

SIGNS OF THE TIMES: *DALE* v. *BOY SCOUTS OF AMERICA* AND THE CHANGING MEANING OF NONDISCRIMINATION

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INTRODUCTION

All antidiscrimination laws are unconstitutional in all their applications.

Citizens are allowed to disobey laws whenever obedience would be perceived as endorsing some message.

Both of these propositions are absurd. However, the Supreme Court's opinion in *Dale v. Boy Scouts of America*¹ stands for at least one of them, and perhaps both. The already voluminous commentary on *Dale* is too polite, because almost all of it fails to notice the sheer lunacy of what the Court said.² The

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¹ 530 U.S. 640 (2000).

² See David McGowan, *Making Sense of Dale*, 18 CONST. COMM. 121 (2001); Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483 (2001); Dale Carpenter, *Expressive Association and Anti-Discrimination Law after Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591 (2001); Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639 (2001); Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917 (2001); David E. Bernstein, *Antidiscrimination Laws and the First Amendment*, 66 MO. L. REV. 83 (2001) [hereinafter Bernstein, *Antidiscrimination Laws*]; David E. Bernstein, *The Right of Expressive*

Court's disastrous opinion offers a useful cautionary lesson in First Amendment jurisprudence: determinations of what is protected speech cannot defer either to individual speakers or to the culture as a whole, because such deference produces bizarre results.

Part I of this essay briefly describes the *Dale* case. Part II shows how the decision supports the first of the absurd rules just described. Part III does the same for the second. The conclusion considers the difficult issues of balancing rights that the Court avoided, and concludes, perhaps surprisingly, that the Court's resolution of the issue was not evasive enough.

I. THE *DALE* DECISION

James Dale joined the Scouts when he was eight years old and remained a member until he turned eighteen. At that point, his membership automatically expired, but he was invited to remain in the organization as an assistant scoutmaster. Then, when he went to college, he learned about the local gay community and decided to come out as gay. He joined the school's lesbian and gay organization in his sophomore year, and within three months had become its co-president. A picture of him appeared in the local newspaper in a story about a gay youth workshop. The article did not mention his membership in the Scouts.

The Scouts, after seeing the story, sent Dale a letter expelling him from the organization. The letter did not explain the reason for the expulsion. When he wrote to inquire why, he was told that the Boy Scouts "specifically forbid membership to homosexuals."³ Dale sued the Scouts under New Jersey's antidiscrimination law. He prevailed in the New Jersey Supreme Court but ultimately lost in the U.S. Supreme Court.

The New Jersey Court held that the Scouts were a "public accommodation" under the statute. The Scouts claimed that the application of the law to them would violate their freedom of expression, but the Court was "not persuaded . . . that a shared

Association and Private Universities' Racial Preferences and Speech Codes, 9 WM. & MARY BILL OF RTS. J. 619 (2001) [hereinafter Bernstein, *Expressive Association*]; Richard Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. CAL. L. REV. 119 (2000). Erwin Chermersky and Catherine Fisk offer a powerful indictment, see Erwin Chermersky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL OF RTS. J. 595 (2001), but it is incomplete. See *infra* note 11 and Part III. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 807-17 (2001), comes closest to the reading I offer here, though we differ on some important matters of detail. See *infra* note 36.

³ Quoted in *Dale*, 530 U.S. at 645.

goal of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral.”⁴ 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 the Boy Scouts’ right of expressive association because his inclusion would not ‘affect in any significant way [the Boy Scouts’] existing members’ ability to carry out their various purposes.”⁵

The U.S. Supreme Court reversed. It reasoned as follows: (1) The Scouts are an association that “engages in expressive activity”⁶ 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”;⁷ (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”;⁸ (4) the Court must give deference to an organization’s assertions regarding the nature of its expression; (5) “we must also give deference to an association’s view of what would impair its expression”;⁹ and (6) “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.”¹⁰

II. EXPRESSIVE ASSOCIATION

The new expressive association right declared by the Court has far-reaching implications. Almost any association is eligible for the protection from antidiscrimination laws that the Court provides. The decision indicates that “[a]n association must merely engage in expressive activity that could be impaired in order to be entitled to protection.”¹¹ As Richard Epstein notes, businesses are constantly engaged in expressive activity, and so the

⁴ *Boy Scouts of Am. v. Dale*, 734 A.2d 1196, 1223-1224 (1999) (internal quotation marks omitted) (quoted in *Dale*, 530 U.S. at 647).

⁵ *Boy Scouts of Am.*, 734 A.2d at 1225 (quoting *Bd. of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987)) (quoted in *Dale*, 530 U.S. at 647).

⁶ *Dale*, 530 U.S. at 650.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 653.

¹⁰ *Id.*

¹¹ *Id.* at 655.

logic of *Dale* applies to them as well as to noneconomic entities.¹² It is hard to imagine an association that is *not* expressive under *Dale*'s criteria.

Once an entity is found to be entitled to protection, the only remaining question is whether the law impairs its expression. *Dale* indicates that the court must never interrogate the stated purposes of any association, and must defer to the association's view of what would impair its expression. It follows that an expressive association claim is available to any entity that wants to discriminate at any time for any purpose.

