

SHOULD NONCOMMERCIAL ASSOCIATIONS HAVE AN ABSOLUTE RIGHT TO DISCRIMINATE?

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I

INTRODUCTION

In *Boy Scouts of America v. Dale*,¹ the Supreme Court held that the Boy Scouts of America had the right to discriminate against gay people. The Court's opinion is so muddled that it is hard to know who, other than the Scouts themselves, will benefit from it. A growing number of prominent scholars have suggested a clarification: that noncommercial private associations should be given an absolute right to discriminate. This clarification should be resisted.

Before *Dale*, American constitutional law's treatment of freedom of association followed what Dale Carpenter calls a "message-based approach":² if an association is organized to express a viewpoint, then constitutional difficulties are raised by a statute that requires it to accept unwanted members if that requirement would impair its ability to convey its message. This rule has become unclear because *Dale* introduced two ambiguities into the law. First, it seemed to hold that substantial interference would be found whenever an organization complained. Second, it seemed to hold that substantial burdens were per se unconstitutional, rather than merely subject to strict scrutiny. In effect, any plaintiff's claim was so powerful that all antidiscrimination laws were unconstitutional in all their applications. However, this rule is so patently silly that the lower federal courts have refused to believe it and have rejected *Dale* claims so consistently that they are on their way to confining *Dale* to its facts. The message-based approach lives.

A notable group of commentators, whom I shall call the "neoliberalarians,"³ have responded to *Dale*'s ambiguity by advocating a sharper rule than any declared in the

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1. 530 U.S. 640 (2000).

2. Dale Carpenter, *Expressive Association and Anti-Discrimination Law after Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1517 (2001).

3. The restriction of the right to noncommercial associations is what makes them "neo."

Dale opinion: an absolute right of noncommercial associations to exclude unwanted members. The group is a distinguished one, including Judge Michael McConnell and Professors David Bernstein, Dale Carpenter, Richard Epstein, John McGinnis, Michael Paulsen, and Nancy Rosenblum. Their approach promises “to draw a line between [freedom of association and antidiscrimination law] that will preserve a large realm for group expression and organization while allowing the state to promote its equality objectives in the most compelling contexts.”⁴ A message-based approach, the neoliberarians argue, gives government the opportunity to scrutinize and reshape private speech, and thereby violates the central purposes of the First Amendment. One illustration of the pathology of a message-based approach, emphasized by several of these writers and by the *Dale* Court as well, is that it produces perverse results: a group that is stridently prejudiced will receive more protection than one that is quieter about its views, and thus the rule creates an incentive to disseminate the very prejudices that antidiscrimination laws aim to temper.

What the neoliberarians describe as perverse effects of a message-based approach are actually desirable ones. The pressure that a message-based approach brings to bear on discriminatory associations is exactly the kind of result that antidiscrimination law should strive to bring about, and it reaches it in a way that gives freedom of speech all the respect that it deserves. A message-based approach does put some pressure on discriminatory associations: discrimination is not so cheap as it was before, and a group will have to decide whether discrimination is worth the added cost. But this pressure serves state interests of the highest order and does not prevent groups with strongly held discriminatory ideas from uniting and disseminating them.

The neoliberalian arguments are only slightly modified versions of old, discredited libertarian objections to the existence of any antidiscrimination law at all. The older, minimal-state libertarianism rests on three premises: (1) a more-than-minimal state violates citizens’ rights (the Rights premise), (2) government cannot be trusted to do more than prevent force and fraud (the Distrust premise), and (3) an unregulated private sector can be relied on to produce benign results (the Optimism premise). Libertarianism has failed as a normative theory because all three premises are often false. The neoliberalian modification is to confine application of all three premises only to noncommercial associations. But even thus restricted in scope, there is no reason to think that any of them is true as a general matter.

Part II of this article describes the confusion of the *Dale* opinion and what lower courts have made of it. Part III surveys the arguments of the neoliberarians and shows that their arguments are slightly modified versions of the old libertarian objections to antidiscrimination legislation of any kind. Part IV examines the state interests that would be sacrificed by the neoliberalian rule, with special attention to the case of the Boy Scouts. I argue that discrimination by noncommercial associations can inflict considerable harms, and that the application of antidiscrimination norms to private associations may reflect members’ preferences better than one in which there is an unrestricted freedom to discriminate. Part V considers what would be the optimal rule of

4. *Id.*

law, given these conflicting interests. Distrust of judicial decisionmakers does not necessarily produce absolute protection of rights; it can lead the Court to withdraw protection, as it did in *Employment Division of Oregon v. Smith*.⁵ Compared to the rigidities of either absolute protection or no protection, the ambiguous protection of the message-based approach, which predated and largely survives *Dale*, is the wisest rule after all.

II

THE CONFUSION OF *DALE*

The leading case before *Dale* that addressed the right to exclude was *Roberts v. United States Jaycees*,⁶ in which the Court held that a state could constitutionally require an all-male association of young businessmen to admit women. The Court's opinion observed that the freedom of speech guaranteed by the First Amendment is often exercised collectively, and so entails a certain degree of freedom of association. This liberty in turn entails a right to exclude unwanted members:

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.⁷

The Court limited the right it thus created, holding that infringements upon the right to exclude could be justified by “compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”⁸ The result was a balancing test: antidiscrimination norms could legitimately be imposed on associations if the state interest was great enough. In practice, free association claims unrelated to viewpoint discrimination lost in the Supreme Court.⁹

Then came *Dale*. The *Dale* case involved a New Jersey statute that prohibited discrimination on the basis of sexual orientation. The Scouts revoked James Dale's membership after a newspaper story (which did not mention his affiliation with the Scouts) identified him as an officer of his college's lesbian and gay student organization. Dale successfully sued under the statute. The Boy Scouts of America claimed that the application of the law to them would violate their freedom of expression, but the New Jersey Supreme Court, applying the *Roberts* test, was “not persuaded . . . that a ‘shared goal’ of Boy Scout members is to associate in order to preserve the view that

5. 494 U.S. 872 (1990) (holding that the Free Exercise Clause was inapplicable because the state law was one of general, neutral applicability).

6. 468 U.S. 609 (1984).

7. *Id.* at 623.

8. *Id.*

9. See, e.g., *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). On the other hand, there is enough ambiguity in the language of these decisions that Michael Paulsen is able plausibly to describe them as rare exceptions to a general rule of freedom of association. See Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1924-28 (2001).

homosexuality is immoral.”¹⁰ The Court noted that the Scouts had not, in their public materials, taken any position whatsoever concerning the morality of homosexuality. It therefore held “that Dale’s membership does not violate Boy Scouts’ right of expressive association because his inclusion would not ‘affect in any significant way [Boy Scouts’] existing members’ ability to carry out [“those activities.”]”¹¹

The U.S. Supreme Court reversed. It used the following reasoning:

(1) The Scouts are an association that “engages in expressive activity”¹² protected by the First Amendment.

(2) Forced inclusion of a member therefore violates the First Amendment if it “would significantly affect the Boy Scouts’ ability to advocate public or private viewpoints.”¹³

(3) The Boy Scouts assert that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly those represented by the requirement that Scouts be “morally straight” and “clean.”¹⁴

(4) The Court must give deference to an organization’s assertions regarding the nature of its expression.

(5) The Court “must also give deference to an association’s view of what would impair its expression.”¹⁵

(6) The Court should prevent forced association: “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”¹⁶

The opinion in *Dale* does not state a clear rule to guide lower courts, but it implies either that all antidiscrimination laws are unconstitutional in all their applications or that citizens are allowed to disobey laws whenever obedience would be perceived as endorsing some message. The first rule is supported by propositions (1) through (5) above, which together permit any defendant to allege a message to which courts must defer. The second rule is supported by proposition (6), together with the Court’s invocation of the rule against compelled speech.¹⁷

Cases after *Dale* have revealed its potentially broad implications and lower courts’ reluctance to follow out those implications. Courts have rejected *Dale*-based chal-

10. *Boy Scouts of Am. v. Dale*, 734 A.2d 1196, 1223-24 (1999) (internal quotation marks omitted), *quoted in Dale*, 530 U.S. 640, 647.

11. 734 A.2d at 1225, *quoted in Dale*, 530 U.S. at 647 (quoting *Rotary Club*, 481 U.S. at 548).

12. *Dale*, 530 U.S. at 650.

13. *Id.*

14. *Id.*

15. *Id.* at 653.

16. *Id.*

17. This analysis of the Court’s opinion is developed in detail in Andrew Koppelman, *Signs of the Times: Dale v. Boy Scouts of America and the Changing Meaning of Nondiscrimination*, 23 CARDOZO L. REV. 1819 (2002). That essay critiques the work product of the Court, but does not deal with the deeper question, addressed by the present essay, of what constitutional protection ought to be given to freedom of association. For a more detailed analysis of the doctrinal confusion introduced by *Dale*, see David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT 121 (2001).

lenges to a city ordinance prohibiting commercial sex clubs,¹⁸ a gun control statute limiting the use of certain weapons to licensed gun clubs (effectively pressuring non-members to join such clubs),¹⁹ the use of undercover officers to enforce a prohibition of “lap dancing,”²⁰ a statute banning children’s access to a public, clothing-optional park,²¹ a state university’s decision to strip a fraternity, where illegal drugs were abused, of its status as a recognized student organization,²² and, not least, a city ordinance prohibiting discrimination on the basis of sexual orientation.²³ The logic of the *Dale* opinion made the claimants’ arguments colorable in all these cases, but the lower courts were unwilling to follow that opinion’s logic to its conclusions. Only four reported cases follow *Dale* to uphold a claim of freedom of association.²⁴ The Boy Scouts themselves are a party in two of these, one of which carves out a category of “nonexpressive” jobs in the Scouting organization, to which *Dale* does not apply.²⁵ Another involves a males-only meeting conducted by the Nation of Islam, and thus raises questions of the autonomy of religious groups that are different from those presented by ordinary association claims.²⁶ Only one decision, released as this article was going to press, upholds a *Dale* claim by a nonreligious association other than the Boy Scouts. It invalidates a statute denying funding to colleges that prohibited on-campus military recruiting.²⁷ This case is the one exception to a general tendency, in the federal courts, to confine *Dale* to its facts.

III

THE NEOLIBERTARIAN REMEDY

The Court’s opinion is mud, but a number of notable scholars have advocated that it be read to stand for a clear rule: noncommercial associations have an absolute right to exclude anyone they like. This section will survey the arguments that have been

18. *Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 220 F. Supp. 2d 1054 (D. Ariz. 2002).

19. *Gun Owners’ Action League, Inc. v. Swift*, 284 F.3d 198 (1st Cir. 2002).

20. *City of Shoreline v. Club for Free Speech Rights*, 36 P.3d 1058 (Wash. Ct. App. 2001).

21. *Cent. Texas Nudists v. County of Travis*, No. 03-00-00024-CV, 2000 Tex. App. Lexis 8136 (Tex. Ct. App. Dec. 7, 2000).

22. *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435 (3d Cir. 2000).

23. *Hyman v. City of Louisville*, 132 F. Supp. 2d 528 (W.D. Ky. 2001).

24. *Forum for Academic and Institutional Rights v. Rumsfeld*, 2004 WL 2698052 (3d Cir. 2004); *Boy Scouts of Am. v. D.C. Comm’n On Human Rights*, 809 A.2d 1192 (D.C. 2002); *Donaldson v. Farrakhan*, 762 N.E. 2d 835 (Mass. 2002); *Chicago Area Council of Boy Scouts of Am. v. City of Chicago*, 748 N.E.2d 759 (Ill. 1st Dist. 2001), *appeal denied*, 763 N.E.2d 316 (Ill. 2001).

