance or media concentration is that equality requires limitations on particularly powerful speakers to enrich the quality of public debate or allow other voices to be heard.<sup>23</sup> This is a nascent movement, but it is one that has not had much resonance in American history: what might be called governmentally created "equality of influence" simply has not reached the level of a constitutional value in the way that equality of treatment has. Finally, attempts to regulate hate speech or pornography fail for a different reason. Although the countervailing interest in preventing discrimination is strong, the link

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20. See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

21. Of course, there are unjustified exceptions to the rule of robust protection, but they, too, fall on both sides of the political spectrum. See, e.g., *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding restrictions on anti-abortion picketing); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997) (same); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (same); *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding restrictions barring recipients of Title X funds from providing abortion counseling to patients); *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding criminal convictions for burning a draft card as a political protest).

22. This assertion—and indeed the whole paragraph—is not uncontroversial. See, e.g., Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 680-84 (1990) (suggesting that competing values mark the boundaries of the protection accorded by the First Amendment).

23. See, e.g., Lillian R. Bevier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985); Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470 (1997); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055 (1999); Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3 (1991). For an excellent critique of these and similar arguments, see MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* (2001).

between hate speech or pornography and discrimination or inequality is too tenuous to support regulation. For different reasons, then, a commitment to strong protection of speech rarely presents the Court with a robust counterweight.

## B. Freedom of Association

Freedom of association cases engender more formidable conflicts between liberty and equality. Although association is not listed as one of the rights protected by the First Amendment, the Court has repeatedly held that, because “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,” the First Amendment implicitly protects a right of association.<sup>24</sup> And, just as the right to speak implies a corresponding right not to speak,<sup>25</sup> the right to associate implies a corresponding right not to associate. Thus, the Court has held that the First Amendment includes some protection against compelled association, at least insofar as expressive or intimate associations are concerned.<sup>26</sup>

Once these preliminary inferences are established, some similarities between association and speech cases become apparent. If one takes a broad view both of associational rights and of the variety of ways in which state action might impair them, a uniform interpretation of freedom of association will have different political consequences depending on context. The same generous reading of the Constitution that protects the NAACP from Alabama’s attempt to force disclosure of its membership<sup>27</sup> will also protect the Boy Scouts (or the parade organizers in *Hurley*) from forced association with those whose presence dilutes its message. One can always draw distinctions among the various cases, but those distinctions undermine the breadth of the Court’s association jurisprudence and manipulate the doctrine to reach politically pleasing results. As with speech, the underlying principle seems to be that intermediate associations are deserving of strong protection across the board, and hence, that subtle distinctions are presumptively unwarranted.

The Court’s history of recognizing and invalidating many types of interference with association rights further emphasizes the political neutrality of its insistence in *Dale* that employing homosexual scout leaders undermined the Scouts’ anti-homosexual message.<sup>28</sup> The Court has invalidated rules requiring

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24. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

25. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Pac. Gas v. Pub. Util. Comm’n*, 475 U.S. 1 (1986); *Wooley v. Maynard*, 430 U.S. 705 (1977); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

26. *See Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 544-45, 548 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977)). For a theoretical defense of the right not to associate and a discussion of some of its implications, see generally Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-association*, 85 MINN. L. REV. 1669 (2001).

27. *See NAACP*, 357 U.S. at 449.

28. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653-56 (2000). Of course, the Court first had to find that the Boy Scouts had adopted an expressive position against homosexuality. There are prob-

disclosure, by individuals or associations, of association membership;<sup>29</sup> it has held that the Constitution prohibits applying anti-solicitation rules to litigation by political organizations;<sup>30</sup> it has ruled that a state university cannot refuse recognition to a student association without proof that the association has refused to comply with campus rules;<sup>31</sup> it has rejected attempts to deny various government benefits, including employment, on the basis of membership in associations;<sup>32</sup> it has invalidated a variety of laws impinging indirectly on political parties;<sup>33</sup> it has recognized a right against compelled financial support of advocacy by unions and other collective organizations;<sup>34</sup> and it has held that, absent a compelling interest, states may not force intimate or expressive associations to accept particular members.<sup>35</sup> Moreover, as Daniel Farber points out, the Court has moved from a narrow position protecting a right of association to broader protection of the *rights of associations* as well.<sup>36</sup> The breadth of these rulings illustrates that, as in the context of speech, the Court has adopted a uniformly strong interpretation of the right of association rather than a narrowly political interpretation.

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lems with that conclusion, as Justice Stevens pointed out in dissent. *Id.* at 668-71 (Stevens, J., dissenting); accord Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595 (2001); Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819 (2002). The weakness of the majority's conclusion on that issue, however, does not detract from my argument that protecting anti-homosexual expression is, in the context of the Court's other association cases, apolitical rather than conservative.

29. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Shelton v. Tucker*, 364 U.S. 478 (1960); *Bates v. City of Little Rock*, 361 U.S. 516 (1959); *NAACP v. Alabama*, 357 U.S. 449 (1958).