The Court's remarkable degree of deference is well illustrated by the facts of *Dale*. The Scouts had no express policy about homosexuality, and their stated position was and is that "boys should 'learn about sex and family life from their parents, consistent with their spiritual beliefs.'"¹³ Until the Scouts started kicking out gays, many members did not know that the organization had an anti-gay purpose. *Dale* himself had no idea that the policy existed until he was notified of his expulsion.

The Court correctly observes that "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."¹⁴ The fact that the Scouts had no apparent position on homosexuality yesterday should not preclude them from taking such a position today. But doesn't that mean that any entity can make a similar claim when discrimination is alleged against it? Can't any entity claim what the Scouts are claiming, that the very act of discrimination shows an expressive purpose?

Consider the following hypothetical: Ollie's Barbecue is a restaurant notorious in some quarters for the time, some decades ago, when it litigated its right to exclude blacks, all the way to the Supreme Court.¹⁵ Suppose that tomorrow it decides that it

¹² See Epstein, *supra* note 2, at 139-40; see also Rubinfeld, *supra* note 2, at 812. Daniel Farber responds that protection of associations need not go so far, but is "most justified when the organization's message is highly value-laden, like 'moral straightness' for the Boy Scouts." Farber, *supra* note 2, at 1500. Farber's reading may be sound as a matter of constitutional theory, but unlike Epstein's is unmoored from the text of the Court's decision. Chermerinsky & Fisk, *see supra* note 2, observe the breadth of the exception created by *Dale*, but they do not note how many entities are eligible to invoke it.

¹³ Quoted in Brief for Respondent at 3, *Boy Scouts of America v. Dale*, 2000 WL 340276. Since the litigation, the Scouts have become much more forthright about their policy. See, e.g., discussions on the Scouts' web page, <http://www.scouting.org/nav/about.html>.

¹⁴ *Dale*, 530 U.S. at 651. The dangers of judicial scrutiny of an association's purposes are not elaborated by the Court, but are persuasively developed in *Carpenter*, *supra* note 2, at 1533-63.

¹⁵ See *Katzenbach v. McClung*, 379 U.S. 294 (1964). Ollie's Barbecue still existed when this article was drafted, but it closed in December, 2001. Telephone Interview,

expresses a message of white supremacy and segregation. It therefore claims a right to exclude blacks, since including them would burden the expression of its viewpoint of white supremacy.

Unlike the Scouts, Ollie's is a commercial establishment. However, the Scouts' noncommercial character played no role in the *Dale* opinion.¹⁶ Commercial speech is entitled to a diminished level of First Amendment protection, but the speech at issue here is not an attempt to solicit a commercial transaction. Rather, it is entitled to the highest level of protection, and Ollie's commercial character doesn't change this. If the restaurant took out a racist ad in the paper or displayed a racist billboard, these things would be protected by the First Amendment. You may be tempted to doubt that Ollie's really does express a message of white supremacy, but under *Dale* you are not permitted to doubt that; you must give deference to Ollie's assertions regarding the nature of its expression. You must also give deference to Ollie's view of what would impair its expression. These requirements of deference are not just procedural provisos that shift the burden of establishing certain facts. They tilt the balance so radically as to transform the underlying law. It is as if there were a new rule of procedure in murder cases, holding that the court must always defer to the defendant's claims of self-defense. The presumption makes the defense so strong that there is no case in which it cannot be invoked, and the underlying prohibition is thereby nullified.

This is why Justice Stevens worried that, under the majority's test, "the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in *any* expressive activities."¹⁷ Justice Souter argued that the Court has made the right of expressive association into "an easy trump of any antidiscrimination law."¹⁸ Chief Justice Rehnquist's majority opinion denies that a group "can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."¹⁹ But he does not explain why the logic of his opinion does not lead to that conclusion.

Rehnquist was an early opponent of the Civil Rights Act of 1964. When it was being considered, he advised his friend, Senator Barry Goldwater, that the bill was unconstitutional.²⁰ It is doubtful

Revenue Dep't, City of Hoover, Alabama, June 26, 2002.

¹⁶ At one point, the Court does note that "[t]he Boy Scouts is a private, nonprofit organization," 530 U.S. at 649, but it does not state that this fact has any legal significance.

¹⁷ *Id.* at 695 (Stevens, J., dissenting).

¹⁸ *Id.* at 702 (Souter, J., dissenting).

¹⁹ *Id.* at 653 (majority opinion).

²⁰ See RICK PERLSTEIN, BEFORE THE STORM: BARRY GOLDWATER AND THE

whether he thinks he can go that far now, and even those who are most eager to have the Court take that step hesitate to say that *Dale* has gone that far.²¹ But that is where the logic of the opinion leads.

What is clear is that *Dale* is a substantial departure from prior law. Until *Dale*, the leading case on the conflict between freedom of association and freedom from discrimination was *Roberts v. United States Jaycees*,²² which upheld the application of a Minnesota antidiscrimination law as applied to the Jaycees and held that freedom of association did not permit the Jaycees to exclude women. Infringements on the freedom of association, the Court held, “may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”²³ The challenged law did not “impose[] any serious burdens on the male members’ freedom of expressive association,”²⁴ and the burdens that were imposed were justified by government’s compelling interest in eliminating sex discrimination. The Court declared that freedom of association would protect an absolute right to discriminate only in cases of “intimate association,” in which small groups were interacting face-to-face. This exception was not available to the Scouts. While it was true that the Scouts met in small groups, sometimes in private homes, the decision to exclude gays was not made by those small groups, but by the national organization.