25. *Chicago Area Council*, 748 N.E.2d at 759 (distinguishing nonexpressive positions). The other case is *Boy Scouts of Am. v. D.C. Comm’n on Human Rights*, 809 A.2d 1192 (D.C. 2002). But even the Scouts have gotten only limited mileage from *Dale*. The City of Berkeley was not prevented from revoking the Scouts’ privilege of docking their boats rent-free in the city’s marina. See *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002), *petition for review granted*, 605 P.3d 402 (2003).

26. *Donaldson*, 762 N.E.2d 835. The internal autonomy of religious groups is a well-established doctrine that has been held to survive the holding of *Employment Division of Or. v. Smith*, 494 U.S. 872 (1990), that (as a general matter) the Free Exercise Clause does not authorize the courts to carve out exemptions to generally applicable laws when such laws burden religious activities. See *Combs v. Cent. Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999); *Equal Employment Opportunity Comm’n v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996).

27. *Forum for Academic and Institutional Rights v. Rumsfeld*, 2004 WL 2698052 (3d Cir. 2004).

made by these neoliberal scholars. These arguments are modified versions of some old, widely discredited libertarian objections to antidiscrimination laws. The neoliberal move is to deploy the same old arguments, but to restrict their scope to apply only to noncommercial associations. The challenge for the neoliberals is to show that this modification rescues the arguments from the fatal flaws of their predecessors.

Justice O'Connor's concurring opinion in *Roberts* first gave the commercial/noncommercial distinction prominence. O'Connor thought that "an association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members," while "there is only minimal constitutional protection of the freedom of *commercial* association."²⁸ O'Connor would characterize an association as commercial "when, and only when, the association's activities are not predominantly of the type protected by the First Amendment."²⁹ She used the Boy Scouts as an example of the importance of context: "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."³⁰

The *Dale* Court does not state O'Connor's limiting principle in its opinion, but she provided the majority's fifth vote and there is no reason to think that she has changed her mind since *Roberts*.³¹ On the other hand, the Court's opinion stressed the expressive (rather than the noncommercial) nature of the Scouts. Daniel Farber observes that "the commercial or noncommercial character of an enterprise is only a rough proxy for its expressive nature."³² O'Connor did not write separately in *Dale*, and it would be premature to conclude that the commercial/noncommercial distinction made in her *Roberts* concurrence of sixteen years earlier—a distinction which is not even mentioned in the *Dale* opinion—is now the law of the land.³³

Nonetheless, should it be?

28. *Roberts v. United States Jaycees*, 468 U.S. 609 at 633-34 (O'Connor, J., concurring in part and concurring in the judgment).

29. *Id.* at 635.

30. *Id.* at 636.

31. David Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83, 127 (2001). During the oral argument in *Dale*, Justice O'Connor asked whether the case might be resolved by relying on the commercial/noncommercial distinction. Respondent's Oral Argument at 23, *Boy Scouts of Am. v. Dale*, No. 99-699, 2000 WL 489419, at *23 (Apr. 26, 2000).

32. Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1500 (2001). Justice O'Connor has written that a commercial association is not protected even if it engages in expressive activity. See *Roberts*, 468 U.S. at 639 (O'Connor, J., concurring in part and concurring in the judgment); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 20 (1988) (O'Connor, J., joined by Kennedy, J., concurring).

33. *But see* Bernstein, *supra* note 31, at 126-27; David Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619, 626 (2001). Bernstein is more cautious about the meaning of *Dale* in DAVID E. BERNSTEIN, YOU CAN'T SAY THAT! THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 104 (2003).

A. The Paleolibertarian Critique

The libertarian objection to antidiscrimination laws is quite old. Classic libertariannism—call it “paleolibertarianism” to distinguish it from the neoliberalism of the contemporary writers whom this paper addresses—takes two forms: deontological and consequentialist. These rest on three argumentative strategies, which I will call “Rights,” “Optimism,” and “Distrust.”

The Rights argument resembles Kantian deontology in that it insists on economic rights without depending on predictions about the workings of an unregulated economy.³⁴ The argument claims that laws against discrimination are unjust regardless of what the consequences of discrimination might be. It begins with the premise that law should not interfere with liberty except to prevent violations of rights. Interferences for any reason other than the prevention of rights violations are themselves rights violations. When A associates with B, but refuses to associate with C, that association does not violate any rights of C. No one has a right to compel others to associate with her. Therefore, A has a right not to associate with C. It follows that the law violates A’s rights when it penalizes A for her refusal to associate with C. When a state violates people’s rights, it fails to show them the respect to which they are entitled.³⁵ Many opponents of the Civil Rights Act of 1964, notably presidential candidate Barry Goldwater, made arguments of this sort.³⁶

Theories of this kind are familiar in the liberal tradition, but they rest on a dubiously atomistic conception of human life, with a remarkably constricted account of the human interests that the state can legitimately protect.³⁷ A society could, on this account, have a permanent outcast population in a state of chronic economic misery, vulnerable to ruthless exploitation.³⁸ The state would have no power to remedy this, even if the culture of prejudice that is maintained thereby is one that itself produces numerous rights violations.³⁹ It is bizarre to think that respect for persons demands such person-destroying results. Not only does this account fetishize a historically contingent distribution of entitlements; it also misreads the history it fetishizes. The idea that property entails an absolute right to discriminate is not embedded in the common law from time immemorial but is an artifact of the Jim Crow era.⁴⁰ Kant, who is the wellspring of such rights-based arguments, was not himself so indifferent to consid-

34. The linkage is clearest in ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

35. For arguments of this sort, see AYN RAND, *THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM* 126-34 (1964); Michael Levin, *Negative Liberty*, 2 *SOC. PHIL. & POL’Y* 84, 98-100 (1984). George Kateb approaches the position described in the text but shrinks from it without much explanation, conceding that businesses, at least, may legitimately be denied the right to discriminate. George Kateb, *The Value of Association*, in *FREEDOM OF ASSOCIATION* 35, 58 (Amy Gutmann ed. 1998).

36. See RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* 363-64 (2001), *id.* at 462 (quoting Goldwater’s speech, co-authored by William Rehnquist, declaring that “the freedom to associate means the same thing as the freedom not to associate”).

37. See Charles Taylor, *Atomism*, in *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 2, 187 (1985).

38. See THOMAS W. POGGE, *REALIZING RAWLS* 15-62 (1989).

39. See ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 43-47, 181-90 (1996).

40. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 *NW. U. L. REV.* 1283, 1475 (1996).

erations of human welfare.⁴¹ As a constitutional argument, libertarianism also has the handicap of entailing the correctness of *Lochner v. New York*,⁴² case law that only a few academics are bold enough to want to resuscitate.

Another strand of libertarian thought does attend to consequences. It rests on two interdependent claims: (1) Government is not to be trusted (Distrust), and (2) an unregulated capitalist economy produces good results (Optimism).⁴³ These claims are interdependent because the strength of each depends on that of the other. Even a largely self-regulating economy might usefully be tinkered with by a sufficiently wise and trustworthy government. Conversely, if an unregulated economy leads to disaster, even an incompetent and corrupt regulator may be better than no regulator at all.

Both claims are exaggerated. The idea that capitalist economies can regulate themselves may have been plausible in John Locke's time, but it is hardly so today.⁴⁴ Unregulated markets do not distribute goods in a just way.⁴⁵ Their capacity to satisfy people's preferences is routinely hamstrung by monopolies, externalities, and other transaction costs. They also produce aggregate effects that no one wants, such as vicious cycles of boom and bust. That is why libertarianism has been such a flop. No unregulated economy exists in any modern industrial country. And government has not proven to be all that untrustworthy. After the judiciary stopped reading libertarianism into the Constitution in the 1930s, the American economy did not collapse, but instead relied on its economic output to win World War II and the Cold War. Central management of the money supply has produced a marked softening of the business cycle. Libertarians worry about regulators being captured by powerful interests, but much of modern regulation manages to pursue the public interest.⁴⁶ The classic tales of wasteful overregulation that are repeatedly cited in the media have been proven apocryphal.⁴⁷ As a general matter, Optimism and Distrust are both falsified by experience.

They meet the same fate when they are applied to antidiscrimination law. Richard Epstein has argued that consumer welfare would be maximized if a right to discriminate were allowed.⁴⁸ Epstein's optimism about the fate of minorities in unrestricted markets is supported neither by history nor by economic theory.⁴⁹ And, once more,

41. See ALLEN D. ROSEN, *KANT'S THEORY OF JUSTICE* 173-208 (1993). Nozick, the most prominent exponent of this type of libertarianism, eventually recanted. See ROBERT NOZICK, *THE EXAMINED LIFE* 286-96 (1989).

42. 198 U.S. 45 (1905).

43. Both claims are prominent in, for example, FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944); FRIEDRICH A. HAYEK, *LAW, LEGISLATION, AND LIBERTY*, V. 2: *THE MIRAGE OF SOCIAL JUSTICE* (1976).

44. See IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN LIBERAL THEORY* 80-203 (1986).

45. The classic argument is JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

46. Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7 (2000).

47. See Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981 (1998).

48. RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992). That his basic philosophical orientation is utilitarian rather than rights-based is made clear in Richard Epstein, *Standing Firm, on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1 (1994).

49. See Glenn C. Loury, *Why Should We Care About Group Inequality?*, 5 SOC. PHIL. & POL'Y 249, 253-59 (1987), David Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L. J. 1619 (1991), Cass R. Sunstein, *Why Markets Don't Stop Discrimination*, 8 SOC. PHIL. & POL'Y 22 (Spr. 1991). The weaknesses of Epstein's attack on antidiscrimination laws are can-

the premise of Distrust is called into question by the success of antidiscrimination laws in dismantling discriminatory markets and opening economic opportunities to African-American citizens.

There is, of course, a valid core to libertarianism. Markets generate wealth better than any rival economic arrangement. They are distributively just to the extent that they make the availability of resources to any person depend on the value of those resources to others.⁵⁰ Also, they necessarily preclude some kinds of centralized direction: “Freedom means that in some measure we entrust our fate to forces which we do not control. . . .”⁵¹ But these generalizations have important exceptions. There is a big difference between being right most of the time and being right all of the time.

B. The Neoliberalist Modification

Neoliberalism is a mutated form of a perennial type of conservative constitutionalism, one which holds that government ought not to intervene in the private sector, either because to do so violates citizens’ rights, or because government cannot be trusted with such powers, or because the unregulated private sector is already the best of all possible worlds.

The newest arguments for a right against antidiscrimination law modify the older libertarian view, which had no use for the commercial/noncommercial distinction, but continue to rely on some combination of Rights, Optimism, and Distrust.

1. Rights

The strongest Rights-based claims after *Dale* are those developed by Michael Stokes Paulsen. He contends that the freedom of speech should be understood to include all exercises of freedom of association. The First Amendment’s text “does not limit the freedom to those who speak alone,”⁵² and so must include the right of groups to choose the content of their messages.