30. *NAACP v. Button*, 371 U.S. 415 (1963).

31. *Healy v. James*, 408 U.S. 169 (1972).

32. *Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

33. *See, e.g., Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (invalidating a state statute requiring blanket primary elections); *Norman v. Reed*, 502 U.S. 279 (1992) (invalidating a state law that barred a new political party established only in the city from fielding candidates under its party name in a county election); *Tashjian v. Republican Party*, 479 U.S. 208 (1986) (finding that a state statute requiring voters in a party's primary to be members of that party impermissibly impinged on the party's freedom of association); *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981) (holding that Wisconsin laws relating to the selection of delegates to national conventions unconstitutionally infringed Democrats' freedom of association); *Cousins v. Wigoda*, 419 U.S. 477 (1975) (holding that the national Democratic Party's delegate-selection rules were constitutionally protected from state interference); *Kusper v. Pontikes*, 414 U.S. 51 (1973) (affirming a lower court decision invalidating an Illinois statute that barred voters from participating in a party's primary election if voters had participated in another party's primary within the preceding twenty-three months).

34. *See United States v. United Foods*, 533 U.S. 405 (2001); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). In these cases, the Court drew a distinction between the association's use of funds for the benefit of its members (members may be compelled to contribute) and its use of funds to advocate positions (members may not be compelled to contribute).

35. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). In each of the cases, the Court concluded both that the particular association raising the constitutional challenge was *not* an intimate or expressive association, and that the state in any case had a compelling interest in prohibiting gender discrimination.

36. Daniel A. Farber, *Foreword: Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483 (2001).

If one accepts the Court's characterization of the Boy Scouts' expressive message, then, the First Amendment is strongly implicated. The Court held that forcing the Scouts to accept homosexual scoutmasters—particularly those who are publicly seen as advocating tolerance of homosexuality—infringed their right of association. This holding is fully consistent with other cases protecting progressive organizations from hostile interference by state entities. The political implications of protecting the Scouts' associational rights arise from its context: Progressives would presumably applaud a ruling that the NAACP cannot be required to accept white supremacists as members, or that the B'nai Brith can exclude Christian proselytizers.<sup>37</sup>

One might disagree with this description of the relationship between *Dale* and associational rights on three grounds. First, there is the disingenuous way in which the Court identified both the organization's message and the effect that retaining Dale as a scoutmaster would have on that message. But that objection only works for the particular case: We can certainly imagine a set of facts that would support the Court's conclusions; the Court would then legitimately be faced with the question of how much to protect the discriminatory organization.

More important, one might question either the value of protecting intermediate associations or the way in which such associations are defined. Christopher Eisgruber, for example, suggests that to the extent that sub-communities can undermine political unity, they should be protected with some caution.<sup>38</sup> As Eisgruber himself recognizes, however, this is merely another way of asserting that there are competing constitutional values at stake.<sup>39</sup> Of course, one could argue that there is no value in protecting intermediate associations at all, but I know of no scholar who takes that position.<sup>40</sup> More narrowly, some

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37. Readers can test themselves on a real case: Would it violate the Constitution to require the admission of women to a speech sponsored by the Nation of Islam? See *Donaldson v. Farrakhan*, 762 N.E.2d 835 (Mass. 2002).

38. Christopher L. Eisgruber, *The Constitutional Value of Assimilation*, 96 COLUM. L. REV. 87 (1996). For a contrary argument, see Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1 (1996).

39. Professor Eisgruber writes,

On the one hand, because reflective constitutionalism is self-critical about the good, it values such sub-communities as sources of dissent and respects them as sincere efforts to pursue a vision of the good that might, after all, prove correct. On the other hand, because reflective constitutionalism embraces a particular conception of the good, it regrets the extent to which dissident sub-communities deviate from that conception.

Eisgruber, *supra* note 38, at 91. Eisgruber ultimately concludes that allowing a sub-community to segregate itself completely from the larger polity is more harmful than beneficial. He reaches this conclusion, however, in the context of *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), in which the sub-community walled itself off from the larger polity by forming its own town and its own school district. The Boy Scouts represent a rather different type of sub-community, in which the members are generally integrated into the society but come together periodically.

40. It is beyond the scope of this Essay to defend the value of intermediate associations, but others have done so. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000); Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477 (2000).

might deny broad protection to intermediate associations because, empirically, they are likely to be conservative.<sup>41</sup> Adoption of such a position may be a progressive political stance, but rejection of it is not necessarily conservative. (It might be conservative if the right of association is protected *because* of the empirical likelihood that it would benefit conservative organizations, but the Court's history belies that possibility.) Thus, the same neutrality that permeates the Court's free speech cases—and often enrages one side or the other—governs the Court's recognition of a broad right of association.