If one were going to try to read the tea leaves of the *Dale* opinion to try to discern the new law of expressive association, one might think that what is really doing the work is the approach suggested by Justice O’Connor’s concurrence in *Roberts*, which argued that the crucial distinction was that between commercial and noncommercial organizations. O’Connor thought that “an association engaged exclusively in protected expression enjoys

UNMAKING OF THE AMERICAN CONSENSUS 363 (2001); see also *id.* at 462 (quoting a Goldwater speech, co-authored by Rehnquist, declaring that “the freedom to associate means the same thing as the freedom not to associate”).

²¹ See Epstein, *supra* note 2, at 139; Richard Epstein, *Free Association: The Incoherence of Antidiscrimination Laws*, NAT’L REV., Oct. 9, 2000, at 38. On the other hand, it is quite possible that he is prepared to invalidate—on states rights rather than free association grounds—some applications of that same civil rights statute to the states. See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 452 (2000).

²² 468 U.S. 609 (1984); see also, to the same effect, *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass’n v. City of New York*, 487 U.S. 1 (1988).

²³ *Roberts*, 468 U.S. at 623.

²⁴ *Id.* at 626.

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.”²⁵ She 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.”²⁶ She gave the 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.”²⁷ The 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*.²⁸ 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.”²⁹ 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.³⁰

All we can say for certain, then, is that the Court cannot mean what it has said about the scope of freedom of association. Rehnquist is not now going to get what he tried to get in 1964, and he probably has enough political common sense not to try.³¹ The fears of Stevens and Souter are therefore probably misplaced. But we have left the text of the *Dale* opinion behind.³²

There is another argument in *Dale* that offers a different rule

²⁵ *Id.* at 633-34 (O’Connor, J., concurring in part and concurring in the judgment).

²⁶ *Id.* at 635.

²⁷ *Id.* at 636.

²⁸ During the oral argument in *Dale*, Justice O’Connor asked whether the case might be resolved by relying on the commercial/noncommercial distinction. *Boy Scouts of Am. v. Dale*, tr. of oral arg., 2000 WL 489419, at *23.

²⁹ Farber, *supra* note 2, at 1500. 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 640 (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).

³⁰ *See* Bernstein, *Antidiscrimination Laws*, *supra* note 2, at 126-27; Bernstein, *Expressive Association*, *supra* note 2, at 626.

³¹ It would be a mistake, however, to place too much faith in the Court’s political common sense. *See Bush v. Gore*, 531 U.S. 98 (2000).

³² As does Dale Carpenter in his otherwise fine elaboration of O’Connor’s theory. *See* Carpenter, *supra* note 2.

of law, based on the law of compelled speech. To that argument I now turn.

III. COMPELLED SYMBOLIC SPEECH

If one focuses on the Court's declaration that Dale's mere presence as a Scout would convey a message that the Scouts are privileged not to have to convey, then most of the opinion's reasoning drops away as surplusage.³³ To compel the Scouts to admit Dale, the Court held, "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."³⁴ The case, the Court reasoned, was analogous to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*,³⁵ which held that the organizers of a private St. Patrick's Day Parade could not be required to include a group bearing a banner identifying itself as the Irish American Gay, Lesbian and Bisexual Group of Boston.

As the presence of GLIB in Boston's St. Patrick's Day parade

³³ David McGowan has correctly observed that this fact cuts against the reading offered in this section: "reading the Court as holding that Dale's homosexuality was inherently expressive would make large portions of the opinion irrelevant." McGowan, *supra* note 2, at 140. There is, however, no reading of *Dale* that can coherently account for all of its parts and fit them into a plausible decision. Even if, as McGowan thinks, the idea that Dale's status as inherently a message-bearer stemmed from his status as a "gay rights activist," this status, if legally relevant, would still render most of the opinion irrelevant. *Id.* Moreover, McGowan's view that "the question whether the Scouts would have a speech-based right to exclude a gay man who was not an activist is left unresolved," seems unduly optimistic. *Id.* Dale was not expelled for being an activist, but for being gay. One of the things that defined him as an "activist" in the Court's opinion was the fact that he was "open and honest about [his] sexual orientation." *Dale*, 530 U.S. at 653. The Court may well have perceived Dale as "fairly shouting a message on a topic the Scouts wanted to avoid," McGowan, *supra* note 2, at 172, but this is a strange characterization of Dale's own speech. 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, STAR LEDGER, July 8, 1990 (quoted in *Dale*, 530 U.S. at 689-90) (Stevens, J., dissenting). If these three paragraphs buried inside a minor news story forever brand Dale as an "activist," then perhaps the only way a gay man can avoid being an "activist" is to remain deeply closeted.

³⁴ *Dale*, 530 U.S. at 653.

