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Free Speech & (and) Election Law: Freedom of Speech vs. Anti-Discrimination Laws

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FREE SPEECH & ELECTION LAW: FREEDOM OF SPEECH VS. ANTI-DISCRIMINATION LAWS*

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PROFESSOR BEVIER: Thank you everyone for coming to this panel. I thank those of you who attended Mark Steyn's speech. Realize that this is the panel to be at, at least in terms of relevance to some of the issues that will be confronting the country in the next few years. The title of the panel is "Free Speech versus Antidiscrimination Law".

We have a very distinguished panel. I'm going to introduce them in the order in which they will speak, and then I'll just say a few words about the topic and let them begin. The first panelist is David Bernstein. He's a professor of law at George Mason University Law School, where he's been teaching since 1995. Professor Bernstein attended Brandeis University and received his J.D. from Yale. He's the author of more than 60 scholarly articles and a book entitled *You Can't Say That!: The Growing Threat of Civil Liberties from Antidiscrimination Laws*.[1] I think you can understand why we asked him to be on this panel and what kind of wonderful contribution he's going to make.

Those of you who are visitors to Professor Volokh's *Volokh Conspiracy*[2] blog will recognize David from his many contributions there.

Our second panelist is Andrew Koppelman on my far left. Is that symbolic? We'll see.

. . .

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** Professor BeVier is the David and Mary Harrison Distinguished Professor of Law at University of Virginia School of Law. She received her B.A from Smith College in 1961 and her J.D. from Stanford University in 1965.

1. DAVID BERNSTEIN, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS (2004).

2. The Volokh Conspiracy, http://volokh.com/ (last visited Mar. 21, 2009).

PROFESSOR BEVIER: Andrew is the John Paul Stevens professor at Northwestern Law School. He received his BA from the University of Chicago and his M.A., J.D. and Ph.D. from Yale. He served as the law clerk to Chief Justice Ellen Peters of the Connecticut Supreme Court. He joined the Northwestern Law faculty in 1997, where he teaches constitutional law and political philosophy and is doing research and writing on paternalism and perfectionism in the law, with special attention to the law of morals.

Our third panelist will be Eugene Volokh, the Gary T. Schwartz Professor of Law at UCLA. Eugene received both his B.S. and J.D. degrees from UCLA, after which he went on to clerk for Judge Kozinski on the Ninth Circuit and then Sandra Day O'Connor before joining UCLA faculty in 1992. He's a very much cited author. He writes a very important case book on the First Amendment and no doubt is known to most of you as the host of the *Volokh Conspiracy*[3] blog.

PROFESSOR BEVIER: Kenneth Marcus, on my immediate right, is the Lillie and Nathan Ackerman Visiting Professor of Equality and Justice in America at Baruch College School of Public Affairs at the City University of New York. Professor Marcus graduated magna cum laude from Williams College, received his J.D. from Boalt Hall, and prior to joining school of public affairs, Professor Marcus served most recently as the staff director of the U.S. Commission on Civil Rights, a presidential appointment and a position he held from 2004 until 2008, and a position in which he was the Agency's chief executive officer.

Before I start with just a couple remarks about this panel and what it is that they're going to address, just a couple of words about how we're going to proceed. The panelists are each given twelve minutes. I'm going to cut them short because the panel is already little shorter than it's scheduled to be. And when the panel is over, I've been asked to ask you to leave the room, not in a big hurry, but to not sort of tarry here because you'll want to go out in the hall and perhaps get in line to attend date the Barbara K. Olson Memorial Lecture, which is the next event at this occasion for those of you who are ticket holders for that event.

Once upon a time, in the early days of the civil rights movement, a panel with the title of this one, the Free Speech versus Antidiscrimination Law, would have been simply unthinkable because the First Amendment at that time was thought to be the handmaid of civil rights. Indeed, if you look at the entire body of First Amendment doctrine, especially doctrine as it emerged during the civil rights movement, the early days of the civil rights movement, it's quite clear

3. *Id.*

that a substantial number of cases that were decided during those years were quite self-consciously crafted to enable the civil rights cause to proceed with freedom and to proceed to success.

Today, however, freedom of speech and freedom of association are perceived by many not as allies of antidiscrimination values, not as consistent with antidiscrimination principles, but as impediments to the achievement of equal rights for all. And the question of how to reconcile these values that many people now regard as in competition is what our panelists are going to be addressing today.

So without further ado, I will turn this over to our first panelist, David Bernstein.

. . .

PROFESSOR BERNSTEIN: Thank you. Obviously, this is near and dear to my heart. And I was watching Mark Steyn's speech. I always tell people that . . . when the people say, oh, don't worry about slippery slopes, we can regulate some kinds of speech, and nothing will happen. We don't want holocaust denial, hate speech, violent pornography, all this sort of thing. This is what people told me about Canada 20 years [ago]. They said, "Don't worry. Look at Canada; they're only regulating a little bit, and they're going to stop there. They know about civil liberties." But now, you publish the Muhammad[4] cartoons or you write something someone objects to, and you find yourself before a human rights commission.

But in any event, rather than talking about this topic in the general philosophical sense, we decided to focus on a few hypotheticals on the current law to see what's going on in the wake of *[Boy Scouts v. Dale]*[5] and similar cases. So, I'll talk about a situation where a non-profit is denied a tax exemption because it discriminates based on sexual orientation, or a student group is denied university funding because it discriminates based on religion or sexual orientation in choosing its officers or members. A wedding photographer who refuses to photograph a same-sex commitment ceremony. And if Lillian doesn't cut me off and I have time, I'll throw in two more, quickly, about a religious school that fires a pregnant teacher, who gets pregnant out of wedlock, and the United Way Campaign, run by a public agency, that refuses to allow the Boy Scouts to participate because of discrimination against homosexuals.

Let's start with the non-profit denied the tax exemption because it discriminates based on sexual orientation. And let's say that the case

4. The Jyllands-Posten Muhammad controversy started after the daily periodical, Jyllands-Posten published cartoons mocking Muhammad on September 30, 2005. Craig S. Smith & Ian Fisher, *Temperatures Rise Over Cartoons Mocking Muhammad*, N.Y. TIMES, Feb. 3, 2006 at A3.