That logically entails a freedom of autonomous message formation and delivery by the group, including the right of the group to define itself—to define who will constitute the group that forms the message and the speakers who will express it on behalf of the group—and, finally, to exclude competing messages from being intermingled with the group’s chosen expression.⁵³

These activities are not themselves speech, but they are a necessary part of the process that produces speech, and so Paulsen infers that they should also be protected from

vassed in detail in a symposium at 31 SAN DIEGO L. REV. 1-277 (1994), and in Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219 (1992) (review of *Forbidden Grounds*).

50. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 65 (2000).

51. HAYEK, *LAW, LEGISLATION, AND LIBERTY*, *supra* note 43, at 30.

52. Paulsen, *supra* note 9, at 1922. For this he cites Akhil Amar’s historical work on the speech and assembly clauses, but Amar’s scholarship does not help him. The right of the people to assemble, Amar observes, “referred to formal gatherings of voters—who else could presume to instruct lawmakers?—rather than mere informal clumps of self-selected persons seeking to associate.” AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 29 (1998). It has no obvious implications for the freedom of nonpolitical groups to discriminate.

53. Paulsen, *supra* note 9, at 1922.

state interference.⁵⁴ Government's incompetence to regulate speech evidently entails its incompetence to regulate the precursors of speech, such as association.

Paulsen is skeptical of the diminished protection accorded to commercial speech,⁵⁵ and he thinks the distinction particularly problematic in the expressive association cases: "Expressive associations can have substantial commercial aspects. . . . Conversely, commercial business enterprises can have substantial expressive dimensions. . . ."⁵⁶ Because Paulsen's approach is so abstract, it offers little to anchor the commercial/noncommercial distinction. He concedes that the distinction may have value because it "supplies an important, if imperfect, limiting principle that attempts to cabin government's efforts to limit the freedom of expressive association."⁵⁷ But this implies that nothing of value would be lost if government's power to regulate associations were not "cabined" to commercial associations but eliminated altogether.

Paulsen's argument might be understood to apply only to precursors of speech that are clearly tied to the production of a specific message. But that would just give us the message-based approach of *Roberts* again, and Paulsen has bigger fish to fry. If the thesis is not thus confined, it would entail the unconstitutionality of the Civil Rights Act of 1964, which affected the precursors of speech by disrupting racist institutions and condemning racism as morally wrong.⁵⁸ The Civil Rights Act of 1964 appears to have played a powerful role in changing racist social norms.⁵⁹ Antidiscrimination law is not intelligible except as an effort to change such norms.⁶⁰

The trouble doesn't stop with the Civil Rights Act. All human conduct is a precursor of speech. All government regulation affects the culture. Thus, Paulsen's theory entails the correctness of *Lochner* as well. Maximum hours laws affect attitudes toward both work and economic policy and thus have political consequences. In that respect, such laws determine the speech that will occur. This reasoning is anarchic in its implications.⁶¹ If government cannot be trusted to regulate any of the precursors of political criticism, then government cannot be trusted to regulate anything.⁶²

54. For a similar argument, see Carpenter, *supra* note 2 at 1535-36 n.99.

55. Paulsen, *supra* note 9, at 1924.

56. *Id.* at 1927 n.49.

57. *Id.*

58. Elsewhere Paulsen acknowledges that "[f]ew these days would take seriously an employer's argument that racially discriminatory employment practices are protected as 'free speech'." Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. DAVIS L. REV. 653, 675-766 (1996).

59. See Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1074-82 (1995).

60. ROBERT POST, ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW (2001); KOPPELMAN, *supra* note 39.

61. The potentially anarchic implication of a very broad reading of the First Amendment was noted long ago by Robert Bork. See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 25-27 (1971). I am not entirely confident of my interpretation of Paulsen, because in a few footnotes, he nearly takes it all back by suggesting that the appropriate test for a restriction on associational freedom is that of *United States v. O'Brien*, 391 U.S. 367 (1968)—a test that in practice has been even easier for the state to satisfy than the *Roberts* test. See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). See Paulsen, *supra* note 58, at 692-93 n.93; Paulsen, *supra* note 9, at 1936 n.86. (On the *Dale* Court's unpersuasive efforts to distinguish *O'Brien*, see Stephen Clark, *Judicially Straight? Boy Scouts v. Dale and the Missing Scalia Dissent*, 76 S. CAL. L. REV. 521, 571-73 (2003).) If this is Paulsen's view, then he should not be classed as one of the neo-

A similarly broad reading of the First Amendment is implicit in the *Dale* opinion, as Richard Epstein has noted.⁶³ Building on the Court's holding that an association need only engage in expression in order to be protected, he observes that businesses are constantly engaged in expressive activity, and so the logic of *Dale* applies to them as well as to noneconomic entities.⁶⁴

The problem will be present in any Rights-based approach to freedom of association that tries somehow to derive it from the abstract idea of freedom itself: The resulting theory will be so abstract that there will be no traction to support the economic/noneconomic distinction, and so it will always collapse back into paleolibertarianism. The only hope for maintaining the neoliberal position, then, is some kind of consequentialist argument. And, indeed, the most persuasive of the neoliberals rely on some combination of Distrust and Optimism.

Dale Carpenter's theory of associational freedom is driven largely by Distrust. He thoroughly catalogues the dangers of *Roberts*'s message-based approach, which requires courts to scrutinize a group's message to determine whether that message is impaired by the application of an antidiscrimination law. Such an approach, he argues, is likely to systematically punish unpopular opinions, since any doubt about a group's message will probably be resolved against such opinions.⁶⁵ The message-based approach underestimates the expressiveness of membership policies.⁶⁶ It fails to notice that silence can itself be a kind of speech, as it was in the case of the Scouts.⁶⁷ It also fails to note the practical harm to an organization that can be brought about by compliance with an antidiscrimination law.⁶⁸

All the dangers that Carpenter enumerates are indeed presented by a message-based approach. On the other hand, the specific abuses that he worries about have not often manifested themselves.⁶⁹ He worries that these dangers are particularly prob-

libertarians; but then it would be hard to understand how he can support the result in *Dale*, as he obviously does.

62. Frederick Schauer has made an analogous point:

To distrust a decisionmaker is to adopt, usually sub silentio, a comparatively rosy view of the status quo. If one has a relatively positive view about where we are now, then one does not want to create new powers possibly producing significant negative changes. Conversely, however, if one is not thrilled with where we are now, a significant possibility that things could get better might be worth running a significant risk that things could get worse. After all, from some points of view, how much worse could they get? Stated another way, the view that process values are sufficiently important to justify tolerating some substantively suboptimal results is a view that presupposes that the process has served us moderately well.

The Calculus of Distrust, 77 VA. L. REV. 653, 666 (1991). I have cited this passage in the past with some skepticism, see Koppelman, *supra* note 39, at 261, but there I was discussing content-based restrictions on speech, restrictions with a long history of abuse. There is no such history here.

63. See Richard Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119, 139-40 (2000). Epstein concedes, however, that it would be "bold and foolhardy" to claim that current law goes so far. *Id.* at 139.

64. See *Id.*

65. Carpenter, *supra* note 2, at 1517.

66. *Id.*

67. *Id.* at 1542.

68. See *id.* 1542-63.

69. Carpenter does devote a long discussion to the history of state-sponsored suppression of expressive associations, *id.* at 1520-33, but all of the history he describes involves naked viewpoint discrimination, which

lematic for gay organizations, but he offers no historical instance in which the message-based approach was used to such an organization's detriment.⁷⁰

Carpenter offers the commercial/noncommercial distinction as a "compromise"⁷¹ solution that avoids these dangers. He observes that "holding a job is more important to most people than learning morals from a scoutmaster while tying a knot in front of a campfire."⁷² Economic interests, protected by the application of antidiscrimination laws to employers and retail businesses, are indeed more important than the noneconomic interests that would be served by the application of those laws to noncommercial associations. But it does not follow that noneconomic interests are *not* important. This compromise might sensibly be adopted by a legislature. Indeed, it *has* been adopted by most state legislatures. But it does not follow that those who reject this compromise are violating the Constitution.

The same theme of distrust is clear in Richard Epstein's critique of a message-based approach, though he carries it to a different conclusion than Carpenter. The Scouts' policy of quietly discriminating against gays made it hard for them to establish their message in court, Epstein observes, but it is "the kind of studied compromise that a large and successful organization must make to stave off schism or disintegration."⁷³ The compromise is "more stable in practice than coherent in theory,"⁷⁴ but if greater clarity is a prerequisite for protection, then "[t]he obvious incentive is for organizations to take extreme positions in order to avoid the heavy hand of state regulation."⁷⁵ A similar concern is intimated in the *Dale* opinion: "The fact that the organization does not trumpet its views from the housetops . . . does not mean that its views receive no First Amendment protection."⁷⁶ This is a serious objection. I shall defer consideration of it until after examining the pertinent state interests.⁷⁷

therefore would be unconstitutional even without any special doctrine protecting associational rights.

Carpenter responds by noting the courts' hamhanded treatment of the groups' messages in *Roberts* and (in the lower courts) *Dale*. "Even if there aren't many examples yet I'm not sure this response is fair given that application of antidiscrimination laws to private, expressive organizations is itself a very recent development (perhaps the last two decades). Give it time, I predict, and the abuses would multiply." Personal communication, Oct. 19, 2003. But there is no such trend. Most antidiscrimination laws have not been construed to apply to private nonexpressive organizations. Even the New Jersey case is an outlier and might have been overruled by the legislature had the Court not intervened.

70. "Imagine, for example, putting the fate of a gay organization's internal organizational rules in the hands of an elected judge in a state with an anti-gay sodomy law." *Id.* at 1549. The prospect is scary, but it is noteworthy that it hasn't happened yet. There is a history of pervasive viewpoint-based discrimination against gays, see Andrew Koppelman, *Why Gay Legal History Matters*, 113 HARV. L. REV. 2035 (2000) (reviewing WILLIAM ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999)), but it considerably antedates *Roberts*.

71. Carpenter, *supra* note 2, at 1587.

72. *Id.* at 1585-86.

73. Epstein, *supra* note 63, at 128.

74. *Id.* at 129.

75. *Id.* at 131. For similar arguments, see Carpenter, *supra* note 2, at 1547; Reply Brief for Petitioner at 4, *Boy Scouts of Am. v. Dale*, No. 99-699, 2000 WL 432367 (Apr. 04, 2000).

76. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000).

77. See *infra* part V.

2. Optimism and Distrust

We already noticed that the Optimism and Distrust arguments are interdependent. Even clumsy government intervention will be justified if the consequences of an unregulated market are worse. Thus, it is not surprising that the Scouts' own attorney relied primarily on Optimism to make his case.

The Optimism strategy is stressed by Professor (now Judge) Michael McConnell, who argued the case for the Scouts in *Dale*. McConnell's brief claimed that private, noncommercial expressive associations have a right to choose their own members and an unqualified right to choose their leaders.⁷⁸ He has expanded on the justification for this rule in his writings unrelated to the litigation:

If every group is internally diverse and pluralistic, reflecting the population as a whole, every group will be the same. If groups are required to accept members and appoint leaders who do not share their distinctive beliefs, their distinctive voice will be silenced. If individuals with disfavored beliefs can be forced to participate in institutions designed to mold them in accordance with the dictates of political correctness, the tapestry of pluralism will be seriously impaired. Genuine pluralism requires group difference, and maintenance of group difference requires that groups have the freedom to exclude, as well as the freedom to dissent. Freedom of association is an essential structural principle in a liberal society.⁷⁹

What McConnell describes would indeed be a nightmare, but is it a real danger? Even New Jersey, when it applied its antidiscrimination laws to the Scouts, did not say that there could be no discrimination anywhere in the state, but only that the Scouts were large and unselective enough to be a public accommodation. McConnell's objection is like an argument against economic regulation that thunders about the evils of Leninism. This distrust is coupled with the optimistic assumption that in an unregulated society, associations will conform to the maximum possible extent to the beliefs of citizens.