³⁵ 515 U.S. 557 (1995).

would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs.³⁶

The First Amendment, it is well settled, protects the right not to speak. The Court has dismissed the idea "that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."³⁷ Persons may not be required "to repeat an objectionable message out of their own mouths" or "to use their own property to convey an antagonistic ideological message."³⁸ This right is not contingent on any finding that the message being sent is antagonistic to the speaker's own views. The fact that the speaker objects is sufficient.³⁹ Thus, steps (1) through (5) in the Court's reasoning, outlined above,⁴⁰ are irrelevant to the compelled speech argument.

The Court's opinion puts its imprimatur on the idea that Dale's presence itself is a message. The Court holds that anyone who associates with him is therefore propounding a point of view. It evidently agrees with the claim in the Scouts' brief that the exclusion of openly gay people was the only way that the Scouts could *avoid* taking a public position on the morality of homosexual

³⁶ 530 U.S. at 654; *see also id.* at 655-56:

The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other.

Jed Rubinfeld's analysis of *Dale* comes close to mine, but he reads *Dale* even more broadly than I do, as holding that "people are constitutionally entitled to violate a conduct law of general applicability because they have important expressive reasons for doing so." Rubinfeld, *supra* note 2, at 817. The passages just quoted, however, show that *Dale* rests on a finding of compelled speech. Compelled speech is distinct from, and constitutionally worse than, "prohibit[ing] some persons from expressing opinions or values in the way they want to express them." *Id.* at 809. The difference matters because, under existing caselaw, the prohibition on compelled speech seems to be an absolute that transcends the balancing that (in the remainder of his article) Rubinfeld deplors. If obedience to a law of general applicability is compelled speech, then government can't require it even if the costs of disobedience outweigh the benefits. *Dale* is thus even crazier than Rubinfeld thinks it is.

³⁷ *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943).

³⁸ *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 471 (1997) (internal citations omitted).

³⁹ *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 410-11 (2001). The prohibition on compelled speech applies with undiminished force to commercial speech and speech by corporations. *See id.*; *Pacific Gas v. Public Util. Comm'n*, 475 U.S. 1 (1986).

⁴⁰ *See supra* text accompanying notes 6-9.

conduct.⁴¹ Arthur Leonard's summary of the case's holding is not unfair: "An openly gay man so constantly and inescapably broadcasts a message about the moral and social acceptability of homosexuality that an organization that does not want to broadcast such a message is entitled to deny him membership"⁴²

That interpretation of the social meaning of Dale's inclusion is unpleasant, but it may be accurate. If the Court's task is to determine whether speech is being compelled, then such interpretations are an unavoidable part of the court's business. If persons cannot be required to transmit messages, then the Court must determine what is and is not a message. One illustration is *Wooley v. Maynard*, in which a Jehovah's Witness objected on religious and political grounds to the requirement that New Hampshire license plates bear the motto "Live Free or Die."⁴³ When he was prosecuted for attempting to cover up the motto, the Supreme Court framed the issue as "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."⁴⁴ Overturning the conviction, the Court declared that the law made him into an "instrument," a "mobile billboard,"⁴⁵ a "courier"⁴⁶ for a "point of view," an "ideological message," or an "idea [he] find[s] morally objectionable."⁴⁷ But as James Madigan notes, this holding necessarily has limits:

Presumably the plaintiff in *Wooley* would have no case if he objected to the words "New Hampshire," and at most an extremely weak case if the plate read "My car is registered in

⁴¹ "The right to control its own message includes the organization's right to be silent about issues if it so chooses. Boy Scouting does not convey an explicit 'anti-gay' message to the boys under its care; but it does not wish to convey approval of homosexual conduct either." Brief for Petitioner at 21, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

⁴² Arthur S. Leonard, *Boy Scouts of America v. Dale: The "Gay Rights Activist" as Constitutional Pariah*, 12 STAN. L. & POL'Y REV. 27, 27 (2001); see also *Dale*, 530 U.S. at 696 (Stevens, J., dissenting):

Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.

⁴³ 430 U.S. 705, 707 (1977).

⁴⁴ *Id.* at 713.

⁴⁵ *Id.* at 715.

⁴⁶ *Id.* at 717.

⁴⁷ *Id.* at 715.

New Hampshire.” One doubts that the person who resides and drives in New Hampshire will be able to escape carrying the state name simply because she hates her state. *Wooley* never suggests that the license plates themselves or their non-ideological numerals and letters could be challenged.⁴⁸

Madigan concludes that the *Dale* decision is erroneous, because Dale himself did not express any message. If his very presence was taken to convey a message, “[t]he content of the message is nothing more than the Boy Scouts’ characterization; after all, James Dale said nothing in the context of Scouting about being gay, and he said nothing in the context of gay activities about being a Scoutmaster.”⁴⁹ The Court, however, did not leave the Scouts free to attribute any message they liked to Dale’s presence. Rather, the Court determined, as a matter of law, what Dale’s presence meant.