5. Boy Scouts of Am. v. Dale, 530 U.S. 640, 120 S.Ct. 2446 (2000).

involve a religious university that prohibits same-sex dating. You can come to our university if you're of homosexual orientation, but no dating members of the same sex or, if we find out, we expel you.

The university could not pursue a viable First Amendment Freedom of Religion[6] claim at all if it was denied the tax exemption on this basis, at least not under the federal Constitution. Perhaps under some state constitutions or state religious freedom, but under federal law, under the case of *Employment Division v. Smith*, given that this law is just a general law saying that you can't discriminate, the fact that this religious university happens to have its religious views doesn't really help it.[7]

So instead, the university would have to rely on *Dale*[8] and argue that its expressive association rights were infringed upon . . . . In *Dale*, the Court held that the Boy Scouts of America has a constitutional First Amendment freedom of expressive association right to exclude a gay scoutmaster from the Scouts on the theory that having a gay scoutmaster would conflict with the Scouts' message in favor of traditional sexual morality.[9]

Now, in our hypothetical, the university is being forced to allow its students to engage in same-sex dating. This would both interfere with its ability to form a university committed to its view of Christian values and also to express an involuntary message to the outside world that it is okay with homosexual dating and such.

So, there are at least three issues. First, does this actually create a viable expressive association claim? I think under *Dale*,[10] it clearly does. If you can exclude a gay scoutmaster for message it sends or for interference with the ability to spread your message, surely you could ban same-sex dating.

Second, is the denial of a tax exemption simply the denial of a privilege that you weren't supposed to have to begin with, and therefore, there's no constitutional violation, or is it in fact something else? I say it's something else. In my view, if you give everyone else a tax exemption but a university that is acting within its First Amendment[11] rights, it is the same as giving no one a tax exemption and fining that university for discriminating. Now under *Dale*, it seems pretty clear to me that the government could not fine the university for banning same-

6. U.S. Const. amend. I.

7. *See* Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).

8. *Dale*, 530 U.S. 640.

9. *See id.* at 643-44.

10. *Id.*

11. *Supra* note 6.

sex dating, so I don't see why you would be allowed to deny it the tax exemption.[12]

Finally, does the government have a compelling interest in preventing this discrimination sufficient to overcome the university's expressive association right? Well, the state or federal government, if they were prosecuting this case against the university it would undoubtedly cite the case of *Bob Jones University*, where Bob Jones had a ban on interracial dating.[13] And Bob Jones argued it had theological reasons why it had to ban this. The university went to the Supreme Court, and the Court ruled against it.[14] In fact, the Supreme Court said that even if Bob Jones did have a valid religious freedom argument here, even if the denial of the tax exemption did impinge on its freedom, it would still reject the university's First Amendment claim because the government has a compelling interest in overcoming discrimination in education and, in fact, in eradicating all discrimination in higher education.[15]

Now, would *Bob Jones* control our same-sex dating hypothetical? I would say the answer is no for a couple reasons. First of all, *Bob Jones* was a religious freedom case. The Court never took the compelling interest test as seriously in religious freedom cases as it takes in expressive cases under the First Amendment. Indeed, of course, the Court eventually rejected the test entirely in the religious freedom context in the *Smith* case.[16]

Second, it's true that in the 1980s, Justice Brennan wrote a few expressive association opinions where he also said the government has a compelling interest in eradicating all discrimination based on sex, in the *Roberts v. Jaycees* case, for example.[17] But since then, since the 1990s at least, there have been a couple of other expressive association cases, one involving a St. Patrick's day parade in Boston[18] and the other, the *Dale* case, where not a single justice on the Court argued that the compelling interest the government may have in eradicating discrimination overcomes a First Amendment expressive association right.[19]

Even in *Dale v. Boy Scouts,* the issues wasn't, "Does the government have a sufficiently strong interest to overcome the Boy Scouts'

12. *See Dale*, 530 U.S. at 643-44.
13. Bob Jones University v. U.S. 461 U.S. 574 (1983).
14. *Id.*
15. *Id.*
16. *Smith*, 494 U.S. 872.
17. Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).
18. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S.Ct. 2338 (1995).
19. *Dale*, 530 U.S. 640.

First Amendment right?" Rather, all nine Justices seemed to assume that the government had no such interest.[20] The debate between the majority and dissent was actually over whether the Boy Scouts really had an expressive interest, where they really cared about sexuality, or whether they were really just engaging in invidious discrimination against gays and this was a mere pretext.[21]

So I think that the university should win this case, and hopefully nine-zero.

Let's take our second example, on whether a student group can be denied university funding because it discriminates based on religion or sexual orientation in choosing its officers or members. So let's assume this is a public university and the funding is therefore akin to the *Rosenberger* case. This case says that you have to be viewpoint-neutral in your funding, which means the First Amendment applies.[22] The first question is, does the university have a policy that all student groups must be open to all students? This is a university-wide policy. If you want to run a student group, if you want funding, everyone has to be allowed to have equal access to that group. If so, I think there's no First Amendment issue.

I think the university could have that policy if it considered its student groups to be part of the educational experience. Just like I, as a professor, can't exclude people from my class on any particular basis, if you have a policy that student groups couldn't do that, I think that would be fine. I think it would be a foolish policy. So, for example, if a student gay group in University of Mississippi is forced to allow conservative Christians to be members and officers, the conservative Christians could take over the group and change the basis of the group from helping gay students to try to convert them to heterosexuality. So I think it's a wise policy let student groups decide who their officers and members should be, but I don't think it's constitutionally required if it's a neutral policy.

But what if, on the other hand, university policy is that Republicans are free to exclude Democrats from the college group. Democrats are free to exclude Republicans. The student NRA is allowed to exclude pacifists. Pacifists are allowed exclude gun nuts and so forth and so — no offense.

(Laughter)

. . .

PROFESSOR BERNSTEIN: — and so forth and on. But gay students aren't allowed to exclude Christians who have conservative views on

20. *See id.*

21. *Id.*

22. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 842 (1995).

sexuality, or Christians aren't allowed to exclude gay rights activists. Given that the right of expressive association is implicated, so there is a First Amendment interest here, then the university is engaging in viewpoint discrimination. And I think in that case, the student group would have a very plausible and hopefully winning argument before the courts that they cannot be denied funding for exercising their expressive association rights when other groups are permitted to decide who their members and officers should be.