The resemblance between McConnell's argument and old arguments for laissez-faire economics is clearest in an early article he coauthored with Judge Richard Posner. The McConnell-Posner vision is one of "a constitutionally prescribed free market for religious belief."⁸⁰ Just as an economist assumes that absent distortions of competition, such as externalities, an unregulated market will allocate resources efficiently, so the theorist of religious freedom should assume that competition between religions is valuable.

The use of a free-market bench-mark is important because it identifies ways in which government policy distorts (sometimes unintentionally) the pattern of economic activity, causing resources to flow from higher-valued to lower-valued uses. Similarly, the First Amendment can be understood as positing that the "market"—the realm of private choice—will reach the "best" religious results; or, more accurately, that the government has no authority to alter such results.⁸¹

78. Brief for Petitioner at 32, *Boy Scouts of Am. v. Dale*, No. 99-699, 2000 WL 228616. (Feb. 28, 2000).

79. Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 466 (2000).

80. Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 60 (1989).

81. *Id.* at 14.

Government should be neutral toward religion in that it should “create neither incentives nor disincentives to engage in religious activities.”⁸²

McConnell’s argument for freedom of association closely resembles his argument for freedom of religion. In both cases, the analogy with the market is doing a lot of work. His *Dale* brief argues that “controversial questions of personal morality, often involving religious conviction, are best tested and resolved within the private marketplace of ideas, and not as the subject of government-imposed orthodoxy.”⁸³

In his leading article on the religion clauses, McConnell proposes to read the First Amendment to “protect against government-induced uniformity in matters of religion.”⁸⁴ The baseline for the question whether government is inhibiting or inducing religious practice, McConnell argues, should be “the hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience, without the influence of government.”⁸⁵ But this hypothetical world not only does not exist—it cannot be imagined. Religious choices are always already made in a political context.⁸⁶ In a world in which Christians are not permitted by the state to massacre Jews, it is inevitable that the meaning of Christianity will gradually shift, so that Christians no longer think that massacres of Jews are pleasing to God. Legislation by its nature induces uniformity. If government must play no role in the shaping of religion, then courts must invalidate the homicide statutes, which impair the formation and preservation of religions (such as that of the Aztecs) that value homicide. Any action at all by government will have some effect on religion, so, absent anarchy, a world in which there is no effect whatsoever is neither attainable nor desirable.

McConnell and Posner acknowledge this.⁸⁷ The interpretation of neutrality that they advocate is one in which “effects of government action on religious practice must be minimized, and can be justified only on the basis of demonstrable and unavoidable relation to a public purpose unrelated to the religious effect.”⁸⁸ Prevention of negative externalities would always satisfy this test; provision of public goods might or might not, depending on the weights of the burden on the minority and of the relative impairment of the good; paternalism and enforcement of morality should never pass the test.⁸⁹ Unlike McConnell’s approach to freedom of association, there is no talk of absolute rights in this co-written work.

To the extent this argument is persuasive, it is because a quasi-libertarian argument works unusually well in the area of religion. Many people believe that there is a fundamental right to follow one’s religious convictions; there is ample evidence that government is incompetent to discern religious truth; and there is also much evidence

82. *Id.* at 11.

83. Brief for Petitioner, *supra* note 78, at 47.

84. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 194 (1992).

85. *Id.* at 169.

86. This argument was previously made more briefly in Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 152 (2002), and is defended against objections in Andrew Koppelman, *No Expressly Religious Orthodoxy: A Response to Steven D. Smith*, 78 CHI.-KENT L. REV. 729 (2003).

87. See McConnell and Posner, *supra* note 80, at 6-7.

88. *Id.* at 33.

89. *Id.* at 46-51.

that religion thrives under a nonestablishment rule.⁹⁰ The Distrust consideration is particularly powerful here. James Madison famously denounced the idea “that the Civil Magistrate is a competent Judge of Religious truth” as “an arrogant pretension falsified by the contradictory opinions of Rulers in all ages. . . .”⁹¹ But this incompetence does not extend to all possible matters of cultural formation.

One of the most powerful recent defenses of an absolute freedom of noncommercial association is Nancy Rosenblum’s book, *Membership and Morals*.⁹² Rosenblum shows that even the most discriminatory and illiberal associations do not invariably damage liberal citizenship. For the alienated loners who join such associations, the likely alternative to illiberal participation is not liberal participation, but even more antisocial behaviors such as crime and drug addiction. Membership in illiberal groups may also strengthen some virtues of citizenship, such as hard work, economic self-sufficiency, and cooperation. Some memberships are also temporary and limited, and they coexist with other identities and memberships.

Rosenblum’s evidence destroys the mechanistic assumption that liberal society is undermined by all illiberal prejudices and associations within it. But to refute this claim is not to establish the opposite proposition, that such prejudices and associations never have antiliberal consequences severe enough to warrant legislative intervention. Epstein’s claim that competition among groups will provide a satisfactory remedy for any pattern of exclusion, Rosenblum thinks, “applies much more convincingly to voluntary associations than it does to employment.”⁹³ In order to determine that, however, one would need to examine the evidence in favor of intervention in any particular case in order to determine both the benefit achieved thereby and the burden on association.

A similar combination of Optimism and Distrust appears in John McGinnis’s defense of *Dale*. McGinnis thinks that *Dale* instantiates a general theme in the Rehnquist Court’s jurisprudence of promoting “decentralization and the private ordering of social norms.”⁹⁴ The rule of *Dale*, he argues, prevents totalitarian domination of government over culture. The abandonment of a message-based approach “allows private associations to exert subtle social pressures through relatively quiet judgments.”⁹⁵ Requiring a clear link between message and protection would create a world “where contentious political advocacy alone supplements the norms encouraged by the government.”⁹⁶ And, once again, the market will fix any wrong that is done. “BSA’s policy decisions are subject to a self-correcting mechanism because they put

90. See Koppelman, *Secular Purpose*, *supra* note 86, at 110.

91. James Madison, *Memorial and Remonstrance Against Religious Assessments*, in RELIGION AND THE CONSTITUTION 65 (Michael W. McConnell et al., eds., 2002).

92. NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* (1998).

93. *Id.* at 170.

94. John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 489 (2002). For a critique of McGinnis’s defense of the Rehnquist Court’s work, see Andrew Koppelman, *How “Decentralization” Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 CONST. COMMENT 11 (2003).

95. McGinnis, *supra* note 94, at 533.

96. *Id.* at 534.

the organization at risk of losing members and civic respect."⁹⁷ This is often true of noneconomic associations, and it is also often true of economic associations. Like Epstein and Paulsen, McGinnis thinks that the economic/noneconomic distinction may prove "unstable,"⁹⁸ since so much of business is expressive. It is hard to keep the logic of the argument from reaching the Civil Rights Act. Since the neoliberalist argument rests on an analogy between associations and markets, it is no surprise that the argument applies as well to markets as it does to associations.⁹⁹

Like the arguments for laissez-faire economic policy, the Optimism argument for freedom of association overgeneralizes from what is often the case to a claim about what is always the case. Regulation of markets is indeed unnecessary and counterproductive. Except sometimes. The neoliberalists claim that the "sometimes" does not happen all that often, but this is merely a hunch. It is dangerous for such hunches to become the basis of judge-made law, particularly constitutional law that is immune to legislative reconsideration in light of experience.¹⁰⁰

Let us take a closer look at the "sometimes."

IV

THE STATE INTEREST

Why would the state ever want to regulate the membership policies of noncommercial associations? As William Marshall observes, "[t]he definitional questions of where a liberty interest begins and a state interest ends are often interrelated."¹⁰¹ The Supreme Court's opinion in *Dale* declares that "[t]he 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,"¹⁰² but, remarkably, it never says what these interests are. The Boy Scouts question presents a useful case study of the relevant interests and therefore of the costs of a broad judicial protection of associations' right to exclude. Perhaps the costs are worth it. But one cannot tell unless one knows what those costs are.

Dale is the focus of this article because it was the case that provided the Court the strongest justification for an expanded freedom of association. Indeed, given the uncertainty of the opinion's reach, perhaps all one can say with confidence about *Dale* is that the Court felt certain that the Scouts, at least, were entitled to expanded protection. If the Court's intuition turns out to be wrong, then the case for expanding the freedom of association into an absolute protection for noncommercial associations becomes weak indeed.

97. *Id.* at 535.

98. *Id.* at 538 n.268.

99. A similar defense of a broad freedom of association is offered in BERNSTEIN, *supra* note 33, at 97-110. Bernstein relies on McGinnis's claims, *see id.* at 103, but is even vaguer than McGinnis about the precise scope of the freedom of association that he wants to defend.

100. *See* Ronald J. Allen, *Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty*, 88 NW. U. L. REV. 436 (1993).

101. William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 96 n.166 (1986).

102. 530 U.S. 640, 659 (2000).

There are two reasons for thinking that it was a mistake to extend such categorical protection to the Scouts. First, even if the Scouts' discrimination accurately reflects the preferences of its members, it nonetheless inflicts considerable harm on a large population of vulnerable children whose preferences are not adequately taken into account by the market for association. Second, there is some reason to doubt whether the Scouts' discriminatory policy really does reflect members' preferences better than a regime in which states can prevent discrimination by the Scouts within their borders.

A. Externalities and Distributive Injustices

The clearest benefit of legal intervention against discrimination is that it will prevent harm to the specific persons who are discriminated against. The harm prevented may outweigh the harm caused by regulation to the person who is prevented from discriminating. The balance of harms is not determinable by a universal rule in either the economic or the noneconomic sphere.¹⁰³ Discrimination has cultural as well as economic externalities: a practice of exclusion that makes insiders very happy may nonetheless injure those who are made pariahs, both because outcast status is bad in itself and because such status is likely to lead to the violation of other rights.¹⁰⁴

As I noted earlier, unregulated markets often produce unjust distributions. Economics is notoriously indeterminate with respect to initial entitlements. If these are unjust, then a free market will simply perpetuate the injustice: garbage in, garbage out. The same is true of unjustly stigmatized social status. Absent the intervention of the civil rights legislation of the 1960s, America's racism would almost certainly be worse than it is now. In changing our culture, we have become a more just society. The fairness of the distribution of honor and dishonor matters, too.¹⁰⁵

In the Boy Scouts case, the most relevant externalities and distributive injustices concern gay children. They were the group who most obviously would have benefited from the application of an antidiscrimination statute to the Scouts.

The stigma against gay people in the United States is most profound among adolescents. A study of harassment in American high schools found that the most upsetting type of harassment was being called gay.¹⁰⁶ One national survey of males aged 15-19 found that 89% thought that the idea of homosexual sexual activity was "disgusting," and only 12% were sure that they could befriend an openly gay male.¹⁰⁷ Students are often conspicuously cruel to peers whom they perceive as gay. Students

103. See Peter DeMarneffe, *Rights, Reasons, and Freedom of Association*, in *FREEDOM OF ASSOCIATION* 145 (Amy Gutmann ed., 1998).

104. See generally Koppelman, *supra* note 39; Andrew Koppelman, *On the Moral Foundations of Legal Expressivism*, 60 MD. L. REV. 777 (2001).