The soundness of the Court’s conclusion depends on whether it correctly interpreted the meaning of Dale’s inclusion. That is a question, not of law, but of cultural anthropology. The semantic meaning of behavior is always a function of the conventions that obtain at a particular time and place.⁵⁰ Depending on what conventions happen to exist, a person’s inclusion may well be speech. The day the Supreme Court ruled against him, James Dale declared in an interview: “I’m not a message. I’m not a symbol. I’m not a sign. I’m just a person who happens to be gay.”⁵¹ But this is a false dichotomy. Depending on the cultural background, *anything* can be a sign.

Steven D. Smith observes that perceptions of what behavior constitutes endorsement are parasitic on one’s background norms of appropriate, neutral behavior. Thus, for example, it is widely thought that the Establishment Clause prohibits the state from supporting religion, but no one thinks that this is what is happening when the church is burning and the fire department puts it out. This is not endorsement. It is just what fire departments do. On the other hand, the state would certainly be sending a symbolic message if the firemen stood by and watched the church burn.⁵²

⁴⁸ James P. Madigan, *Questioning the Coercive Effect of Self-Identifying Speech*, 87 IOWA L. REV. 75, 108 (2001).

⁴⁹ *Id.* at 94. *Accord Dale*, 530 U.S. at 694 (Stevens, J., dissenting) (“[Dale’s] participation sends no cognizable message to the Scouts or to the world.”).

⁵⁰ A useful short overview of the philosophical literature on semantic meaning may be found in Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PENN. L. REV. 1363, 1384-96 (2000).

⁵¹ *All Things Considered* (National Public Radio broadcast, June 28, 2000), available at LEXIS, News Library, NPR file.

⁵² See Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment*

The question of whether the Scouts have “endorsed” homosexual conduct, then, depends on one’s background assumptions about what sort of action is normally appropriate. If one is behaving appropriately, then one is behaving neutrally and avoiding improper favoritism.⁵³ The idea of “endorsement” is always parasitic in this way. Following the unspoken norm endorses nothing. Only departing from the norm sends a message.⁵⁴ It follows that, depending on what the unspoken norm happens to be, the imperative of avoiding symbolic endorsement can justify anything.⁵⁵

The decision to voluntarily and publicly associate with a pariah has conventional meaning, because it so openly defies a conventional norm. Baseball teams are not now understood to be making a statement when they add well-qualified players to their rosters—that’s just what baseball teams do—but the Brooklyn Dodgers necessarily and inevitably made a statement when they decided to hire Jackie Robinson in 1947.

The pariah status of gays has been well established in American culture for a long time. The practice of making them into outcasts reached its peak in the middle of the twentieth century. In 1953, President Eisenhower issued an executive order barring gays from all federal jobs, and the FBI initiated an elaborate system of surveillance to enforce the order.⁵⁶ Corporations under government contract applied the administration’s security provisions to their own employees, and many states and municipalities followed the federal government’s lead, while also enforcing similar standards in the licensing of many professions. One study in the mid-1950s estimated that over

Neutrality and the “No Endorsement” Test, 86 MICH. L. REV. 266 (1987).

⁵³ See *id.* at 325-31.

⁵⁴ Of course, some minorities may perceive a message where none is intended or perceived by the majority, and the minority’s pertinent background assumptions are sometimes more attractive than the majority’s.

⁵⁵ Here is one illustration, from the French Revolution:

The execution of the Hebertists implied that of the Dantonists also. If they were left alive after their opponents had been killed their position would be relatively stronger, and it would appear that the Committee had acted at their command. The unity of the Committee was also at stake, for Billaud-Varenne and Collot d’Herbois could not have been expected to accept the suppression of the extremists unless the moderates were also destroyed.

M.J. SYDENHAM, *THE FRENCH REVOLUTION* 212 (1965). Similar logic was used for many years to maintain the criminalization of homosexual sex: if the law stopped hunting down gays’ private sex acts, it was successfully argued, this would implicitly send a message of approval. See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1339-46 (2000).

⁵⁶ JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 293 (1988).

12.6 million workers, more than 20 percent of the labor force, faced loyalty-security investigations as a condition of employment.⁵⁷ The military collected the names of more than 12,000 “known or alleged homosexuals,”⁵⁸ and police vice squads had their own lists.⁵⁹ The FBI, which acted as a clearinghouse, shared police and military records with private employers.⁶⁰ As a result, those who lost federal jobs often found themselves blacklisted in the private sector as well.⁶¹

The closest thing to a canonical rationale for this pervasive discrimination was set forth in 1950 by a Senate committee that investigated the employment of “homosexuals and other moral perverts” in government.⁶² Such people, the committee concluded, lacked “emotional stability,” because “indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility.”⁶³ Even one “sex pervert in a Government agency,” the committee warned,

tends to have a corrosive influence upon his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. . . . One homosexual can pollute a Government office.⁶⁴

The world view instantiated by these statements holds that gay people are inherently predatory and unclean. Ostracism is the normal, neutral response to this condition. It does not send a message, any more than a fire department does when it extinguishes a fire in a church.

A great deal has changed since the 1950s, but the background norms of that time remain a part of American culture, and the inclusion of gay people in ordinary pursuits remains controversial. And that is why, whenever someone refuses to discriminate against gays, that person is often perceived as making a statement

⁵⁷ See *id.*; JOHN D’EMILIO, *The Homosexual Menace: The Politics of Sexuality in Cold War America*, in MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY 57-73 (1992). The most thorough study to date of the legal status of gays in the decade and a half after World War II is WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 57-97 (1999).