And one last thing about that. We have to differentiate, even then, between status-based discrimination and ideology-based discrimination. So, I would think there would not be an expressive association right if the Christian group, for example, was excluding someone of homosexual orientation but who profess to agree with their Christian values, who says, "I do not engage in homosexual activities; I think it's a sin, but I happen to prefer men in my mind to women for sexual purposes." And similarly, if, for example, the Christian group said we won't take someone born Jewish who now professes Christianity, that would not be an ideological expressive association discrimination based on someone's viewpoint, but instead they would just be discriminating based on someone's status, a person of Jewish descent.

So, the next example was the wedding photographer. We need to distinguish again between a photographer who simply refuses to deal with, say, gay people or black people for any purpose. I've already taken a photo. I don't want to sell it to you because you're gay or black, whatever. I think in that case, there's no First Amendment interest involved.

But what if someone comes to a wedding photographer and says, "We are having a same-sex commitment ceremony and we would like you to take our wedding photos?" It seems there, while you can argue that it's a close case, I think there is an artistic component of taking wedding photographs sufficient to make this a First Amendment interest. I would say that if you're going to make the wedding photographer take these photos, you are in fact violating the photographer's First Amendment rights by making him engage in compelled speech.

And while the expressive interest here isn't as big as it might be in some other cases, the government's interest, on the other hand, is very slim, unlike, say, the *Bob Jones* case, where at least the Court was able to assert the interest of eradicating discrimination in higher education.[23] There are so many wedding photographers in any given town, why would a gay couple even want a photographer who doesn't approve of same-sex commitment ceremonies to take their photo-

23. *Bob Jones*. 461 U.S. 574, 604.

graphs? It can't be that they think this person's going to be able to see the same beauty in their ceremony as someone who approves of it!

So it strikes me that the only reason anyone would even file a claim for discrimination in this context is spite. "We feel annoyed that you didn't want to take our pictures, and now we're going to get back at you." And it seems to me, being offended or being spiteful or trying to get revenge is not a decent reason to overcome someone's First Amendment rights.

The obvious tough question is, well, are you just picking on gays for some reason, or would your same analysis apply to someone who refuses to photograph, for ideological reasons, interracial ceremonies or Jewish ceremonies or Muslim ceremonies or Hindu ceremonies or take your pick? And I think it applies in any of those cases, again, as long as you have actually have an ideological reason and you're not just saying I don't want to deal with that particular group for any purpose. I just don't want to be seen as approving using my artistic talents to approve of this particular ceremony. For that matter, the same principle would apply if a Jewish photographer refuses to do an intermarriage for ideological reasons.

So, let me throw in those last two hypotheticals. Lillian says one more hypothetical.

. . .

PROFESSOR BERNSTEIN: So I'll do the one about the Christian school because this has actually something that's come up a lot. I haven't seen a post-*Dale* case on it, but I would be very interested to see how it comes out. Should a Christian school that believes in traditional sexual morality and tells its students and its teachers that the teachers are role models for the school's beliefs be allowed to fire an unmarried teacher who gets pregnant out of wedlock? I think the answer is pretty clearly yes given that forcing the school to retain the teacher would make it more difficult for the school to promote its religious ideology. Again, I think this is even a clearer case than *Dale*. But there hasn't been, as far as I know, any post-*Dale* cases on this. Thank you.

PROFESSOR BEVIER: Out next speaker is Andy Koppelman. Professor Koppelman.

PROFESSOR KOPPELMAN: [H]ere, I'm going to fail in my commission by agreeing with David about the regulation of student group cases. In his hypothetical, you've got a university that's discriminating on the basis of viewpoint, saying that some viewpoint-based exclusions from student groups are okay, but there were some viewpoints we don't like, and you can't exclude people on that basis.

Well, I think that is viewpoint discrimination even if the conduct itself is not constitutionally protected, even if it's okay for the university generally to say student groups aren't allowed to exclude people on the basis of viewpoint. It still can't itself have favored and disfavored views. That's the holding of *R.A.V. v. St. Paul.*[24] But notice how narrow the exception is. As long as the university can ban discrimination that has nothing to do with viewpoint, if the university does that, then we don't have a First Amendment claim.

Another possibility is that you've got some government regulation that compels speech. This is his concern in the wedding photographer case. Here, it seems to me the wedding photographer's is a close question because it depends on how expressive the service is. It is true that a photograph can be an expression, but this isn't universally true of all photographs. So, let's imagine a drugstore that takes passport photo on the side. And so in the back of the store, there is a camera bolted to the floor and a chair bolted to the floor, and you sit in the chair, and the store takes your picture. And the guy who runs the store happens to agree with *Dred Scott*; he doesn't think that blacks should be citizens.[25] And so, he's got an ideological objection to taking passport photos of black people. It seems to me that his First Amendment claim is pretty attenuated.

And so, then we have to ask about the wedding photographer. How expressive is this really? There's a limit to how much discretion a wedding photographer has. The wedding photographer, I don't think is going to be able to say, you know something? I don't think that the bride is as attractive as the maid of honor, so my aesthetic is we should photograph the groom with the maid of honor. If you're a professional wedding photographer, I advise you not to do this. You're not going to go far in your career. So I think that there's some question whether the wedding photographer is in fact engaged in an expressive business or whether it's just another business that holds itself out to the public selling a service.

It's also possible for regulation to have an impact on speech that is negative. So, it can be applied, for example, in a way that requires you actually to bear a message containing words that you disagree with. And that's the *Hurley* case, where the St. Patrick's Day parade

24. 505 U.S. 377 (1992) (petitioner charged under Minnesota's Bias-Motivated crime ordinance after allegedly burning a cross on the yard of an African-American family). The Supreme Court held that the ordinance was facially unconstitutional because it arose to content discrimination — prohibiting otherwise permitted speech solely on the basis of the subjects the speech addressed — in violation of the First Amendment. *Id.*

25. Dred Scott v. Sandford, 60 U.S. 393 (1856) (holding that descendents of the African race who were brought to the United States as slaves were not citizens within the meaning of the Constitution), *superseded by statute*, U.S. Const. amend. XIV, § 1.

was being required by the city of Boston to include messages, words on signs, that it disagreed with.[26] But even that's not enough to get you to, I think, the cases that David wants to center on, which is cases of expressive association — so the case of the nonprofit denied tax exemptions because it discriminates based on sexual orientation or the case of the religious school who fires a pregnant teacher.