Finally, assuming associational rights should be protected, one might question how these rights ought to be defined. The Court does not protect all human relationships that might arguably fall within the definition of “association.” In particular, the Court has a mixed record with regard to what it labels intimate, rather than expressive, associations. It has protected—not necessarily under the rubric of the First Amendment—the right of a grandmother to live with her two grandsons despite a contrary zoning ordinance,<sup>42</sup> and the right of a government-paid lawyer to advocate, on behalf of his client, positions with which the government disagrees.<sup>43</sup> On the other hand, it rejected a challenge to a zoning ordinance brought by unrelated college students wishing to live together,<sup>44</sup> approved—for almost two decades—state laws criminalizing intimate relationships between consenting adults,<sup>45</sup> and upheld a federal law interfering with the relationship between doctor and patient.<sup>46</sup> A truly encompassing vision of associational rights might be more protective of these intimate relationships. Even such an encompassing vision, however, would confront hard cases. For example, how should a right of intimate association apply to a statute that allows grandparents to visit their grandchildren despite the objections of the children's parent?<sup>47</sup>

The Court's reluctance to extend constitutional protection to every human relationship does not detract from the importance of the associational rights it has protected. Indeed, the Court's jurisprudence on what might be called “organizations” (thus excluding more intimate associations) is remarkably internally consistent. That the Court got it wrong in *Bowers v. Hardwick*<sup>48</sup> or in *Rust v. Sullivan*<sup>49</sup> does not mean that it should therefore not extend protection to the NAACP, the Boy Scouts, or the Catholic Church.

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41. For an argument that the proposition in the text is empirically false, see Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001).

42. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

43. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

44. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

45. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

46. *Rust v. Sullivan*, 500 U.S. 173 (1991).

47. *Troxel v. Granville*, 530 U.S. 57 (2000).

48. 478 U.S. at 186, *overruled by* *Lawrence*, 539 U.S. at 588.

49. 500 U.S. at 173.

### C. Undervaluing the Equality Interest

So far, then, associational rights are much like speech rights: The Court has protected associations irrespective of the ideological consequences. Unlike most speech cases, however, there are serious competing constitutional values at issue in many association cases. In particular, the Court has recognized a compelling government interest in preventing discrimination, which can sometimes trump an association's right to choose its own members. The Court failed to properly credit this interest in *Dale*. Thus, the problem with *Dale* lies not in its thick interpretation of the First Amendment, but in its unduly thin vision of anti-discrimination principles.

To illustrate this point in stark terms, consider the likely ruling if the Scouts had instead tried to exclude blacks. Even if the Court had found that racism was part of the Scouts' expressive message, the Court would probably have accepted New Jersey's argument that it had a compelling interest in prohibiting race discrimination. In *Bob Jones University v. United States*,<sup>50</sup> the Court found the eradication of race discrimination sufficiently compelling to overcome a free exercise challenge; there is no reason to believe that it would be considered less compelling in the context of an associational claim. In earlier cases involving gender, even the parties claiming an associational right to discriminate disavowed any right to discriminate on the basis of race.<sup>51</sup>

One defender of *Dale* has suggested that liberals should applaud the decision because it can be used to protect private universities engaged in affirmative action from state laws prohibiting racial preferences.<sup>52</sup> Strong protection for associational rights allows universities to use race-based selection criteria just as it allows the Boy Scouts to use sexuality-based criteria. Whether uniformly vigorous protection of associational rights might serve that purpose, of course, depends on whether prohibiting discrimination against whites is thought to constitute a compelling state interest. Again, then, whether a particular interpretation of freedom of association produces liberal or conservative results depends primarily on the breadth of our definition of discrimination rather than on our interpretation of rights of association.

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50. 461 U.S. 574 (1983); *see also* *Runyon v. McCrary*, 427 U.S. 160 (1976).

51. *See* William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 71 & n.23 (1986) (citing briefs). The Court has also found the eradication of gender discrimination compelling enough to override associational rights in some cases. *See* Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). These cases also rested on the Court's perception that the organizations at issue were not expressive associations and thus, that admitting women would not undermine any expressive message. Nevertheless, the Court explicitly held in each case that the state had a compelling interest in eradicating discrimination. Still, there is some doubt about whether gender discrimination laws could be applied to less commercial organizations. This fact merely illustrates that anti-discrimination norms are not as strong in the context of gender as they are in the context of race. *See, e.g., Suzanna Sherry, The Forgotten Victims*, 63 U. COLO. L. REV. 375 (1992).

52. David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619, 621 (2001).

In *Dale*, however, the majority dismissed the state's claimed interest in eradicating sexual orientation discrimination in a single conclusory sentence: "The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."<sup>53</sup> The Court's view of what might constitute invidious discrimination justifying state remedies is so thin that it cannot possibly encompass sexual orientation discrimination, so it did not even bother to argue the point. It is evident that the Court treats equality norms—and anti-discrimination legislation—differently depending on its own view of the wrongness of the discrimination.<sup>54</sup> Eradicating discrimination is a sufficiently compelling interest to overcome even a strong right of association if that discrimination is based on race (at least when the discrimination is against the minority race), possibly sufficient if the discrimination is based on gender, but not even arguably sufficient if the discrimination is based on sexual orientation.