⁵⁸ See ESKRIDGE, *supra* note 57, at 74.

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.* at 70.

⁶² Committee on Expenditures in Executive Departments, *Employment of Homosexuals and Other Sex Perverts in Government*, U.S. Senate, 81st Cong., 2nd Sess., S. Doc. 81-241, at 4 (1950).

⁶³ *Id.*

⁶⁴ *Id.*

of approval of homosexual conduct. The Court was not idiosyncratic in its perception of the conventional meaning of Dale's inclusion.

Law routinely incorporates conventional meanings into its determinations. If it did not, it is not clear how it could distinguish "Live Free or Die" from the number on a license plate. But there must be limits on such reliance. In *Plessy v. Ferguson*,⁶⁵ the Court upheld a law requiring racial segregation by reasoning that the legislature was at "liberty to act with reference to the established usages, customs, and traditions of the people."⁶⁶ Numerous cases from the Jim Crow south held, on the basis of those established usages and customs, that calling a white person black was an actionable humiliation.⁶⁷ By such means do prejudices become legal doctrine.

Conventions change over time, of course. And semantic meanings change as conventions change. No message is perceived now when Ollie's Barbecue seats black customers. The situation the day after the restaurant lost its case, however, was very different. It is only when the law is trying to change established social practice that the required conduct will be reasonably understood as sending a message.

It follows that, if the compelled speech doctrine is understood in the way the *Dale* court understands it, the First Amendment will preclude law from operating in those areas where convention is most resistant. Prejudices will be insulated from the law precisely to the extent that they are widespread. *Dale* thus stands on its head the holding of *Palmore v. Sidoti*⁶⁸ that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or

⁶⁵ 163 U.S. 537 (1896).

⁶⁶ *Id.* at 550.

⁶⁷ See generally CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE NEGRO 18-25 (1940). The argument for so holding was succinctly stated by one court:

Under the social habits, customs and prejudices prevailing in Louisiana, it cannot be disputed that charging a white man with being a Negro is calculated to inflict injury and damage. We are concerned with these social conditions simply as facts. They exist, and for that reason we deal with them. No one could make such a charge, knowing it to be false, without understanding that its effect would be injurious and without intending to injure.

Sportono v. Fourichon, 4 So. 71, 71 (La. 1888) (quoted with approval in *Flood v. News & Courier Co.*, 50 S.E. 637, 639-40 (S.C. 1905)); see also *Wolfe v. Georgia Ry. & Elec. Co.*, 58 S.E. 899, 902 (1907) ("neither legislatures nor courts shall grade the citizen according to his social status, and yet . . . the courts can and must know and notice the meaning of words of opprobrium as well as the connection in which these words are used."). Courts have now abandoned this doctrine, but have not clearly explained the reasons for the abandonment. See Lyrissa Barnett Lidsky, *Defamation, Reputation, and the Myth of Community*, 71 WASH. L. REV. 1, 28-36 (1996) (discussing recent cases).

⁶⁸ 466 U.S. 429 (1984).

indirectly, give them effect.”⁶⁹ *Dale* implicitly holds that the Court has a duty to discern the private biases that exist and to give them effect by making them the basis for exemptions from generally applicable laws. Prejudice is thereby given a legal privilege that is denied to religious scruples.⁷⁰ This is, of course, entirely at odds with the settled understanding of the Fourteenth Amendment, which precludes government from imposing badges of inferiority.⁷¹ The Court’s ratification of popular prejudices has its own symbolic meaning, and it is not pretty.⁷²

The basic problem here is analogous to one that Avery Katz has identified in the context of contract law. A common way of understanding the courts’ role, Katz observes, is as providing “convention maintenance,” which serves the functions of “protecting the reliance interests of those who operate according to established convention, mediating between those using rival conventions, and providing incentives for newcomers to learn established convention.”⁷³ But these policy considerations do not tell us what the ideal convention should or could be. The costs of making the transition to a new and better convention might be outweighed by the unfairness or inefficiency of existing practices. A convention maintenance rationale, Katz concludes, unjustifiably privileges the status quo.⁷⁴ So does the compelled speech doctrine as understood by the Court in *Dale*.

Thus, like the expressive association claim, the compelled speech claim, as stated by the *Dale* court, reaches farther than the Court could possibly have intended. The compelled speech argument has implications that are even more destructive than the expressive association argument, which only would have invalidated antidiscrimination laws. The compelled speech claim would invalidate any law that requires conduct that can reasonably be understood as having symbolic meaning. Federal regulations now require cars to have airbags. These regulations were adopted despite the resistance of automobile manufacturers. When new cars conspicuously have airbags, this is reasonably understood as sending a message that (1) airbags are necessary to make cars safe

⁶⁹ *Id.* at 433.

⁷⁰ *Compare* Employment Div. v. Smith, 494 U.S. 872 (1990).