In order to make those First Amendment claims, you've got to rely on *Dale v. Boy Scouts of America*.[27] And so, to understand what is protected by *Dale v. Boy Scouts of America*, I think that it's necessary to get into just what the reasoning was of that case. So for anyone who doesn't remember — it's been a couple years now — *Dale v. Boy Scouts of America* involved a man who had been a member the Boy Scouts since he'd been a child.[28]

He gets out of the Boy Scouts, he goes to college, and he remains on the rolls of the Boy Scouts as a scoutmaster even though he's not attached to any particular troop.[29] And he gives an interview to a newspaper in which he identifies as a leader of a gay student group at his school.[30] He doesn't mention in the newspaper story that he's ever been associated with the Boy Scouts.[31] But the Boy Scouts finds out about this and throws him out, and he brings a complaint under New Jersey's human rights law against the Boy Scouts.[32]

The New Jersey Supreme Court upholds his claim against the Boy Scouts, and it comes up to the Supreme Court, which in a Rehnquist opinion reverses.[33] The New Jersey court found, relying on previous law, that in order to decide whether a group has an expressive association claim, you've got to look at the group's message and try to decide whether including this person would interfere with that group's message.[34] And the New Jersey courts found the Boy Scouts haven't said anything in particular about homosexuality.[35] They haven't got any message that's contradicted by Dale's presence.[36]

Now, there could be cases where the entity is sending a message that is contradicted by the individual's presence. In the case of the

26. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995)(holding that the state courts' application of Massachusetts' public accommodation law essentially required the defendants, private citizens, to alter the expressive content of their parade, violating defendants' First Amendment rights).

27. 530 U.S. 640 (2000).

28. *See id.* at 644.

29. *Id.*

30. *Id.* at 645.

31. *See id.*

32. *Id.*

33. *Id.* at 646, 661.

34. *Id.* at 646-647.

35. *Id.*

36. *Id.*

Christian school, depending on what they teach in the Christian school, the Christian school might have a pretty good claim that, look, we're trying to teach our students that premarital sex is not okay. If we've got an unmarried teacher who's pregnant and on our staff, that's going to interfere with our capacity to send that message, and we can show you that we've been teaching that message. So that claim probably is going to prevail.

But that was not available in the Boy Scout case because the New Jersey courts found as a matter of fact that the Boy Scouts had not been teaching any message at all about sexuality,[37] and the U.S. Supreme Court is not — appellate courts generally are not — well positioned to reverse cases because they disagree about facts. Trial courts find facts. So, what the Court did instead is it reasoned as follows: it found that the Scouts are an association that engages in expressive activity that is protected by the First Amendment, so forced inclusion violates the First Amendment if it would significantly affect the Boy Scouts' ability to advocate their viewpoint.[38]

Now, they say 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".[39] You might not have thought that those spoke to the issue of homosexuality, but the Boy Scouts say that they do.[40] The Court said it has to give deference: "The Court gives deference to [an organization's] assertions regarding the nature of its expression," and "must also give deference to an association's view of what would impair its expression."[41] Well, this gets around the problem of the Boy Scouts not having a clear message.

The problem with this rule of deference, though, is that it means that any defendant in any antidiscrimination suit can say, "Look, you may not have noticed, but I'm trying to send a message and admitting this person — Ollie's Barbeque — is trying to send a message about white supremacy. Maybe we didn't mention it before, but we're excluding this black person, and you know, we think we're sending this message and you have to defer to us on that."[42] And that's going to happen with any anti-discrimination suit at all. So, all antidiscrimination laws are unconstitutional in all of their applications. Now, that

37. Dale v. Boy Scouts of Am., 734 A.2d 1196, 1202-03 (N.J. 1999), Dale v. Boy Scouts of Am., 706 A.2d 270, 274-75 (N.J. Super. 1998).

38. *Dale*, 530 U.S. at 648-50.

39. *Id.* at 650 (discussing the Boy Scouts' arguments before the Supreme Court).

40. *Id.*

41. *Id.* at 641, 653.

42. *See generally* Katzenbach v. McClung, 379 U.S. 294 (1964).

does not seem to be what the Court wanted to say in *Dale v. Boy Scouts*, but that's the implication.[43]

Now, the Court also said, "That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message."[44] But then you wonder, "Well, so what are they saying?" It's very hard to tell, and the lower courts have not been able to figure it out. If you look at the lower courts' treatment of *Dale,* the lower courts have basically confined *Dale* to its facts.[45] In order to bring a successful claim in the lower federal courts, you need to either be the Boy Scouts, and even then you don't always win, or you need to be Louis Farrakhan trying to exclude women from an all-male meeting.[46] There, the fact that it's a religious entity seems to add some weight to his claim.[47]

There is a second claim in *Dale* that David alluded to, having to do with being forced to send a message — and the *Dale* Court said this also — that accepting Dale as a member would force a message of approval of homosexuality.[48] The problem here is the claim seems to be that any time that a law requires me to engage in conduct that's that is conventionally assumed to carry a certain meaning, it is compelled speech, *West Virginia v. Barnette*[49] compelled speech, to force me to obey this law. This also has strange implications.

So, General Motors, in the newspapers lately, really didn't want to be required to include airbags in cars and lobbied against it.[50] They

43. 530 U.S. 640.

44. *Id.* at 653.

45. *See generally* Villegas V. City of Gilroy, 484 F.3d 1136 (9th Cir. 2007), Gathright v. City of Portland, 439 F.3d 573 (9th Cir. 2006), Recreational Developments of Phoenix, Inc. v. City of Phoenix, 220 F. Supp.2d 1054 (D. Ariz. 2002).

46. Donaldson v. Farrakhan, 762 N.E.2d 835 (Mass. 2002); Chicago 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); Boy Scouts of Am. v. D.C. Comm. on Human Rights, 809 A.2d 1192 (D.C. 2002); *see also* Boy Scouts of Am., South Florida Council v. Till, 136 F. Supp.2d 1295 (S.D. Fla. 2001) (public school is a limited public forum that cannot exclude scouts from meeting space because of disagreement with viewpoint). 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, 65 P.3d 402 (Cal. 2003), *cert. denied*, 127 S.Ct. 434 (2006). Nor was the state of Connecticut barred from excluding the Scouts from its state employees' charitable campaign. Boy Scouts of Am. v. Wyman, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004). *See also* Barnes-Wallace v. City of San Diego, 471 F.3d 1038 (9th Cir. 2006) (avoiding federal question by certifying to California Supreme Court question of whether leasing of public park land to Scouts violated religion clauses of state constitution).