105. See Will Kymlicka, *Civil Society and Government: A Liberal-Egalitarian Perspective*, in *CIVIL SOCIETY AND GOVERNMENT* 79 (Nancy L. Rosenblum and Robert C. Post eds., 2002).

106. Alice McKee, American Association of University Women, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools* 20, 23 (1993). See also Deborah Brake, *The Cruellest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX*, 1 GEO. J. GENDER & L. 37 (1999).

107. William Marsiglio, *Attitudes toward Homosexual Activity and Gays as Friends: A National Survey of Heterosexual 15- to 19-Year-Old Males*, 30 J. SEX RES. 12 (1993).

thought to be gay are often publicly humiliated, threatened with harm, spit at, pushed, and physically attacked. Adults in authority often do nothing at all about the harassment, and sometimes they blame the victims.¹⁰⁸

Gay adolescents often are rejected, not only by their peers, but by their parents as well.¹⁰⁹ This extreme rejection and isolation produces a disproportionately high incidence of suicide attempts.¹¹⁰ One study found that suicide attempts were associated with “reliance on social support from people who rejected them because of their sexual orientation”¹¹¹ Gay youth have the option of keeping their sexuality secret from everyone, but this secrecy has psychic costs of its own. The fear of discovery becomes an integral part of their lives, and the constant feeling of isolation often leads to clinical depression.¹¹² Suicide attempts “occur[] most often before they acknowledged or disclosed their sexual identities to others.”¹¹³

Those prejudiced against gays regard them as, in some ways, even more polluting than racists regarded blacks. Gays are traditionally entitled to no legitimized place at all in society.¹¹⁴ Martha Nussbaum observes that in the judge’s famous speech at Oscar Wilde’s sentencing for sodomy, one of the most prominent legal texts in the history of homosexuality, the judge “treats the prisoners as objects of disgust, vile contaminants who are not really people, and who therefore need not be addressed as if they were people.”¹¹⁵ From this it is not far to Heinrich Himmler’s speech to his SS generals, in which he explained that the medieval German practice of drowning gay men in bogs “was no punishment, merely the extermination of an abnormal life. It had to be removed just as we [now] pull up stinging nettles, toss them on a heap, and

108. See Safe Schools Coalition of Washington State, *They Don’t Even Know Me! Understanding Anti-Gay Harassment and Violence in the Schools* (1999), at <http://www.safeschools-wa.org/theydntevenknowme.pdf>. See also Gay, Lesbian, and Straight Educational Network, The 2003 National School Climate Survey, <http://www.glsen.org/cgi-bin/iowa/all/news/record/1413.html>; Human Rights Watch, *Hatred in the Hallways: Discrimination and Violence Against Lesbian, Gay, Bisexual and Transgender Students in U.S. Public Schools*, at <http://www.hrw.org/reports/2001/uslgbt/>; Pride and Prejudice: Working With Lesbian, Gay and Bisexual Youth (Margaret Schneider ed., 1997).

109. Anthony R. D’Augelli, *Lesbian, Gay, and Bisexual Development During Adolescence and Young Adulthood*, in *Textbook of Homosexuality and Mental Health* 267, 275 (Robert P. Cabaj and Terry S. Stein eds., 1996).

110. One well-known study found that “gay youth are 2 to 3 times more likely to attempt suicide than other young people. They may comprise up to 30 percent of completed youth suicides annually.” Paul Gibson, *Gay Male and Lesbian Youth Suicide*, in 3 Report of the Secretary’s Task Force on Youth Suicide, U.S. Dept. of Health and Human Services 3-110 (1989). Some recent studies have confirmed this finding, while others suggest that the disparity exists but is far lower. See Ritch C. Savin-Williams, *Suicide Attempts Among Sexual-Minority Youths: Population and Measurement Issues*, 69 J. CONSULTING & CLINICAL PSYCH. 983 (2001).

111. D’Augelli, *supra* note 109, at 280.

112. See A. Damien Martin & Emery S. Hetrick, *The Stigmatization of the Gay and Lesbian Adolescent*, 15 J. HOMOSEXUALITY 163 (1988). “These youth suffer from chronic depression and are at high risk of attempting suicide when the pressure becomes too much to bear. They may run away from home with no one understanding why. A suicidal crisis may be precipitated by a minor event which serves as a ‘last straw’ to the youth. A low grade may confirm for the youth that life is a failure. An unwitting homophobic remark by parents may be taken to mean that the youth is no longer loved by them.” Gibson, *supra* note 110, at 3-120.

113. D’Augelli, *supra* note 109, at 280.

114. See Cheshire Calhoun, *Sexuality Injustice*, 9 NOTRE DAME J. L. ETHICS & PUB. POL’Y 241 (1995).

115. Martha C. Nussbaum, “*Secret Sewers of Vice*”: *Disgust, Bodies, and the Law*, in *THE PASSIONS OF LAW* 46 (Susan A. Bandes ed. 1999).

burn them.”¹¹⁶ Such attitudes are a ubiquitous part of the experience of many gay people in the contemporary United States, taking forms that range from cold attitudes to violent attacks.¹¹⁷

If the state is going to combat this prejudice, it cannot be unconcerned with the institutions that promulgate it. Nan Hunter observes that when entities that generate norms represent themselves as open to the public, but then exclude some people on the basis of their identity, that exclusion becomes a marker of inferiority.¹¹⁸ Some of those entities in fact have enormous norm-generating power, and those norms powerfully stigmatize those who are excluded.¹¹⁹

The Boy Scouts of America is now the single largest entity in the United States that excludes gay people on the basis of their identity, and it justifies this exclusion on the basis of gays' own purported moral failings.¹²⁰ It is a statistical certainty that tens of thousands of the boys in the Scouts will grow up to be gay.¹²¹ We have already reviewed the devastating consequences when gay youth are forced to lie and hide their identities, which is precisely what the Scouts' policy requires of the gay adolescents who discover their sexuality when they are already members. Defenders of the Scouts emphasize the good that Scouting does and the valuable experiences and skills that members acquire. But these very virtues can make the program poisonous for some. The pressure on gay teenagers to hide their sexual identity, and the sense that their secret makes them intrinsically worthless, are more intense the more they already value and trust the adults who, they discover, reject and ostracize gay people. After the Rhode Island Medical Society unanimously approved a resolution saying that the Scouts' ban on gays would increase the risk of teen suicide, a spokesman for the Scouts responded that gay youths had other options: “[T]here are other organizations that these kids can be a member of.”¹²²

116. Quoted in RICHARD MOHR, *A MORE PERFECT UNION: WHY STRAIGHT AMERICA MUST STAND UP FOR GAY RIGHTS* 69 (1994).

117. See ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 21-25 (2002).

118. Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1634 (2001).

119. See Marshall, *supra* note 101, at 94-96.

120. Even the United States military no longer does this. Rather, it justifies its policies on the basis of the anticipated hostile reactions of non-gay troops to the presence of gay soldiers. See Andrew Koppelman, *Gaze in the Military: A Response to Professor Woodruff*, 64 UMKC L. REV. 179 (1995). The Catholic Church condemns homosexual activity, but it does not hold that a person is morally defective and unclean merely because of homosexual desire. Quite the contrary; “the particular inclination of the homosexual person is not a sin.” Congregation for the Doctrine of the Faith, *Letter to Bishops on the Pastoral Care of Homosexual Persons* (Oct. 1, 1985), 32 THE POPE SPEAKS 62 (1987).

121. Between two and five percent of the male population is gay. See RICHARD POSNER, *SEX AND REASON* 294-95 (1992). The 2000 Annual Report of the Boy Scouts of America reported a total membership of 3,351,969. Subsequent reports (reflecting, perhaps, negative publicity in the wake of *Dale*) do not state the total membership. The 2001 Annual Report provides figures on Cub Scouts and Boy Scouts that add up to 3,049,070, while the 2002 report's total is 3,011,269 and the 2003 report's total is 2,911,823. See <http://www.scouting.org>. It follows that the number of gay youth is somewhere between 60,000 and 152,000. There is some evidence that the percentage is even higher among adolescents. See D'Augelli, *supra* note 109, at 267-68.

122. Matthew Schuerman, *Dying to Be a Boy Scout?: Doctors Say the Boy Scout Ban Will Increase The Rate of Suicide Among Gay Youth*, THE ADVOCATE, June 19, 2001, at 15.

The trouble, of course, is that a seven-year-old boy does not know whether he is gay when he decides to join the Cub Scouts. James Dale, whose expulsion from the Scouts when he was a college student led to the *Dale* litigation, is an example. He joined the organization when he was eight. He wanted to join when he was even younger, since his older brother and his father were members.¹²³ He was an enthusiastic Scout, rising to the rank of Eagle, the highest honor the Scouts could bestow.

The Scouts revoked Dale's membership after a newspaper story, which did not mention his affiliation with the Scouts, identified him as an officer of his college's lesbian and gay student organization. The Scouts claimed that Dale's continued membership would contradict their moral teachings because he disagreed with those teachings. But the Scouts' decision to terminate Dale was not, and could not have been, based on his beliefs. When they threw him out, they did not know anything about his beliefs.¹²⁴ The Scouts also said that they believed that "homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed. . . ."¹²⁵ But the Scouts did not know anything about Dale's conduct, either. They terminated him without making any effort to find out about either his beliefs or his behavior.¹²⁶ The letter that

123. Chuck Sudetic, *The Struggle for the Soul of the Boy Scouts*, ROLLING STONE, July 6-20, 2000, at 101, 105.

124. The relevant passage from the news article that was the basis of his expulsion reads:

James Dale, 19, co-president of the Rutgers University Lesbian Gay Alliance with Sharice Richardson, also 19, said he lived a double life while in high school, pretending to be straight while attending a military academy.

He remembers dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers.

"I was looking for a role model, someone who was gay and accepting of me," Dale said, adding he wasn't just seeking sexual experiences, but a community that would take him in and provide him with a support network and friends.

Seminar Addresses Needs of Homosexual Teens, THE STAR LEDGER, July 8, 1990, *quoted in Boy Scouts of Am. v. Dale*, 530 U.S. 640 at 689-90 (2000) (Stevens, J., dissenting).

125. Position statement promulgated by the Boy Scouts in 1991, *quoted in Dale*, 530 U.S. at 652 (majority opinion).

126. The following representation during the Scouts' oral argument in *Dale* thus is inconsistent with the stipulated facts:

QUESTION: When you—I'm not sure what we're talking about when we say exclusion of people who are not openly homosexual. I mean, what if someone is homosexual in the sense of having a sexual orientation in that direction but does not engage in any homosexual conduct?

MR. DAVIDSON: Well, if that person also were to take the view that the reason they didn't engage in that conduct would it would be morally wrong—

QUESTION: Right.

MR. DAVIDSON: —and that's the view that would be communicated to youth, that case has not come up, but it's my understanding of the policy that that person would not be excluded.

QUESTION: But somebody who was homosexual and celibate, but who said, in my view it isn't morally wrong, would such a person be excluded?

MR. DAVIDSON: Justice Ginsburg, I'm not sure I got the notes right in that question, but if somebody said it was morally wrong, and that they didn't engage in it but did have homosexual inclinations, I believe that that person would be eligible for leadership, as I understand the policy.