*Dale*, then, is not a conservative interpretation of the *First Amendment* but rather a failure of vision akin to the Court's previous refusal to invalidate sodomy laws<sup>55</sup> or to subject sexual orientation discrimination to strict scrutiny.<sup>56</sup> It is an undervaluing of equality, not an overvaluing of liberty. This distinction makes a considerable difference: it tends to rehabilitate the Court's approach to the First Amendment, but impugn the Court's definition of equality. It thus tells us that looking hard at associational rights is focusing on the wrong aspect of the problem. Ironically, the ultimate effect of this mistaken focus hurts liberal opponents of *Dale* and *Hurley* more than it does their conservative advocates. These effects could be described in three ways.

First, blaming *Dale* on a political interpretation of the First Amendment blinds us to the need to make hard choices. This Essay suggests that *Dale* is right in its strong protection of associational rights but wrong in its failure to recognize rights against discrimination. The two rights inevitably conflict, and the stronger the Court's protection of each, the more conflicts will arise.<sup>57</sup> We cannot satisfactorily resolve the conflict by simply ignoring or de-emphasizing one right or the other, especially since which one we ignore will likely depend

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53. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000).

54. See William N. Eskridge, Jr., A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 *YALE L.J.* 2411, 2458-60 (1997). Compare *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding the abrogation of sovereign immunity in the Family and Medical Leave Act (FMLA), combating gender discrimination), with *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (invalidating the abrogation of sovereign immunity in the Americans with Disabilities Act (ADA), combating disability discrimination), and *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (invalidating the abrogation of sovereign immunity in the Age Discrimination in Employment Act (ADEA), combating age discrimination). For a discussion of the Court's different treatment of the types of discrimination at issue in these cases, see Suzanna Sherry, *The Unmaking of a Precedent*, 2003 *SUP. CT. REV.* 231.

55. See *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

56. See *Romer v. Evans*, 517 U.S. 620 (1996).

57. See William P. Marshall, *Discrimination and the Right of Association*, 81 *NW. U. L. REV.* 68 (1986); see also Deborah Rhode, *Association and Assimilation*, 81 *NW. U. L. REV.* 106 (1986).

primarily on which right stands in the way of our current political desires. Thus, diluting protection of associational rights based on the theory that such rights represent a conservative reading of the Constitution is no more a solution to the problem than is the *Dale* majority's casual tolerance of discrimination. Labeling the Court's emphasis on associational rights as conservative simply subordinates one constitutional value to another, just as the Court itself did in *Dale*. Instead, we should grapple with the hard choice between freedom of association and freedom from discrimination. This is just another version of the perennial conflict between liberty and equality, and we cannot avoid it by castigating or celebrating the analysis of the former.

Second, a critique of *Dale* based exclusively on the First Amendment—such as the claim that only very small associations should be entitled to full associational rights<sup>58</sup> or that expressive conduct should not be protected unless the state intentionally suppresses its message<sup>59</sup>—both waters down the protection afforded liberal organizations and fosters the production of parallel conservative theories of the First Amendment claiming that current doctrine is slanted in a progressive direction.<sup>60</sup> After all, if liberals argue that the Court's First Amendment jurisprudence is conservative just because it sometimes produces illiberal results, conservatives can point to opposite results and label the same jurisprudence overly liberal. Those who value speech or association for its own sake will be the losers, as will whichever groups are, in the long run, on the wrong side of majoritarian politics. One of the benefits of judicial review by independent judges is that it purports to be politically neutral, and, in the case of speech and association, it largely lives up to that promise. There are enough instances in which the Court is crassly political,<sup>61</sup> or simply ideologically motivated,<sup>62</sup> without scholars making unfounded accusations.

Finally, focusing solely on the First Amendment subjects progressives to charges of non-neutrality: they want progressive organizations to benefit from the Court's consistently strong view of associational rights in cases such as *NAACP v. Alabama*,<sup>63</sup> but they do not want to extend those benefits to conservative organizations. It thus plays to those who deem judicial review simply politics by another name and encourages further politicization of the appointment process. Progressives are likely to be sadly disappointed by the results of such a politicization: their success in defeating Robert Bork is unlikely to be repeated (especially after the most recent elections), and the past fifty years do not give much indication that progressives can out-mobilize conservatives.

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58. See, e.g., Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002).

59. See Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

60. For an interesting version of such a theory, see Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 CAL. L. REV. 119 (2000).

61. See *Bush v. Gore*, 531 U.S. 98 (2000); see also Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

62. See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

63. 357 U.S. 449 (1958).

One final and transitional note: Perhaps progressives can change the level of analysis and simply argue that choosing liberty over equality is itself a conservative stance. We should hesitate long before adopting such a global conclusion, and, in any case, the charge is unlikely to be true. The next Part shows that in the case of the Religion Clauses, progressives may well favor liberty when it conflicts with equality.