47. *Id.* at 840-41.

48. 530 U.S. at 648.

49. West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943).

50. *See, e.g.*, Kendra Marr, *Carmakers Lobbying as They Get Bailout Money*, WASH. POST, Mar. 11, 2009, at D03.

were required to do it. So after *Dale*, can General Motors say, "Look, if we put airbags into cars, people are going to infer from that that we think that airbags are cost-effective. It's compelled speech for us to be required to put airbags in our cars." So, this reading of *Dale* also seems to be unduly broad.

So, I guess my deepest and most fundamental disagreement with David about the compelled speech claim, which is the way that he makes his claim about the nonprofit, is that *Dale,* precisely because it is so massively over-broad in its writing, has been construed by the lower federal courts not to mean anything at all, and therefore, you cannot rely on it as the basis for any First Amendment claim against any law.[51]

. . .

PROFESSOR BEVIER: Our next speaker is Professor Volokh.

PROFESSOR VOLOKH: Thank you. We had a little bit of a technological adventure, but I think we've managed to get out unscathed.

So, the title of this part of this talking panel is "Freedom of Speech Versus Hostile Environmental Harassment Law." I've written about this quite a bit, and if anybody is interested, I have a lot of material collected on my web page. It should also be in the CLE materials. I started writing about it about 15 years ago, back when most of the action was in hostile work environment harassment. But today, I'm going to talk about hostile education, public accommodation, and housing programs, as well, because the law has indeed shifted more and more in that direction.

So, first of all, what is harassment? Harassment means many things in many contexts. For example, there's a crime of telephone harassment. That, we're not going to talk about. There's a crime of harassment in other contexts, so essentially persistent mailing or telephoning or approaches to people. Again, not the issue.

For our purposes, we're talking about hostile environment harassment. We're also setting aside quid pro quo harassment, sexual extortion–sleep with me or you're fired. We're talking about hostile environment harassment. And hostile environment harassment defines speech and conduct, but including speech, to be harassment if it's sincere or pervasive enough to create a hostile, abusive, or offensive work environment, or educational environment, or public accommodations environment, or housing environment based on race, religion, sex, national origin, age, disability, military membership, veteran status and, in some jurisdictions, sexual orientation and the

51. The analysis here is developed in detail in ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION, (Yale University Press, 2009).

rest–basically, all the categories covered by antidiscrimination for the plaintiff and for a reasonable person.

As a consequence, the employer–the college, the restaurant, the landlord, depending on which branch of hostile environment law you're talking about–is liable for a court-ordered damages award based on the speech and possibly injunction against the speech.[52] Interestingly, generally speaking, the damages award doesn't run against the actual speaker but rather against the employer or college or restaurant or landlord that tolerated the speech.[53] Although, in some situations, you will find damages awards and injunctions against the individual speakers as well.[54] My view is that actually doesn't really matter for First Amendment purposes.

The premise of harassment law is the law bars discrimination in all those contexts; discrimination in terms of conditions, for example, of employment.[55] The quality of the environment is one of the terms or conditions of employment.[56] Therefore, when the employer tolerates an environment that is offensive, particularly for a particular group, it is therefore discriminating even if it didn't create it, it discriminates through tolerating this environment, whether the environment was created by its managers, by its employees, by customers, by contract contractors or whoever else.[57]

That's a lot of words, but what does it mean? Well, generally speaking a considerable range of speech has been found to have helped create a hostile environment, some of the time standing alone, sometime coupled with other things. But clearly, even when coupled with conduct, the speech was included as part of what pushed the aggregate past the legally significant threshold of hostile environment: racially, religiously, sexually or ethnical offensive political or social statements, sexually themed humor, misogynistic rap music, sexually themed art, music videos depicting sexually provocative conduct, religious proselytizing.[58]

To give two things which are clearly examples of the first: statements by an NYPD counterterrorism adviser arguing that Islam is evil and Muslims are security;[59] allegedly racist imagery displayed in bars. There's a case in Boston where there was a display, kind of a jungle-

52. *See, e.g.*, Dicenso v. Cisneros. 96 F.3d 1004, 1005 (7th Cir. 1996).

53. 45B AM. JUR. 2D *Job Discrimination* § 847 (2008).

54. *E.g.*, Peterson v. Buckeye Steel Casings, 729 N.E.2d 813, 821 (Ohio Ct. App. 1999).

55. *E.g.*, 42 U.S.C. § 2000e-2(a)(1) (2008).

56. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998).

57. Holmes v. Utah Dep't of Workforce Servs. 483 F.3d 1057, 1064 (10th Cir. 2007).

58. *E.g.*, Page v. City of Chicago, 701 N.E.2d 218,229 (Ill. App. Ct. 1998) (finding a hostile environment based on supervisor's sexually themed comments to an employee).

59. Doe v. City of N.Y., 583 F. Supp.2d 444, 446 (S.D.N.Y. 2008).

themed display, during February, which the manager or the owner says, well, that was just meant to kind of create a warm tone in a cold Boston winter.[60] But there was evidence that a bartender made some racist allusions with regard to that, saying that this is the liberation of African history month and pointing to a gorilla and saying that represents Martin Luther King, Jr.[61] So if the claims about the bartender are to be believed, then this was in fact racist statements. And it's part of imagery displayed in a bar.

All of this is stuff that one would generally think, it seems to me, is protected by the First Amendment. Threats are not protected by the First Amendment.[62] Incitement (inaudible) violence maybe but not protected by the First Amendment.[63] Certain kinds of face-to-face insults are unprotected.[64] But racially,[65] religiously,[66] sexually offensive[67] speech generally speaking is.