Official Transcript of Oral Argument at 6-7, *Boy Scouts of Am. v. Dale*, April 26, 2000, 2000 WL 489419 (No. 99-699). "No BSA representatives spoke with Dale during the course of his expulsion, asked his views on sexuality or any topic, or questioned his approach to scoutmaster duties." Brief for Respondent at 7, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (No. 99-699).

told him the reason for his expulsion stated simply that the Boy Scouts “specifically forbid membership to homosexuals.”¹²⁷ They threw him out for *being* gay.

“Boy Scouts was community,” Dale later explained.¹²⁸ “It was a place where I felt I belonged. I did other things. I was in soccer and basketball. But nothing fit as well as the Boy Scouts. I felt I didn’t have to be the best football player or run the fastest. In the Boy Scouts, I could be who I was. They valued me for who I was.”¹²⁹ When he was expelled, “it was like a kidney punch. I felt betrayed. This was the organization that taught me how to be me.”¹³⁰

Possibly, these harms do not rise to the level that justifies interference with the Scouts’ liberty. That was the position of most legislatures before *Dale*. The Scouts’ cultural power may not be enough to inflict serious harm on many boys. Competition among youth groups and activities may ameliorate the harm of exclusion. But these are fact-dependent questions, the answers to which are likely to vary from place to place. They are not sensibly resolved by a uniform national rule emanating from the courts. The prevention of this kind of mistreatment is not obviously beyond the legitimate power of the state.

B. The Free Market of Ideas and the Second Best

Thus far, this analysis has assumed that an unregulated market reflects the preferences of consumers; that if the Scouts exclude gays, it is because that is what the members want. The Scouts, however, have considerable market power that is reinforced by the Boy Scouts’ status as a kind of government-created monopoly. Consequently it is far from clear that regulation must produce a decline in consumer satisfaction.¹³¹

The position in society of the Boy Scouts of America is not that of one small booth in the pluralist bazaar. It is more like that of Anglicanism in England. The BSA is enormous. It is deeply intertwined with the state, to a degree unmatched by any other youth organization. Its success in these respects is the result of its calculated decision to present itself as universalistic rather than particularistic. It is pretty late in the day for the BSA to be presenting itself as one competitor among many.

The BSA is the largest civic youth organization in the United States, and perhaps in the world. More than eighty-seven million boys have belonged to BSA, and in 1992 over a million adults were active members.¹³² Fifty percent of all American boys

127. *Quoted in Dale*, 530 U.S. at 643.

128. Sudetic, *supra* note 123, at 105.

129. *Id.*

130. *Id.* See also Clark, *supra* note 61, at 562-63 n.199.

131. The same point could be made about political parties. A broad right of noncommercial association would not only hamstring antidiscrimination law, it would also render unconstitutional much of existing election law, which pervasively regulates party primaries. See Samuel Issacharoff, *Private Parties With Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274 (2001).

132. See *Dale* 530 U.S. at 697 (Stevens, J., dissenting).

between the ages of seven and ten are Cub Scouts, and twenty percent between eleven and eighteen are Boy Scouts.¹³³

Since 1916, the BSA has held a Congressional charter.¹³⁴ The BSA is exempted from a federal statute that bars civilians from wearing uniforms resembling those of the armed forces.¹³⁵ Every President since Taft has served as BSA's honorary president. Congress has authorized the military to loan equipment to the Scouts without charge, and to sell the BSA obsolete or surplus material.¹³⁶ Every four years, the National Jamboree, a huge camping festival that attracts tens of thousands of Scouts from all over the world, is hosted by Fort A.P. Hill in Virginia, a U.S. military base.¹³⁷

From the beginning the Scouts have emphasized their inclusiveness. One historian of the BSA notes that an important asset of the organization was that it "adopted a point of view attuned to a democratically minded citizenry and opened its ranks freely to all creeds, races, and classes."¹³⁸ Official materials declare that "[n]either [our federal] charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy."¹³⁹ One typical publication urges representatives to give a "[p]ersonal invitation to every boy in school to join scouting."¹⁴⁰ The Scouts are declared by their bylaws to be "absolutely nonsectarian."¹⁴¹ The Scouts have managed to identify themselves with the nation as a whole. "Perhaps the BSA's greatest image-building triumph was its appropriation of the symbols of American nationhood."¹⁴² Bitter differences of religion and ethnicity have been avoided. The history of the Scouts with respect to race is less admirable, but even here the organization has become increasingly inclusive, and it is well ahead of the rest of America.¹⁴³

133. Brief for Respondent at 1, *Dale* (No. 99-699).

134. See 36 U.S.C.A. §§ 30901-30908 (2003).

135. DAVID I. MACLEOD, *BUILDING CHARACTER IN THE AMERICAN BOY: THE BOY SCOUTS, YMCA, AND THEIR FORERUNNERS, 1870-1920* 157 (1983); see 10 U.S.C.A. § 772(j)(1) (2003).

136. See 10 U.S.C.A. § 2554(a) (2002) (authorizing the loaning of equipment at Scout Jamborees); 10 U.S.C.A. § 4682 (2003) (authorizing the sale of obsolete Army equipment); 10 U.S.C.A. § 7541 (2002) (authorizing the sale or gift of Navy equipment); 10 U.S.C.A. § 9682 (2003) (authorizing the sale of obsolete Air Force equipment); 14 U.S.C.A. § 641 (2003) (authorizing the gift or sale of Coast Guard equipment to BSA or any public body or private, non-profit organization); see also 16 U.S.C.A. § 539f (2003) (waiver of rental fees in National Forest System not restricted to BSA).

137. Sudetic, *supra* note 123, at 109. The support provided by the military is prodigious, involving the active assistance of nearly 1500 uniformed members. See Ken Perrote & Yvonne L. Smith, *A.P. Hill Support Contributes to Success of Scout Jamboree*, MDW News Service (Aug. 6, 2001) available at <http://www.mdw.army.mil/content/anmviewer.asp?a=607&z=13>.

138. HAROLD P. LEVY, *BUILDING A POPULAR MOVEMENT: A CASE STUDY OF THE PUBLIC RELATIONS OF THE BOY SCOUTS OF AMERICA* 21 (1944).

139. *Quoted in* Brief for Respondent at 1, *Dale* (No. 99-699).

140. *Id.* at 2.

141. *Id.* at 3.

142. MACLEOD, *supra* note 135, at 178.

143. In its early days, the organization was as racist as the rest of American society. "The first American Boy Scout handbook included Baden-Powell's mnemonic device for 'N' in Morse code, a cartoon of a 'Nimble Nig' (the dot) chased by a crocodile (the dash)." *Id.* at 212. The BSA's executive board decided that it would sanction no black troop without local council approval, and the southern whites' veto was in constant use. One board member answered a critic by noting that to admit black boys "would lose us many white Scouts. . . ." *Id.* Where there was no established council, the organization simply refused to register blacks. The Chief Scout Executive, James West, foresaw "great mischief. . . if we permit the organization of colored troops in some very small community, even with the consent of the superintendent of schools and other representative people.

Another early success was the monopolization of the term “Boy Scout.” There were other organizations that used the term when the BSA was founded, but they were eclipsed by the success of BSA. “[W]ithin its first year of life this organization succeeded in absorbing every other active boy scout group but one—the American Boy Scouts which, though a formidable competitor, also passed from existence before 1920.”¹⁴⁴ This triumph was abetted by the Congressional charter enacted in 1916, which gave the BSA the exclusive right to use the name of Boy Scouts. This was promptly followed by successful legal action against the competitor organization, which was forced to change its name and did not survive.¹⁴⁵

After this long history of inclusiveness, the decision of the BSA leadership to plunge into the culture wars betrayed the expectations of much of the membership.

Although the Boy Scouts are not an actual monopoly,¹⁴⁶ they have enormous market power. The next largest youth organization, Camp Fire USA, has less than a quarter of the Scouts’ membership.¹⁴⁷ Membership in the Boy Scouts has a nationally understood meaning. If you tell someone you are an Eagle Scout, no further explanation is necessary. No other youth organization has such universal recognition or such enormous cultural resonance.¹⁴⁸

It is commonly said that those who disagree with the Scouts’ policies need not be members. If an association is going to develop a coherent voice at all, its internal means of addressing dissent has to be respected by the law.¹⁴⁹ Exit is a common method of dissent, and the characteristic means of control in free markets. However, as the classic study of the exit option observes, when an organization provides a public good, it is not really possible to exit.¹⁵⁰ A young man can resign from the Scouts, but he must still live in a society in which the only boys’ organization with quasi-official status publicly stands for the proposition that gay people are inherently defective and contaminating.

Judge McConnell’s policy argument for freedom of association analogizes that freedom with freedom of religion.¹⁵¹ The analogy is problematic, because no religion

Suppose this small community eventually becomes part of a county council or district council—it would work havoc and be an unnecessary embarrassment to overcome.” *Id.* at 213. In the North, there were black troops, but most troops were segregated. In some cases, segregation was imposed by the leadership. *Id.* at 213-14. Eventually, this policy was relaxed, and in the late 1920s and 1930s (a time when the nation as a whole exhibited little concern about racial injustice) southern councils began to accept black troops, encouraged by a promotion campaign undertaken by the national office. “Stanley Harris, field executive for the South, estimated that by 1939, 50,000 of the nation’s 1,449,103 Boy Scouts were black.” *Id.* at 214.

144. LEVY, *supra* note 138, at 19.

145. MACLEOD, *supra* note 135, at 156-57.

146. This is emphasized in *Epstein, supra* note 63, at 136-39.

147. The Boy Scouts of America has a total membership of approximately three million. *See supra* note 121. Camp Fire USA reports a membership of 735,000, of whom half are girls and therefore are not eligible for membership in the BSA. *See* http://www.campfire.org/all_about_us (last visited April 10, 2003).

148. The Girl Scouts come close, with 2.8 million girl members and 942,000 adult members; *see* <http://www.girlscouts.org/about/> (last visited Nov. 7, 2002); but they obviously do not compete with the Boy Scouts.

149. *See* Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639 (2001).

150. *See* ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 98-105 (1970).

151. *Supra*, part III B, 2.

in the United States represents an overwhelming majority of the pertinent population in the way that the Scouts do. If we put some pressure on the analogy, we will see the important ways in which freedom of association is legally constrained, to the benefit of the BSA, even after *Dale*.

In a regime of free association like that which has prevailed in the religion area, the Scouts would face a real possibility of schism over the homosexuality issue.¹⁵² In February 2001, the New York City board of the Scouts declared that the national organization's ban on gays was "repugnant" and "stupid."¹⁵³ New York's leadership later joined with those of Chicago, Los Angeles, San Francisco, Philadelphia, Minneapolis, and Orange County, California, in proposing that the ban be discarded.¹⁵⁴ Yet none of these cities' councils has officially rejected the national policy. The national organization has too much leverage over them for them to do that. Philadelphia's council tried to adopt a nondiscrimination policy in May 2003, but quickly reversed itself after pressure from the national organization.¹⁵⁵

American churches have divided in the past over fundamental moral differences. When Northern and Southern churches disagreed about slavery, the Presbyterians, Methodists and Baptists each split into separate regional churches.¹⁵⁶ Similarly, today there is a serious danger of division over the moral status of homosexual conduct among Presbyterians, Lutherans, Episcopalians, and Methodists.¹⁵⁷

152. Nancy Rosenblum offers schism as the healthiest solution to the problem of discriminatory associations. See ROSENBLUM, *supra* note 92, at 170-71.