### III RELIGION

The jurisprudence of the Religion Clauses is notorious for its incoherence and its controversy. Rather than wade into the morass, this Essay uses the dichotomy between liberty and equality developed in the previous Part to provide a different perspective on the Court's precedents. As with the right of association, examining the Religion Clauses through the lens of this tension demonstrates that it is misleading to label particular approaches as conservative or progressive.

The first problem is identifying the competing constitutional values in the clauses. The Court tends to speak of "neutrality" rather than liberty or equality; scholars use a plethora of terms in often confusing and contradictory ways. It is easy to recognize an individual liberty interest in protecting freedom of expression, but it is not so easy to describe the types of liberty protected by the Religion Clauses. Similarly, there is agreement on at least the core meaning of equality in the context of associations that want to exclude some people from membership, but the term "equality" is used in a variety of ways in the literature interpreting one or both of the Religion Clauses. In short, although the constitutional values identified here are widely recognized, the labels are somewhat arbitrary—and my labels differ from the labels often used by religion law scholars.

#### A. The Free Exercise Clause

However it is described, the central modern question in Free Exercise Clause jurisprudence arises when neutral, generally applicable laws conflict with religious beliefs and thus impose a particular burden on religious believers.<sup>64</sup> Litigated examples include a law requiring parents to send their children to school through age sixteen, as applied to Amish families who object on religious grounds to schooling past the eighth grade;<sup>65</sup> a military rule prohibiting the wearing of headgear, as applied to observant Jews who are required by Jewish law to wear a yarmulke (skullcap);<sup>66</sup> and a law prohibiting public employees, on pain of discharge, from using illicit drugs, as applied to a

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64. For an interesting approach to this question, as well as a survey of other scholars' views, see Bressman, *supra* note 10.

65. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

66. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

Native American who ingests peyote as part of a religious ceremony.<sup>67</sup> The question arising from this conflict is often phrased as whether the Clause guarantees religious observers substantive neutrality or merely formal neutrality.<sup>68</sup> If the Free Exercise Clause requires only formal neutrality, then these laws are constitutional because they apply to all citizens equally. If the clause requires substantive neutrality, on the other hand, some scholars argue that, because religious observers are uniquely burdened by the laws, they must be exempted from the laws' strictures to be treated truly equally.<sup>69</sup>

The use of the term "neutrality," however, masks the fact that interpreting the Free Exercise Clause implicates both liberty and equality. It is only if we wish to protect *both* the liberty to engage in religious practices *and* the equality of all citizens, that tensions arise over the meaning of the Free Exercise Clause. If we are concerned only with equality, we should not care why some citizens are burdened, nor should we lift those burdens selectively. Citizens whose objections are moral or otherwise compelling but not religiously grounded are similarly burdened, but they have never been constitutionally entitled to an exemption from neutral laws.<sup>70</sup> Arguments supporting a difference in treatment must be based on a determination that liberty to practice one's religion should be more strongly protected than general liberty of conduct.<sup>71</sup> While such a conclusion may or may not be justifiable as a matter of constitutional interpretation, it is nevertheless an argument more about the liberty of *some* than about the equality of *all*. Put otherwise, by defining religious and other objectors as not similarly situated, the doctrine of substantive neutrality considers religious practices a protected liberty that trumps the principle of treating all citizens equally.

Substantive neutrality, then, is closer to liberty than to equality. If exemptions are available to religious believers, but not to other citizens with nontrivial objections to compliance, then the unique privilege afforded to religious believers is more accurately described as the liberty to practice their religion notwithstanding the state's interest in law enforcement. Thus, one can view the choice between formal neutrality and substantive neutrality as a choice between equality (treating everyone the same) and liberty (giving religious believers protection against the state's attempt to compel them to conform their

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67. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

68. *See, e.g.*, Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Towards Religion*, 39 DEPAUL L. REV. 993 (1990); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

69. *See, e.g.*, Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

70. *See Yoder*, 406 U.S. at 216 (noting that, if Amish objections to Wisconsin's compulsory school attendance law had been secular rather than religious, the objections would have been insufficient).

71. Some scholars who maintain that the Free Exercise Clause requires accommodation of religious objection do in fact argue that the Clause contains a substantive protection of religious liberty, including protection from incidental infringement (infringement that is incidental to a law's application rather than its primary objective). *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1137 (1990).

behavior to legislated norms). Although the competing concerns are not conventionally described this way, doing so will enable us to apply the insights gained in the earlier examination of freedom of association to shed light on the Religion Clauses.