Now, what effect does the law have? Well, I should say that in many of these instances, I can tell you for sure that, yes, this speech would indeed be severe or pervasive enough, especially given those vague terms of "severe" or "pervasive," to create a hostile, abusive, or offensive environment. Those terms are vague enough that you can't be sure. In some cases, there's liability; in other cases, there may not be liability. But this very vagueness, it seems to me, exacerbates the First Amendment problem here. And I quote here from the Supreme Court actually, from Justice Brennan: Vagueness leads people to "steer far wider of the unlawful zone" and leads to over-deterrence on the speaker's part, where the speaker avoids any speech that might be punishable and not just speech that is sure to be punishable.[68]

An example that I give is, imagine your client comes to you and asks you for advice. Look, one of my employees, students, patrons is complaining about offensive speech by others. I'd rather not suppress the speech. I'm sure I have the right to. I mean, as the property owner, I'm entitled to. But I really want to avoid liability. What should I do to be safe? It could be harsh condemnation of religion, Clinton-Lewinsky jokes — by the way, there were specific comments

60. Tatsha Robertson, *S. Boston Bar, MCAD Settle Complaint*, THE BOSTON GLOBE, Apr. 20, 2000, at B2.

61. Jeff Jacoby, *A Rush to Censor*, THE BOSTON GLOBE, Apr. 6, 2000, at A19.

62. United States v. Fulmer, 108 F.3d 1486, 1492-93 (1st Cir. 1997).

63. Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952).

64. *E.g.*, White v. Monsanto Co., 585 So. 2d 1205, 1210 (La. 1991) (holding that certain insults may rise to the level of intentional infliction of emotional distress when made by a supervisor to an employee).

65. Bond v. Floyd, 385 U.S. 116, 134-35 (1966).

66. Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton, 536 U.S. 150, 160-64 (2002).

67. Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 687-90 (1959).

68. Speiser v. Randall, 357 U.S. 513, 526 (1958).

in the employment law press about that, talking about how, in fact, yeah, you should tell people not to say such things because that can create a sexually hostile environment.[69] Or a sexually suggestive print hanging in someone's office–there've been complaints about that[70]–allegedly racist political statements,[71] comments criticizing veterans harshly.[72] And this could be in a factory, in a newspaper, a university, a bar, a bookstore. All those are workplaces, right? Workplaces. One of them is an educational place. Some of them are places of public accommodation as well.

What would you say? Would you say, well, no, you're safe? I doubt it. I'd say, you'd say, look, I don't know. Maybe you'd be held liable; maybe not. But the safe bet, especially since the speech is by your employees or your patrons and not by you, your safe bet–so you'd get all the cost of the speech and don't get really any of the benefit–the safe bet is to restrict the speech.

Now, it's true that generally speaking . . . . [T]his only applies to speech that is severe or pervasive enough to create a hostile, abusive, or offensive work environment.[73] Single incidents of speech, generally speaking, aren't supposed to be enough,[74] although, for example, in one case a dozen incidents over twenty months, of which only four were actually heard by the offended employee and the eight were heard by the person by hearsay, was considered to be enough.[75]

But the important thing is, the requirement cannot help because a client cannot order its employees to say, look, do not say things, which is aggregated with other speech or severe or pervasive to create an offensive environment. First of all, that would be too vague for people to apply on the ground. I do not know what that means. But second, if my statement coupled with your statement, with your statement, with your statement, even though we do not know about each other's statements, can in the aggregate create a hostile, abusive, or offensive environment. The only way that you as the employer can be safe–or again, as the owner of the place of public accommodation or as the educator can be safe–is by restricting each individual statement. Only then, can you prevent the aggregate.

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69. Diane Sears Campbell, *Don't Cause a Scandal–Be Careful What You Say*, ORLANDO SENTINEL, Sept. 23, 1998, at E4.

70. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1542 (M.D. Fla. 1991).

71. Amber Pyramid, Inc. v. Buffington Harbor Riverboats, L.L.C., 129 Fed. App'x 292, 296 (7th Cir. 2005).

72. Petersen v. Dep't of the Interior, 71 M.S.P.R. 227, 235-37 (1996).

73. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78 (1998).

74. Fekete v. U.S. Steel Corp., 353 F. Supp. 1177, 1186 (W.D. Pa. 1973).

75. Schwapp v. Town of Avon, 118 F.3d 106, 111-12 (2d Cir. 1997).

This is exactly what experts recommend because the legal boundaries are so poorly marked, the best course of action is to avoid all sexually offensive conduct, including speech, in the workplace. To deal with harassment, it is necessary to the individual actions that, when added up, amount to institutional discrimination. These are not people with some First Amendment ax to grind; these are just employment lawyers giving advice.

Here is another example. In an article[76] aimed at people in restaurant management saying that if one of your waiters overhears a patron–because remember, a hostile environment can be created not just by coworkers but by patrons, so long as the patron could be disciplined, for example, by being kicked out by the owner if a patron is telling religious jokes in the waiter's presence–not even certainly to the waiter, but just around the waiter–then in that case, the waiter should tell the patron, stop. And if not, then in that case, the nonemployee harasser must be warned that sanctions [will follow] . . . future harassing conduct.

So here, you thought you were free to speak in restaurants, at least free form government restriction. A private entity could just say, look, we'll kick you out because it is our property. But at least free from the government forcing people or pressuring oppression into kicking you out, apparently not. Likewise, there are injunctions enforcing the law. And injunctions, after all, are trying to prevent the continued violations. Just like employers on their own try to prevent initial violations, they ban each individual incident, including speech that is pretty clearly constitutionally protected.

That's true in workplaces like factories. It's true in workplaces that are even created–I'm not talking about injunctions; I'm talking about the possibility of hostile environment law applying–even in workplaces in which there is a further First Amendment product being created because every place is someone's workplace. A writer's office is someone's workplace. A university is someone's workplace. A classroom is someone's workplace. A newspaper is someone's workplace. So, coworkers who are offended by things being said by journalists, by writers and such, can sue and, in some of these situations, have sued. The first of these cases, actually the California Supreme Court rejected on an interpretation of state law that actually does not mirror federal law, so the same lawsuit could have been brought under federal law and might well prevail.

76. *See* Eugene Volokh, *Freedom Of Speech In Cyberspace From The Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, And Sex*, 1996 U. CHI. LEGAL F. 377 (1996).