153. The New York board acted, in part, in response to a threat by the New York City government to prohibit its agencies from sponsoring Scout activities. Eric Lipton, *Local Scouting Board, Calling Gay Ban "Stupid," Urges End to Nat'l Policy*, N.Y. TIMES, Feb. 27, 2001, at A21.

154. See *Nine Scout Councils Request BSA National to Stop Discrimination Against Gays*, <http://www.scoutingforall.org/aaic/100101.shtml>. Thus far, however, this movement has not succeeded in getting any modification of the national policy. The organization responded by enacting a resolution reaffirming the gay exclusion and stating that there is no local option to the contrary. Boy Scouts of America, BSA Board Affirms Traditional Leadership Standards, News Release (Feb. 2002) available at <http://www.scouting.org/nav/enter.jsp?s=mc&c=fs> (last visited April 7, 2003). The reformers seem unlikely to succeed because conservative religious organizations are so strong within the BSA. "[R]eligious bodies now sponsor 65 percent of all troops, compared with just over 40 percent 15 years ago." Benjamin Soskis, *Big Tent: Saving the Boy Scouts from its Supporters*, NEW REPUBLIC, Sept. 17, 2001 at 18. Of these, two-thirds are sponsored by the Catholic Church, the United Methodist Church, the Church of Jesus Christ of Latter-Day Saints (the Mormons), the Lutherans, and the National Council of Young Israel. Brief of Amicus National Catholic Committee on Scouting et al. in Support of Petitioners at 1, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699). Of these, the Mormons "sponsor more Scout troops and packs than any other religious or civic group in the country." Lesley Stahl, *The Boy Scouts: Policy of the Boy Scouts to Disallow Homosexuals Into Their Ranks*, 60 Minutes, April 1, 2001, CBS News Transcripts. The Mormons are less than two percent of the American population, but more than 12% of all Scouts and 23% of all Scout troops. Sudetic, *supra* note 123, at 105; Tracy Thompson, *Scouting and the New Terrain*, WASHINGTON POST MAGAZINE, Aug. 2, 1998. "Almost all of the church's top leaders achieved the rank of Eagle Scout as young men, and Mormon elders use the Boy Scout program as an integral part of its youth ministry." Sudetic, *supra* note 123, at 109. The Mormon leadership has a remarkably retrograde view of homosexuality, one that sanctions even violent abuse of gay people, and that appears not to follow in any apparent way from Mormon theology. See Katherine Rosman, *Mormon Family Values*, THE NATION, Feb. 25, 2002.

155. See Sara Rimer, *Boy Scouts Under Fire: Ban on Gays Is at Issue*, N.Y. TIMES, July 3, 2003, at A19.

156. See SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 659-65 (1972).

157. See David Van Biema, *Out of the Fold? The Debate over Gay Ordination and Same-Sex Unions Poses a Critical Choice for Mainline Protestants: Embrace or Schism?*, TIME, July 3, 2000 at 48; Dave Condren, *Presbyterian Church Faces Split over Same-Sex Unions*, BUFFALO NEWS, March 12, 2001, at B1; Tom Heinen,

When these religious splits have occurred, the state has remained neutral. After the rift over slavery, the respective factions on both sides of the Mason-Dixon line continued to call themselves Presbyterians, Methodists and Baptists, and to follow the rituals of their respective denominations. Neither side attempted to enjoin these practices by the other. More recently, the Society of St. Pius X is a group of Catholics who from 1988 to 2002 were in schism from the Church, their leaders excommunicated by the Pope, because of their rejection of the Vatican II reforms.¹⁵⁸ A number of churches of the Society operate in the United States, and it has hundreds of members here.¹⁵⁹ During the schism, they celebrated the Catholic Mass using the priestly clothing and language traditionally associated with the church. No effort was ever made by the Church to claim that these rituals and symbols were its intellectual property, or to legally enjoin the Society from operating as it did.

The law of intellectual property does not compel this result. Religious groups are protected as much as other groups from competitors with similar names, on principles analogous to those applied in trademark and trade name cases.¹⁶⁰ Present law might well have authorized the Pope to enjoin Martin Luther from calling himself a “Christian.” What has kept this rule from being a disaster for American religious pluralism is that few religious denominations have tried to enjoin each other from existing,¹⁶¹ and nothing of this sort happened in the major divisions just noted.

There is, however, every reason to think that the Boy Scouts of America would use the law to crush any schism within its ranks. Any troop that separated from the BSA would have to give up its uniforms and its curriculum.¹⁶² It would have to alter itself in a fundamental way. If it attempted to continue while disavowing the anti-gay policy, the BSA would presumably get an injunction to force it to stop identifying itself as a Boy Scout troop.

Lutherans Address Same-Sex Unions, MILWAUKEE J. SENTINEL, Jan. 16, 2001, at 1B; Caryle Murphy, *Confrontation Reveals Episcopal Split; Conservatives Attempt to Develop a Parallel, Supportive Church Hierarchy*, WASH. POST, June 2, 2001, at B9; John Rivera, *Deep and Difficult Differences Trouble Episcopalians in U.S.*, BALTIMORE SUN, Nov. 4, 2001, at 1F; Bruce Nolan, *Methodist Split Not Seen as Answer, Bishop Says, but Church Still Deeply Divided on Gay Issue*, NEW ORLEANS TIMES-PICAYUNE, May 15, 2004. There is also a danger of schism over the issue within the worldwide Anglican church. See STEPHEN BATES, *A CHURCH AT WAR: ANGLICANS AND HOMOSEXUALITY* (2004).

158. See FATHERS OF THE HOLY CROSS SEMINARY, *MOST-ASKED QUESTIONS ABOUT THE SOCIETY OF ST. PIUS X* (1997); Associated Press, *The World: Catholics Close a Historic Rift*, L.A. TIMES, Jan. 19, 2002, at A7.

159. See John C. Ensslin, *Sanctuary St. Isidore Parish Flowers Despite Rift With Catholic Church*, ROCKY MOUNTAIN NEWS, March 25, 2001, at 44A; see also <http://www.sspix.org> (listing statistics for the American District).

160. See generally Jed Michael Silversmith and Jack Achiezer Guggenheim, *Between Heaven and Earth: The Interrelationship Between Intellectual Property Rights and the Religion Clauses of the First Amendment*, 52 ALA. L. REV. 467 (2001); Howard J. Alperin, Annotation, *Right of Charitable or Religious Association or Corporation to Protection Against Use of Same or Similar Name by Another*, 37 A.L.R.3D 277 (1971).

161. There are, however, some significant religious groups that have used intellectual property rights to prevent schism. See, e.g., *Christian Science Bd. of Dirs. v. Nolan*, 259 F.3d 209 (4th Cir. 2001); *General Conf. Corp. of Seventh-Day Adventists v. Perez*, 97 F. Supp. 2d 1154 (S.D. Fla. 2000); *Church of Scientology Int'l v. Elmira Mission of the Church of Scientology*, 794 F.2d 38 (2d Cir. 1986).

162. See *Boy Scouts of Am. v. Teal*, 374 F. Supp. 1276 (E.D. Pa. 1974), and cases cited therein (enjoining operation of “Havertown Sea Scouts”).

What the BSA leadership has after *Dale* is the best of both worlds: freedom of association protects their right to discriminate, but their Congressional charter and intellectual property law prevents dissenting factions, even those with tens of thousands of members, from splitting off. If the religion analogy is accepted, then it should be pushed to its limits and the Scouts exposed to the dangers of schism that American religions routinely cope with.¹⁶³ Of course, the Supreme Court, having decided to protect the Scouts in *Dale*, could not then order that their intellectual property protections be lifted. It has no authority to do so. But that is one more reason why these matters should have been left to the legislature, which has the flexibility to craft solutions of this kind.

The present regime does not uniformly reflect the preferences of local associations. The application of antidiscrimination law would be a great relief to some local councils, who after *Dale* are squeezed between their own gay-tolerant moral beliefs (and those of their donors and members) and the national policy. The anti-gay policy has become a powerful obstacle to fundraising and the recruitment of volunteers in precisely those urban areas where the benefits of Scouting are most urgently needed. "There are probably a hundred positive things that scouting affords young people," commented Lewis Greenblatt, president of the Chicago Area Council of the BSA. "This is one of the few negative things that is going on in scouting. In Chicago, our core group is kids from the inner city. Scouting offers them some extremely positive reinforcement that they don't otherwise get." Chicago's council has expressed its disagreement with the national policy, but it is not openly repudiating it. "We've gone about as far as we can go. We're right up to the line."¹⁶⁴

The Chicago council would be greatly strengthened in its negotiations with national headquarters if the Council were constitutionally subject to the Chicago human rights ordinance. It could tell headquarters that it had no choice but to comply, while telling locals forthrightly that it does not discriminate.¹⁶⁵ Counsel could then do its local work with the homosexuality issue firmly off the table. The controversy over anti-gay discrimination, which the Chicago council did not invite, would disappear. The *Dale* decision has made it impossible to resolve the issue in this way.

Dale is, then, at least to some extent, a defeat rather than a victory for pluralism. The pluralist argument depends on a simplistic, binary view of the constraints on association, in which associations are either subject to state power or absolutely free to organize themselves as they see fit. In fact, as the Chicago case shows, associations actually operate in a complex web of constraints, including the state, their umbrella

163. Yael Tamir argues that the proper remedy for exclusion from dominant associations is for the state to provide citizens with "a network of state-sponsored services that would lessen their dependency on the associations to which they belong." Yael Tamir, *Revisiting the Civic Sphere*, in *FREEDOM OF ASSOCIATION* 214, 232 (Amy Gutmann ed., 1998). The regime that prevails after *Dale* is just the reverse of this: the quasi-official association is precisely the one doing the discriminating, and of course the state provides no alternative.

164. Telephone interview with Lewis Greenblatt, President of Chicago Area Council of the BSA (Oct. 22, 2002).

165. Chicago in fact had been attempting to enforce its human rights ordinance against the Scouts when the *Dale* decision was handed down. See *Chicago Council of Boy Scouts of Am. v. City of Chicago*, 748 N.E.2d 759 (Ill. App. Ct. 2001), *appeal denied*, 763 N.E.2d 316 (Ill. 2001).

organizations, and various groups of constituents, including donors, volunteers, and members. Eliminating state control does not always increase a local association's ability to reflect the preferences of its members. In many of the nation's largest cities, the opposite has been the case.¹⁶⁶ Local scout troops *are* bullied by a distant bureaucracy; that bureaucracy just happens to be a non-state entity.

The libertarianism of *Dale* is analogous to that of *United States v. E.C. Knight Co.*,¹⁶⁷ which held that Congress had no power to regulate a trust that controlled 98% of the country's sugar refining industry. The Supreme Court's disabling of government power did not empower anybody except the monopolists who controlled the trust. Similarly here, the Court's constraint on public power produces a hypertrophy of private power. Judge McConnell would read the religion clauses to "protect against government-induced uniformity in matters of religion,"¹⁶⁸ and his argument for freedom of association suggests similar concerns. Yet the *Dale* case has itself induced uniformity. Had the case come out the other way, the result would be different in different states. The Scouts might be forbidden to discriminate in Chicago except where individual troops invoke a right of intimate association,¹⁶⁹ but it is most unlikely that the Scouts would be thus restricted in Salt Lake City. This proliferation of options is one of the traditional strengths of federalism.¹⁷⁰

The problem in the *Dale* case thus resembles the problem described in what economists call the theory of the second best.¹⁷¹ The theory holds that when many markets are not competitive, it may be counter-efficient to attack monopolies in only some segments of the market. Consumers may respond to the regulation by shifting to unregulated activities that are even more inefficient than the activities that regulation drove them away from, resulting in a net efficiency loss. Here, if the Scouts possess a quasi-monopoly over a valuable cultural resource, freeing them from state regulation will not improve the market. It may just produce still greater consumer dissatisfaction. If the first best solution of free association is not available, a message-based approach may be the second best.