## B. The Establishment Clause

Turning to the Establishment Clause, one of the core disputes is the extent to which it permits or requires government funding of religious institutions on an equal footing with analogous secular institutions. Again, although not the conventional nomenclature, the competing values here can be described as interests in liberty and equality. When the government subsidizes educational, charitable, or other organizations, equality principles suggest that it should not deny funding to similarly situated religious institutions. On the other hand, one purpose of the Establishment Clause may be to preclude the government from subsidizing religion, regardless of whether it subsidizes other groups; the underlying value is to prevent citizens from being required to support religion with tax dollars. That underlying value can be characterized as a liberty interest: The Establishment Clause protects the freedom of taxpayers *not* to support religion in any way.<sup>72</sup>

## C. Characterizing the Religion Clauses Jurisprudence

Thus, both the Free Exercise Clause and the Establishment Clause pose the same tension between the competing values of liberty and equality as that raised by the association cases. Characterizing the Supreme Court's resolution of this tension in the context of the Religion Clauses, however, is more complex than it is in the context of the right of association. For one thing, we must analyze the jurisprudence of both clauses; for another, the Court has recently reversed course under both clauses.

The Warren and Burger Courts tended to favor liberty under both clauses. Under the Free Exercise Clause, the Court required generally applicable laws to be justified by a compelling government interest if such laws placed a substantial burden on religious practices.<sup>73</sup> This doctrine was perhaps honored more in the breach than in the observance,<sup>74</sup> but it was at least an aspiration. Under my theory, then, by granting special privileges to religious objectors, the Court valued liberty of religious observers over equality among objecting citizens. But the Warren Court, and to a somewhat lesser extent, the Burger Court, also favored liberty in its interpretation of the Establishment Clause. The Court during this era permitted—indeed required—discrimination *against*

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72. Kathleen Sullivan has suggested that the Establishment Clause creates a somewhat different "liberty": a substantive right to a purely secular government. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

73. See, e.g., *Yoder*, 406 U.S. at 205; *Sherbert v. Verner*, 374 U.S. 398 (1963).

74. Suzanna Sherry, *Lee v. Weisman, Paradox Redux*, 1992 SUP. CT. REV. 123, 128, 150 & n.104; Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701 (1986).

religion when it came to government funding, excluding religious institutions from some forms of government largesse available to similar charitable or educational institutions.<sup>75</sup> It thus protected the liberty of taxpayers at the expense of equality between religious and nonreligious organizations.

The Rehnquist Court has inverted its predecessors' relationships between the Religion Clauses and the liberty-equality tension. In *Employment Division v. Smith*,<sup>76</sup> the Court held that the Free Exercise Clause permits the government to enforce generally applicable laws even against religious objectors. The Court thus signaled that treating all citizens alike is more important than protecting religious liberty. Concurrently, the Court has relaxed the ban on government funding of religious organizations, permitting,<sup>77</sup> and sometimes requiring,<sup>78</sup> government funding of religious institutions on an equal basis with other institutions. Here again, the Rehnquist Court favors equality over liberty, mandating equal treatment despite infringing upon individual liberty by coercing taxpayers to subsidize religious institutions.<sup>79</sup>

If this description of each Court is accurate, where does that leave politics? The same Court that privileged liberty over equality in the association cases is now privileging equality over liberty in the religion cases. And many of the progressive scholars who find *Dale* unconscionable for upholding discriminatory practices are equally apoplectic over both the abandonment of the compelling interest test in the Free Exercise context and the easing of prohibitions on government funding in cases such as *Rosenberger* and *Zelman*. At the same time, conservatives who applaud the funding cases (and often *Dale* as well) make common cause with progressives in opposing *Smith*.

This confusing mass of alignments should not surprise us once we recognize that all of us—progressive and conservative, Justice and scholar—are engaging in a delicate and sophisticated balancing act. Not only each clause, but each case, requires us to weigh the competing constitutional values of liberty and equality in a particular factual context, against a particular precedential *and* ideological backdrop. Change any aspect and it is difficult to predict the likely, or appropriate, outcome of a case.

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75. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, *Meek*, and *Wolman*, the Court invalidated state statutes providing state aid to church-related schools, while in *Aguilar*, the Court specifically barred the use of federal funds to pay salaries of public employees teaching in parochial schools.

76. 494 U.S. 872 (1990).

77. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding an Ohio statute providing tuition aid to students choosing to attend a participating private school); *Mitchell v. Helms*, 530 U.S. 793 (2000) (overruling *Meek*, 421 U.S. at 349, and *Wolman*, 433 U.S. at 229); *Agostini v. Felton*, 521 U.S. 103 (1997) (overruling *Aguilar*, 473 U.S. at 402).

78. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

79. For an analogous description of recent cases as pitting the right of association against the principles of the establishment clause, see Steven G. Gey, *The No Religion Zone: Constitutional Limitations on Religious Association in the Public Sphere*, 85 MINN. L. REV. 1885 (2001).

To see the subtlety of the questions, consider such issues as tax deductions for charitable contributions or fire protection for churches. No one argues that the government should not provide fire protection, and few, if any, argue that contributions to religious organizations should be treated differently than contributions to other nonprofit organizations. But why not, since it means that government is in some sense subsidizing religious associations by absorbing a cost that would otherwise accrue to the association? To treat churches the same way that we treat schools, we are overriding the constitutionally valued freedom of those who wish to withhold all financial support from religious institutions. The reason must be that the equality principle in these contexts outweighs the liberty principle, even for progressives—but that is not necessarily true in all contexts.