So where do harassment lawsuits suppress speech? Well, first in workplaces, where most people spend one third of waking hours. That includes libraries, art colleges, government buildings, restaurants.[77] In universities there's hostile education environment law.[78] In bars,[79] private clubs,[80] libraries,[81] and restaurants,[82] that is hostile public accommodation environment law. Hostile housing environment law, which is just beginning to emerge, suggests that if, for example, some tenants say things, not even to a particular person but in the hearing of a particular person–they've put up signs or they say things in common areas that are overheard, then the landlord may have a duty to silence the tenants.[83]

So, the result is the government–again, it's not just the private property owner–it's the government, through threat of liability, it's expressing speech that offends on these various bases when said by employers, employees, students, or patrons, including political speech, religious speech, art, social commentary in all of these various places. It's a conscience-based and viewpoint-based restriction. Unprotected speech is not just conduct, it's not just that you can discriminate in the sense of you can't fire people, you can't refuse to hire people. If the people are being punished precisely because their speech contains a particular content–now to be sure, the fear is not of the content as such; it is of the harm of the offensive environment that's created by this content and an environment that is more offensive to people of some groups than other groups. I agree. But almost all speech restrictions do not aim at the speech as such; they aim at the speech because of the harm that the speech supposedly yields.

So, let me just close by saying that I think there has got to be an answer. One possible answer–some say it is a safe harbor for some political statements. Some say safe harbor for some favored workplaces. Okay, restrict the speech in the law firms, let us say, and in the factories and such, but at the very least, in the newspapers and universities and other places it has to be protected. Some say safe harbor for all speech except the low-value speech. I argue that actually there

77. *See id*; Eugene Volokh, *Freedom Of Speech And Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

78. *See generally* Escue v. Northern OK College, 450 F.3d 1146 (10th Cir. 2006) (discussing application of hostile educational environment claim with respect to sexual harassment). *See also* Gebser v. Lago Vista Independent School Dist. 524 U.S. 274 (1998).

79. Valadez v. Uncle Julio's of Illinois, Inc., 895 F. Supp 1008 (N.D. Ill. 1995).

80. *See generally In re* Minnesota by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985).

81. *See generally* Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration,* 63-SPG LAW & CONTEMP. PROBS. 299, 326-334 (Winter/Spring 2000).

82. See generally Sambo's v. City Council of City of Toledo, 466 F. Supp. 177 (N.D. Ohio 1979) (discussing protected speech in context of potentially offensive restaurant name).

83. *See* Szkoda v. Illinois Human Rights Comm'n., 706 N.E.2d 962 (Ill. App. Ct. 1998).

ought to be some latitude for restricting one-to-one speech, kind of personal insults even not rising to the level of fighting words, but not for speech that is said to the workplace at large or said to at least some willing listeners.

But I think some answer–I would not choose one, two or three, but I would instead choose four. Some answer is necessary because there is a very serious First Amendment problem here.
(Applause.)

PROFESSOR BEVIER: Thanks, Eugene. Our next speaker is Kenneth Marcus. Professor Marcus.

PROFESSOR MARCUS: Thank you. Good afternoon. For about 20 years, I happily enough sat in these seats watching these talks with my nice pitcher of water and little sucky candies they give you and was perfectly content. I knew that I might or might not be able to ask a question, but at least nobody would ask a question of me. It was a safe place to be. And then recently, I got a call, and I was told that my name had gone to the top of the list and that it was my turn to *speak* at one of these things. But the catch was that the topic is the First Amendment, the prior speaker is Eugene Volokh–

. . .

PROFESSOR MARCUS:–he has already called dibs on the pro side, and I get what's left. So I'm very pleased to be here, with some trepidation.

I think that Professor Volokh has given us an excellent overview. I think that there are some important respects in which I think he's nailed the issue. I think that there's at least one important respect in which he has understated the extent of the problem. But I think that there are also some important respects in which I think he has overstated it or at least in which the problem can be resolved perhaps a little more easily than he might think.

Let me start with what I think that he's gotten right. For many people, I think the problem of this conflict between free speech and antidiscrimination law is resolved by the stringency of the civil rights standards.[84] After all, in order to succeed in a hostile environment

84. In other words, as Professor Volokh has previously observed, "If there is anything about harassment law that prevents liability based on [protected] speech, it has to be the severity/pervasiveness component." Eugene Volokh, What Speech Does "Hostile Work Environment" Harassment Law Restrict?, 85 GEO. L.J. 627 (1997). This position is reflected, for example, in the guidance on the First Amendment limitations of sexual harassment law issued by the U.S. Department of Education's Office for Civil Rights (OCR). In a regulatory policy statement developed by the Clinton Administration and reissued by the George W. Bush Administration, OCR announced that "[i]n order to establish a violation of Title IX, the harassment must be sufficiently serious to deny or limit a student's ability to participate in or benefit from the education program." *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997) (Rev. Jan. 19, 2001). The tacit principle here is that the stringency of this harassment standard protects against First

claim, depending on the particular context, you usually have to make a showing that the extent of the problem was so severe, pervasive and objectively offensive that it denied educational opportunities or that it was so severe and pervasive that it changed the terms of employment.[85] It's easy to think, well, now, if that's what we're talking about, not just a single incident or a few incidents, but something that's that severe and pervasive, that's that bad, then it must be a low value of speech, and we're not really talking about the sorts of things that cause First Amendment problems.

And I think that one of the values in Professor Volokh's presentation is that it drives home that, in fact, as long as you acknowledge, as one must, that sometimes harassment takes the form of words and as long as we bar hostile environment, even single incidents can potentially be at risk if not before a court of law, then certainly in the face of an organization that wants to comply.[86] And I think that's true for some of the reasons he said and maybe others that he suggested, which is to say, to start with, that there are some courts that will be overly aggressive and will find liability with one or only a few incidents, a second that a cautious lawyer in some cases, will deal strongly with even single incidents.[87] And of course, if you are a manager or a leader and you are aware of even the one incident, you don't know that there aren't other things that have been happening or will happen if you do nothing. So it really is a conundrum.

Let me tell you one way in which I think Professor Volokh has understated the problem. The conflict, as I see is not just between speech and antidiscrimination law; it's between speech and something that's much larger and which I would call the "diversity project."

Amendment infringements. *See* Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964,* 15 WM. & MARY B. RTS. J. 837, 885-87 (2007) (analyzing the relationship between statutory and regulatory harassment standards and the First Amendment).

85. *See* David v. Monroe County Bd. of Educ., 526 U.S. 629, 659-60 (1999) ("[S]evere pervasive and objectively offensive").

86. Indeed, this observation has been one of Professor Volokh's important contributions to the subject. *See, e.g.*, Volokh, supra *note* 83 (explaining the effect of harassment standards on the suppression of protected speech).