⁷¹ *See, e.g.*, *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

⁷² Thus, David Bernstein is too charitable to the Court when he writes that “the underlying moral rectitude of the BSA’s exclusion of homosexuals was not legally relevant in *Dale*.” Bernstein, *Antidiscrimination Laws*, *supra* note 2, at 88.

⁷³ Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 222 (1990). Thanks to Henry Smith for pointing out the relevance of Katz’s article.

⁷⁴ *See id.*

and that (2) their inclusion is cost-justified—both propositions from which the manufacturer may dissent. Under *Dale*, does the manufacturer not have a powerful argument that its First Amendment rights are being violated by compelled speech?⁷⁵

Once more, the rule stated by the Court is absurdly broad unless it is supplemented by a limiting principle that appears nowhere in the opinion. The crucial and unprecedented move is *Dale's* extension of the compelled speech doctrine to include symbolic speech. Because any kind of conduct can convey a message, the Court has been unwilling to say that all communicative conduct is protected by the First Amendment. When a person *refuses* to obey a law, the law may nonetheless be applied to him

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁷⁶

In practice, this test has been very deferential; “the Court virtually never invalidates a regulation once it has found it to be content neutral.”⁷⁷

The anarchic potential of *Dale's* compelled speech rationale dwarfs that of the symbolic conduct cases. The compelled speech doctrine is absolute and does not permit balancing. The symbolic conduct cases involved parties who wanted to disobey a law to send a message, and their claim rested on their unusual attempt to convey their message by their conduct. *Dale's* rationale, however, does not find speech in disobedience, but in obedience, so that once a law is found to compel symbolic conduct, *anyone* is authorized to resist it—not only those who are affirmatively trying to convey a message.

The only cure for this problem is to put the doctrine back where it was before *Dale*: the prohibition of compelled speech should not reach symbolic speech, but only actual statements. Government cannot compel the use of language to endorse an idea. But government should not be barred from compelling conduct, even if that conduct will conventionally be understood to convey a message, so long as the state interest promoted by the

⁷⁵ The car manufacturer is primarily a commercial rather than an expressive association, but, again, businesses are protected against compelled speech. See *supra* note 39.

⁷⁶ *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

⁷⁷ DANIEL A. FARBER, *THE FIRST AMENDMENT* 26 (1998).

law is unrelated to the suppression of ideas.

CONCLUSION

The Scouts' brief before the U.S. Supreme Court did not only make the claims of expressive association and compelled speech that the Court adopted. It also claimed that private, noncommercial expressive associations have a right to choose their own members and an unqualified right to choose their leaders. Such a right was hard to infer from earlier Court decisions, however, since *Roberts* and its progeny had sustained antidiscrimination laws that abridged private clubs' freedom of association. The Scouts noted that these cases were distinguishable because they "involved quasi-commercial organizations" and "the clubs did not have any moral code or philosophy that was logically related to their challenged membership criteria."⁷⁸ But *Roberts* had not drawn the lines in those ways, and neither of these lines seems to be closely tied to the purposes of the First Amendment. What is really doing the work in the Scouts' brief is the view that "American pluralism thrives on difference"⁷⁹ and 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."⁸⁰

Pluralism is valuable. So is the autonomy of diverse groups. But it doesn't follow that these values should always take priority over the effort to break up entrenched patterns of discrimination and include, in socially valued activities, people who have traditionally been outcasts.⁸¹ The harms of discrimination are particularly acute for children; gay youth suffer severe developmental harm when forced to lie and hide their identities, which is precisely what the Scouts' policy requires of the millions of gay adolescents who discover their sexuality when they are already members.⁸² The prevention of such harm is not a trivial

⁷⁸ Brief for Petitioner at 34, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

⁷⁹ *Id.* at 45.

⁸⁰ *Id.* at 47.

⁸¹ See generally ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (1996); Hunter, *supra* note 2, at 1629-34; for a more skeptical view, see NANCY ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 166-90 (1998). The *Dale* Court 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 association," 530 U.S. at 659, but it never discusses what these interests are.

⁸² See, e.g., Anthony R. D'Augelli, *Lesbian, Gay, and Bisexual Development During Adolescence and Young Adulthood*, in TEXTBOOK OF HOMOSEXUALITY AND MENTAL

state interest.

If the claim of freedom of association is understood as a deontological claim, inherent in the dignity of persons, then it's hard to confine it to the noncommercial context, and all antidiscrimination laws would have to be condemned as violating the freedom not to associate.⁸³ If the claim is a consequentialist one, on the other hand, it has some plausibility. "The challenge," Dale Carpenter observes, "is 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."⁸⁴ But what are the most compelling contexts?