Again, then, it is misleading to characterize *Zelman* or *Rosenberger* as conservative interpretations of the First Amendment. The cases raise difficult questions pitting one constitutional value against another. The Court's opinions are defective, but not because they reach the wrong or conservative answer. Instead, like *Dale*, they reflect a failure to properly consider one of the competing constitutional values—in this case, the liberty interest in not being forced to support religion. Had the Court truly grappled with the hard questions, it might nevertheless have reached the same conclusions, but it might have persuaded progressives that those conclusions were reasonable (or even correct).

#### IV

#### ASKING THE RIGHT QUESTIONS

If associating varying political ideologies with liberty and equality is asking the wrong question, what are the right questions? One question might be whether a general preference for liberty in the context of association and for equality in the context of religion is fairly labeled conservative. In the course of constructing an answer to that question, however, one would have to examine and reject alternative explanations for the pattern of preferences. Maybe religious and other intermediate organizations are socially vital or historically privileged. Maybe discrimination based on religion is more dangerous than other types of discrimination. Maybe the American people—from the Founders onward—are more concerned about limiting government's ability to do harm than fostering government's ability to do good (and maybe the concern is warranted). Or maybe none of these things are true and the Rehnquist Court's pattern cannot be justified. The point is that we cannot label one particular set of resolutions to the dilemma posed by competing constitutional values without actually grappling with the dilemma ourselves. And once we have done that hard substantive work, we have better ammunition against erroneous Court decisions than a derogatory label. In that sense, then, the right question is simply whether the Court got it right in any particular case.

Once we remove our gaze from politics, we can also begin to ask other questions. We should be troubled by the Court's systematic undervaluing of constitutional principles, whatever those principles are. We might ask ourselves why the Court sometimes refuses to grapple with the tension, preferring instead to cast the issues in one-sided ways. Why do we seem to be losing what Robert McCloskey once called "one of the most significant qualities of the American political mind at all stages of national history": a "propensity to hold contradictory ideas simultaneously"?<sup>80</sup> Here we might tentatively assign blame to trends in constitutional scholarship. Much of recent constitutional scholarship has itself ignored nuances, tensions, and inconsistencies, searching instead for an overarching theory that will make constitutional law predictable and coherent—and politically congenial.<sup>81</sup>

A case in point is the title of this Symposium, illustrative of a broader change: Why has "progressive" replaced "liberal" as the adjective of choice for those on the political left? It is not because those favoring the term have a coherent vision of what either term means. Instead, the use of "progressive" by the left is much like the appropriation of the term "federalist" by a particular faction on the right. Both terms evoke the winning side in earlier disputes—the Progressives of the early twentieth century, whose views are perceived to have prevailed by the 1940s, and the Federalists of the late eighteenth century, who succeeded in their goal of substantially increasing national power.<sup>82</sup> Both leave their opponents at a rhetorical disadvantage: what are you if you are not progressive? (The disadvantage of being labeled an "anti-Federalist" is historical rather than linguistic, but is otherwise similar.) Finally, and most important, both are misleading: twenty-first century progressives do not reflect the views of twentieth-century Progressives,<sup>83</sup> and the modern Federalist Society takes a much more constricted view of national power than did its eighteenth-century counterparts.<sup>84</sup>

The move from liberal to progressive (as well as the evocatively named Federalist Society) is reflective of the migration from scholarship to politics that has characterized much of recent legal academic writing. It falsely implies a full-blown constitutional theory based on sound philosophical analysis that answers all the hard questions in constitutional law. It polarizes the debate and

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80. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 13 (1960).

81. See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002). Certainly this is not true of *all* constitutional scholars, but it is true of some of the most prominent ones.

82. For an argument that the eighteenth-century Federalists may have misappropriated the term in similar ways, see DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 175-76 (1990).

83. For one elaboration of this view, see EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000).

84. For one elaboration of this view, focusing on the anti-nationalist Supreme Court's misuse of leading nationalist Alexander Hamilton, see David McGowan, *Ethos in Law and History: Alexander Hamilton, The Federalist, and the Supreme Court*, 85 MINN. L. REV. 755 (2001).

stigmatizes one's opponents. It exacerbates the tendency to use labels instead of grappling with issues, and it lends itself to a lack of nuance. If legal scholarship has any influence on the Supreme Court, it should not be surprising that the Court is moving in a similar direction. To the extent that constitutional scholars are the cause, however, they can also help with the solution: if our scholarship becomes more pragmatic, more doctrinal, more comparative, more historical, more empirical, and less overwhelmingly meta-theoretical, we might force the Court to confront the hard questions.

Finally, there is the question of manipulating the facts to reach desired results. Many commentators have noted how the majority manipulated the facts in *Dale* to create a stronger associational interest than the Boy Scouts actually had.<sup>85</sup> Many of the same Justices engaged in similar practices in the religion cases.