166. See *supra* text accompanying note 154 (noting resistance to the policy from New York City, Chicago, Los Angeles, San Francisco, Philadelphia, Minneapolis, and Orange County, California).

167. 156 U.S. 1 (1895).

168. McConnell, *supra* note 84, at 194.

169. The Scouts' Supreme Court brief emphasized that "[t]roops are incontrovertibly small, closely knit groups." Brief for Petitioner at 40, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). It also cited the right of parents to direct the upbringing of their children. See *id.* at 42-44. These arguments were of no avail in *Dale*, because the intimate associations involved in scouting were not the entities that decided to do the discriminating. That decision originated in a distant headquarters in Texas, without the participation or even the knowledge of local groups. But if the adult leaders of an individual troop wanted to exclude gays, they would have had a powerful claim.

170. See Michael W. McConnell, *Federalism: Evaluating the Framers' Design*, 54 U. CHI. L. REV. 1484, 1493-94 (1987).

171. The classic exposition is Kevin Lancaster & R.G. Lipsey, *The General Theory of the Second Best*, 24 REV. OF ECON. STUD. 11 (1956).

V

RULES OF LAW

The argument just offered challenges the Optimistic story, but the Distrust problem has not yet been addressed. Absent Optimism, though, Distrust lead us to a very different judicial rule than the one contemplated by the neoliberarians.

Distrust was a pervasive theme in the Supreme Court's reasoning in *Employment Division v. Smith*.¹⁷² In that case, the Court, largely consolidating a trend of the previous cases,¹⁷³ held that the Free Exercise Clause does not authorize the courts to carve out exemptions to generally applicable laws when such laws burden religious activities.¹⁷⁴ One reason why the Court declined to protect religious activities was that a different rule would require it to assess the burden that any law placed on religious activities,¹⁷⁵ which in turn would require it to scrutinize the beliefs of the religious. Scalia's reservations about that procedure look a lot like Carpenter's and Epstein's reservations about a message-based approach to freedom of association:

It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." . . . Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.¹⁷⁶

The rule that remains after *Smith* protects religion only against intentional interference motivated by animus against a specific religion.¹⁷⁷ If one similarly distrusts judges' ability fairly to discern and weigh the importance of associations' messages, one might follow the reasoning of *Smith* by concluding that associations should have similar protection: only laws that deliberately burden them because of their viewpoint should be deemed to violate the First Amendment.¹⁷⁸

Before *Dale*, of course, the Court had a more protective rule than this: if it could be shown that a nondiscrimination law burdened an association's ability to express its viewpoint, then the law would be invalid unless it was necessary to a compelling state interest. The reason for the additional protection, as noted earlier, is that some associations really are so closely associated with specific speech that the associations are practically inseparable from the speech. But deciding whether this is so in any particular case depends on a fact-specific investigation, with all the dangers of subjectivity and balancing that repulsed the Court in *Smith*.¹⁷⁹ The difference between the two

172. 494 U.S. 872 (1990).

173. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1277-82 (1994).

174. *Smith*, 494 U.S. at 878-79.

175. *Id.* at 886-87.

176. *Id.*

177. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

178. The anomaly of Scalia's providing the fifth vote in *Dale* is explored in detail in Clark, *supra* note 61.

179. This is noted by Carpenter, *supra* note 2, at 1539.

cases is that in the case of religion, it is well settled that courts may not interpret religious doctrines.¹⁸⁰ But this is entailed by the requirement that government not make pronouncements of religious truth,¹⁸¹ a requirement that is not relevant to most cases of freedom of association.¹⁸²

The message-based approach does have the effect of offering protection only to the most obviously prejudiced speakers. Epstein's question deserves an answer. "Why should the First Amendment protect only the extremes of the political distribution, but not the associational preferences of large, mainstream organizations?"¹⁸³

The answer is that social meanings are not innocuous. Antidiscrimination law presumes, and experience amply shows, that patterns of discrimination and exclusion will perpetuate themselves absent legal intervention, and that this justifies such intervention. The law is intervening to try to change social meanings. The message-based approach does put pressure on the culture to become less discriminatory, but it does so in a way respectful of speech, particularly the speech of those who most disagree with the government's position.

Jennifer Gerarda Brown argues that states should enact disclosure requirements that would require associations to disclose their discriminatory policies as the price for exemption from antidiscrimination laws. Such requirements would ensure that people know the messages that they are associating with when they join, and so would facilitate more informed decisions to associate.¹⁸⁴ Brown's proposal is attractive, but she does not notice how close we now are to the regime she proposes. The *Dale* litigation forced the Scouts to be open about their discriminatory policy and thus made salient an exclusion that had previously been tacit and thus normalized.¹⁸⁵

Antidiscrimination law does not defer to the market. It skews its operation in just the way that a message-based approach skews the operation of associations. Kimberly Yuracko has shown that the prohibition of sex discrimination in employment has isolated exceptions. Some of these derive from gender-based concerns of personal privacy: hospitals can discriminate in hiring nurses in maternity wards, and retirement homes can discriminate when they hire personal caregivers for their patients. More interesting is the case of businesses that sell sexual titillation. Strip clubs can discriminate when they hire strippers, but businesses are not permitted to discriminate for the sake of "plus sex" marketing, which packages sexual titillation together with other products. To take one well-known example, airlines may not discriminate on the basis

180. See *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969); *Watson v. Jones*, 80 U.S. 679 (1872).

181. See Koppelman, *supra* note 86, at 108-113.

182. This requirement is relevant to the autonomy of religious associations, which is why the *Dale* rule has been successfully invoked only by religious groups such as the Nation of Islam. See *supra* note 24 and accompanying text. The exemption of religious groups from antidiscrimination law is in this way not an exception to *Smith* but an application of its principles.

183. Epstein, *supra* note 63, at 130.

184. See Jennifer Gerarda Brown, *Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute*, 87 MINN. L. REV. 481 (2002).

185. See Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 L. & SEXUALITY 271 (2003).

of sex in order to combine air travel with alluring flight attendants.¹⁸⁶ Yuracko explains, “[W]hen deciding sexual-titillation cases, courts effectively do two things: (1) they rigidly divide the work world between sex and nonsex businesses, and (2) they police the boundaries between these categories to ensure that the nonsex world does not shrink, even though it may grow.”¹⁸⁷ This rule makes sense, because the sexualization of the workplace “alters the way [women] are treated by others so that their intellectual and professional attributes are simply less likely to be recognized and encouraged.”¹⁸⁸ Such focus on the body also has a detrimental effect on the performance of the women themselves.¹⁸⁹ Constricting the market makes people freer.

Like plus-sex businesses, invisible-discrimination associations aren’t allowed to exist. You can avoid the application of antidiscrimination law only by openly and notoriously discriminating. But when you do that, you scare away some of the customers. And this becomes a powerful incentive not to discriminate.

Does this effect itself create First Amendment difficulties? Is the state, under this rationale, suppressing speech in order to suppress its message? Carpenter correctly observes that under a message-based approach, ambiguity is likely to be construed against associations that want to discriminate.¹⁹⁰ More importantly, silence itself can sometimes be a message.

Gay advocates understand that silence signals tacit disapproval of gay-rights claims, or at the very least embarrassment and shame about the subject. . . . [A]gainst the backdrop of loud, continuous, and insistent demands to discuss and take sides on gay-rights claims, a steadfast refusal to talk at all about the issue is hardly neutral. It is itself a position, a “message.” It is like the schoolchild who remains silent while students all around him recite the Pledge of Allegiance. . . . Preserving traditional sexual morality is the goal; silence is the method. We may not like the goal or the method. But if the First Amendment secures some space in which to develop one’s own identity, it surely guarantees enough to prevent the evolution of that identity in a direction the state demands.¹⁹¹

But freedom of speech does not mean a right to engage in otherwise prohibited conduct in order to send a message, nor does it authorize one to disregard generally applicable laws whenever compliance with them will be taken by onlookers to send a message.¹⁹²

A law that precludes silent discrimination does not necessarily burden speech. Silence is not always a message. At least some entities that discriminate are not thinking about sending any message at all. An absolute right of noncommercial entities to associate, Marshall observes, “is overbroad because it protects discrimination wholly removed from the expressive goals of the organization.”¹⁹³ So when the message-based approach collides with the determined silence of the Scouts, the collision is less

186. See *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971).

187. Kimberly Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 196 (2004).

188. *Id.* at 205.

189. *Id.* At 205-09.

190. Carpenter, *supra* note 2, at 1542.

191. *Id.* at 1556-57, footnotes omitted.

192. See Koppelman, *supra* note 17, at 1826-35.

193. William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 79 (1986).

like *West Virginia v. Barnette*¹⁹⁴ than it is like *Clark v. Community for Creative Non-Violence*:¹⁹⁵ the First Amendment does not bar application of a law that prohibits conduct that is not itself inherently communicative, even if the defendant engages in the conduct for communicative reasons, so long as the law does not define the prohibited conduct by reference to the viewpoint that is communicated.

Does it matter that government's purpose is to shape the culture? But the law does this all the time. When persons are forbidden to discriminate, this makes it more likely that they will develop less discriminatory attitudes. When persons are forbidden to steal, this makes it more likely that they will develop greater respect for others' property. When any conduct is prohibited, preferences tend to adapt so that the conduct is no longer desired. These effects are not unintended. That they are intended, however, does not mean that the laws violate the First Amendment. People's preferences are inevitably shaped in nonrational ways by their environment, and law is part of that environment. Typically, neither racists nor nonracists arrive at their positions through a process of rational deliberation. Antidiscrimination law redirects these non-rational processes in a way that ameliorates severe and pervasive harms. As George Sher asks, "exactly what is disrespectful about taking (benign) advantage of a causal process that would occur anyhow?"¹⁹⁶

A message-based rule, in short, raises the cost of discrimination. If you raise the cost of anything, you'll get less of it. This effect can already be seen in the aftermath of *Dale*, when the Scouts suffered a decline in their membership. In the course of litigation—and certainly once the case was over—the Scouts became so associated with discrimination against gays that they now almost certainly could satisfy the *Roberts* test. Their fate is a warning to other groups. Discrimination is not free. Nor should it be.

VI

CONCLUSION

Dale is a mess, but the upshot of the mess is that we still have the old message-based rule of *Roberts*. An association is more likely to win immunity from an antidiscrimination law, the more clearly its message is a discriminatory one. *Dale* is in some tension with this rule, but the opinion is so muddled that it establishes no new rule to displace the old one. And this is not a bad place to end up.

In the end, we have a choice of pathologies. We can either live with the little pathologies created by the message-based rule, or with the big pathologies that would be created by either of the large and clear rules—absolute protection for discrimination, or no freedom of association at all—between which it uneasily perches. Ambiguity has its virtues. There is this much to be said for the Court's confused opinion in *Dale*: it has thickened the fog where clarity would be deadly.

194. 319 U.S. 624 (1943).

195. 468 U.S. 288 (1984).

196. GEORGE SHER, BEYOND NEUTRALITY: PERFECTIONISM AND POLITICS 73 (1997).