The question of the state's interest in *Dale* is really two questions, one normative and one empirical. The normative question is whether discrimination against gays is a bad thing. Here public opinion is rapidly shifting. Discrimination against gays may once have seemed the neutral and normal thing to do; it may still seem that way to some. It would, however, be an abuse of judicial power for the Court to read that view into the Constitution, and so to disable legislatures from addressing what is increasingly understood as a severe problem. If there ever were a cultural moment when the Court should be neutral on the question of the morality of homosexual conduct, this is it.⁸⁵

The empirical question is whether laws like New Jersey's are necessary to remedy gays' outcast status. That question cannot be answered from the judicial (or the academic!) armchair, insulated from experience. Perhaps the autonomy of groups like the Scouts does not pose much of a threat to the equality of gays. Perhaps competition among groups will provide a satisfactory remedy for any pattern of exclusion.⁸⁶ But I don't know these things, and I

HEALTH 267 (Robert P. Cabaj & Terry S. Stein eds., 1996); Joyce Hunter, *Violence Against Lesbian and Gay Male Youths*, J. INTERPERS. VIOLENCE 295 (Sept. 1990); PRIDE AND PREJUDICE: WORKING WITH LESBIAN, GAY AND BISEXUAL YOUTH (M. Schneider ed., 1997). Thanks to Tobias Wolff for calling my attention to these articles.

⁸³ Michael Paulsen's broad interpretation of freedom of association tends toward this conclusion, though he resists it. See Paulsen, *supra* note 2, at 1924, 1927 n.49.

⁸⁴ Carpenter, *supra* note 2, at 1517.

⁸⁵ On the case for neutrality, see Andrew Koppelman, *Sexual and Religious Pluralism*, in *SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 215 (Martha Nussbaum & Saul Olyan eds., 1998), and Michael McConnell, *What Would It Mean to Have a "First Amendment" for Sexual Orientation?*, *id.* at 234.

⁸⁶ This claim, Nancy Rosenblum argues in the most sustained defense of freedom of association with which I am familiar, "applies much more convincingly to voluntary associations than it does to employment." ROSENBLUM, *supra* note 81, at 170. Rosenblum's evidence powerfully casts doubt on the mechanistic assumption that liberal society is undermined by illiberal prejudices and associations within it. She does not, however, establish the opposite proposition, that such prejudices and associations never

don't know how one could find out. The Court was not willing to so hold; it declined the invitation to hold that noncommercial associations had an absolute right to exclude anyone they wished to. The reasons for its hesitation are clear: such imponderables are poor candidates for judge-made law, particularly constitutional law that is immune to legislative reconsideration in light of experience.⁸⁷ The Court's awareness of its limitations is commendable but did not go far enough.

This is not to say that the dissenters in *Dale* were right. Dale Carpenter shrewdly points out the dangers of their "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. The approach underestimates the expressiveness of membership policies. It fails to notice that silence can itself be a kind of speech, as it was in the case of the Scouts. And it fails to note the practical harm to an organization that can be brought about by compliance with an antidiscrimination law.⁸⁸ Carpenter may be right, although the dangers he describes have not manifested themselves very often.⁸⁹ But his proposed solution, which elaborates Justice O'Connor's approach—giving expressive associations and activities almost absolute protection from antidiscrimination law—vindicates liberty by simply abandoning the mandate of social equality in those contexts, with no confidence that the tradeoff is worth it. One might say with equal plausibility that a message-based approach is the only way to avoid overinclusive protection of associations.⁹⁰ There is no clear answer to the question of where the limits of freedom of association should be located.⁹¹ And one

have antiliberal consequences severe enough to warrant legislative intervention.

⁸⁷ See Ronald J. Allen, *Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty*, 88 NW. U. L. REV. 436 (1993).

⁸⁸ See Carpenter, *supra* note 2, at 1542-63. For a similar critique, see ROSENBLUM, *supra* note 81, at 191-211. Rosenblum observes that even political parties may not be able to satisfy this test, since their ideological positions are unstable and unpredictable. See *id.* at 200-03.

⁸⁹ He does devote a long discussion to the history of state-sponsored suppression of expressive associations, Carpenter, *supra* note 2, at 1520-33, but all of the history he describes involves naked viewpoint discrimination, and so would be unconstitutional even without any special doctrine protecting associational rights.

⁹⁰ See, e.g., William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68 (1986).

⁹¹ For this reason, there is also no clear answer to the question of how the New Jersey Supreme Court ought to have decided the *Dale* case. That question involves, not only freedom of association, but also issues of statutory construction that are beyond the scope

gets no clear answer from the Court's opinion, which seems to rely on the Court's implicit judgment that the Boy Scouts are especially worthy of judicial protection, or that gay people are especially unworthy of legislative protection, or both.⁹²

It was a mistake to grant certiorari in *Dale*. If the courts have nothing useful to say, then they ought to shut up. As Richard Posner has observed in another context, when courts are asked to declare a new constitutional right, they should consider "the feasibility and desirability of allowing the matter to simmer for a while before the heavy artillery of constitutional rightsmaking is trundled out."⁹³ The Scouts might have gotten an adequate remedy in the New Jersey legislature, which could easily have overturned the state supreme court's interpretation of the public accommodations statute. The parties should have been left to slug it out there.

of this paper.

⁹² The Court's *Lochner*-like arrogation to itself of the power to review the needfulness of legislation sheds unflattering light on its decisions interpreting Section 5 of the Fourteenth Amendment, which purport to hold that the power to define impermissible discriminatory conduct is reserved to the states. See Jed Rubenfeld, *The Anti-Discrimination Agenda*, 111 YALE L.J. 1141 (2002).

⁹³ Richard A. Posner, *Should There Be Homosexual Marriage? And if So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585 (1997).