In *Mitchell v. Helms*,<sup>86</sup> a predecessor to *Zelman* that was decided on the same day as *Dale*, the plurality upheld direct, per-capita aid to religious schools. By characterizing that aid as identical to portable benefits (such as a deaf student's right to an interpreter) given to students to take to any school they wish, the plurality avoided difficult questions about the liberty values inherent in the Establishment Clause. It seems churlish, as well as unconstitutional under precedent, to deny to a deaf student a federally funded interpreter just because that student chooses to attend a religious school. When the state gives books, maps, and computers directly to religious schools, however, it raises harder questions—unless, as the plurality did in *Mitchell*, we disingenuously characterize the direct aid program as “distribut[ing] benefits neutrally to any child.”<sup>87</sup>

In *Rosenberger*, the same plurality collapsed another important factual distinction, this time between providing a forum for religious speech (clearly required under earlier cases) and providing funds to disseminate religious speech. Earlier cases had involved public spaces that were available for most groups or speakers, and the Court had held that religious groups or speakers could not be excluded simply because they were religious. In *Rosenberger*, the University of Virginia allocated monies from its Student Activities Fund to pay printing costs for publications by authorized student groups. It refused to pay such costs for a student organization that published *Wide Awake: A Christian Perspective at the University of Virginia*. The plurality characterized the Student Activities Fund as a public forum, albeit “more in a metaphysical than in a spatial or geographic sense,” thus making the physical forum cases directly relevant.<sup>88</sup> The plurality also ignored the proselytizing nature of the publication,

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85. See, e.g., sources cited *supra* note 28.

86. 530 U.S. 793 (2000).

87. *Id.* at 811 (plurality opinion) (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993)). Justice O'Connor, who provided the necessary fifth vote, declined to join the opinion in part because it elided this distinction. *Id.* at 842 (O'Connor, J., concurring in judgment).

88. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995).

merely describing it as offering a “Christian viewpoint” and including articles on “racism, crisis pregnancy, stress, prayer, C.S. Lewis’ ideas about evil and free will, and reviews of religious music.”<sup>89</sup> The dissent, by contrast, quoted extensively from the publication at issue, backing up the claim that the writing “is no merely descriptive examination of religious doctrine or even of ideal Christian practice,” but rather “a straightforward exhortation to enter into a relationship with God as revealed in Jesus Christ.”<sup>90</sup>

In *Rosenberger* as in *Dale*, then, only a willful blindness to the facts allowed the Court to apply the particular precedent it did. If the Boy Scouts as an organization did not actually endorse the anti-homosexual message it propounded for litigation purposes, then its expressive associational rights would not be harmed by retaining Dale. If the religious student group was proselytizing rather than simply providing a Christian perspective, then their activities were not the same as those of other student groups and did not necessarily require equal treatment. In both *Rosenberger* and *Mitchell*, when the Court was confronted with undeniable but uncomfortable distinctions—that physical space is not money and that portable benefits are different from direct aid to schools—the plurality glossed over those distinctions and recharacterized the facts. In both cases, the recharacterization meant that the result followed almost inevitably from the precedent, and thus made the decision seem both easier and more justifiable.

This manipulation of the facts presents a more serious threat to the regime and to the rule of law than would a narrowly conservative or progressive interpretation of the Constitution. It is beyond the scope of this Essay to explore the causes for the apparent rise in such manipulation, or the cure for it. But I will make two speculations. First, the post-modern denial that objective facts even exist certainly gives comfort to those who would put their own spin on the factual circumstances of a case. The realists gave us infinitely malleable law, and the post-modernists have given us infinitely malleable facts. Second, the judicial appointment process has, over the last twenty years, become so politicized that ideology now matters more than legal acumen, integrity, or character. Together, these two developments are bound to lead to a Court more concerned with end results than with the law. The more we attach labels to cases and constitutional doctrines, the more we contribute to that trend.

## V

### CONCLUSION: THE FAILURE OF CONSTITUTIONAL THEORY

Here is a multiple-choice question: Which is more progressive, (a) protecting liberty or (b) protecting equality? My answer is (c): both of the above. The perennial problem, of course, is that liberty and equality are often

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89. *Id.* at 826.

90. *Id.* at 867 (Souter, J., dissenting).

in tension. We cannot make the conflict go away by labeling one side or the other conservative or progressive.

While it is bad form to attack one's hosts, I would assert that this Symposium is a symptom of the same failure of vision that has beset the Supreme Court. Rather than conceding that the Constitution is a mass of conflicting values that are often difficult or impossible to reconcile, we want to believe that it provides clear and correct answers to important questions as long as we can find the right theory of interpretation. But interpreting the Constitution by means of an overarching theory or political vision is definitely asking the wrong question. Let's not kid ourselves: in a pluralist democracy committed to majoritarianism and rights, to liberty and equality, asking whether the Court "got it right" in any particular case is not an easy question. But it's the right one.