87. Indeed, OCR's regulatory guidance explicitly announces that "a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment." Sexual Harassment Guidance, *supra* note 83. This guidance appears to conflict with the holding in *Davis v. Monroe County Bd. of Ed.* In that case the Court instructed that

> [a]lthough, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.

Davis, 526 U.S. at 652-53. For one potential means of resolving this conflict, see Marcus, *supra* note 83, at 806 n.292.

There's a conflict between speech and a cluster of values, policies, and practices which include not just equal opportunity but also affirmative action and diversity management dealing with the way we deal with differences.[88] This is to say that even aside from antidiscrimination law, there are lots of reasons why organizations might clamp down on offensive speech dealing with broader issues of diversity. And I'll tell you a little bit about what I mean.

Suppose there is someone making offensive statements on a university campus or in a corporation or some other area where the civil rights laws apply, and an organizational leader needs to figure out, "Do I have to do something about it?" Well, there are lots of reasons why an organizational leader might have to act and act quickly even aside from potential liability. The organization might have adopted a set of diversity values which include a strong commitment to a culture of respect and civility which exceeds the minimum requirements of the law.

And frequently I hear that from leaders of organizations that they do not merely want to meet the minimum requirements of the antidiscrimination law. Rather, they want to create a culture which is even more protective of the sorts of civility norms that they believe in. So they want to exceed the minimum requirements.

Second, an organization may value forms of diversity which they feel are threatened by certain forms of offensive behavior, which fall far short of the legal standard. And one approach would be to say, if we are afraid that certain minorities or other groups will be driven out of an organization if they feel unwelcome, then we need to deal very boldly with offensive conduct, even apart from liability issues.

Third, the organization may want to choose to protect its members from even subjectively offensive behavior out of a sense of protectiveness, even of highly sensitive employees or students or other stakeholders.

Fourth, there may be internal political pressures, public relations concerns, or reputational interests which require prompt action.

And finally, white guilt may play a role when an organization feels that there's been a history of discrimination or perhaps even contin-

88. The distinction between the related concepts of "equal opportunity," "affirmative action," and "diversity management" is now well established in the academic and consulting literature, even if the terms are widely conflated in common discourse. For two useful, practical discussions of the relationship between these concepts R. ROOSEVELT THOMAS, JR., BUILDING ON THE PROMISE OF DIVERSITY: HOW WE CAN MOVE TO THE NEXT LEVEL IN OUR WORKPLACES, OUR COMMUNITIES AND OUR SOCIETY 49-63 (2006); David A. Thomas & Robin J. Ely, *Making Differences Matter*, *in* HARVARD BUSINESS REVIEW ON MANAGING DIVERSITY 33-66 (2001). A more theoretical discussion of the conceptual and political foundations of these concepts, albeit in the British context, may be found in GIL KIRTON & ANNE-MARIE GREENE, THE DYNAMICS OF MANAGING DIVERSITY: A CRITICAL APPROACH 113-139 (2d ed. 2005).

ued discrimination of some sort that they cannot locate, and that overreaction to statements that they find may be a way of dealing with it.[89] For all of these reasons, it seems to me that even if there were no antidiscrimination laws, some of the norms and values within certain organizations would create the same sorts of issues that Professor Volokh describes.

Furthermore, I'm not even convinced that antidiscrimination law is the main driver. Oftentimes, we think that the potential of liability is the main driver in dealing with censorship. But it seems to me that potential liability sometimes will curb corporate or university behavior and sometimes will not. It may depend, not only on the extent of the potential liability but also on the extent to which the values underlying the legal principles are embraced by the relevant community.

For example, look at the response of universities to *Gratz v. Bollinger*.[90] Despite the post-*Gratz* liability potential, many universities don't seriously consider race-neutral alternatives before commencing or continuing the use of non-remedial, racially preferential affirmative action.[91] Another example is the failure of many public universities to withdraw vague or invasive hate speech codes, despite a host of lower court decisions which require them to do so.[92] It seems to me that even when the potential for liability appears to be the driver, it's not just liability, it's liability plus either certain underlying norms or else the risk of the liability which in dollar terms is very high. So what I'm saying here is that this is an even broader problem in some ways than Professor Volokh describes, but the antidiscrimination law is only one small piece, and if you took it away, the same problem might exist even to the same extent.

Now, how has he overstated the problem? Two respects. First, when you consider the different motivations on an employer, it seems to me that the cautious employer is going to overreact to the potential for civil rights liability if they do not have an opposing set of potential liabilities. If they are a public employer and they have potential liability for First Amendment violations, then it seems to me that there are opposing sets of values which change the dynamic and change the set

89. *See generally* SHELBY STEELE, WHITE GUILT: HOW BLACKS & WHITES TOGETHER DESTROYED THE PROMISE OF THE CIVIL RIGHTS ERA (2007).

90. 539 U.S. 244 (2003).

91. *See* George La Noue & Kenneth L. Marcus, *Serious Consideration of Race-Neutral Alternatives in Higher Education*, 57 CATH. U. L. REV. 991, 994, 1026 (2008).

92. *See* Jon B. Gould, *The Precedent That Wasn't: College Hate Speech Codes and the Two Faces of Legal Compliance*, 35 LAW & SOC'Y REV. 345, 345, 387-88 (2001).

of incentives.[93] So, much of this discussion I think applies to a far greater extent with private than public employers.

Additionally, it seems to me that if we think that there is a choice between complying with civil rights requirements or accepting freedom of speech, we've embraced a fallacy of false alternatives because the organization, whether an employer or a university, which wants to deal with offensive speech has a wide range of things, speech-neutral alternatives that it can employ.[94] And it seems to me that the cautious employer or university has to do something when there's even one example of offensive speech, but that the reasonable alternative under current law isn't necessarily to censor it.

There are any number of things that the university or employer can do.[95] To begin with, there are a host of regulatory alternatives which are speech-neutral, at least with respect to protected speech. The organization can regulate non-speech elements. It could regulate time, place, or manner through viewpoint-neutral regulations. It could regulate non-protected speech, whether it's incitement, obscenity, defamation, or fighting words. It can regulate speech in non-forum private areas. It can regulate speech that furthers a discriminatory scheme, such as postings of "No Jews Need Apply" or some such thing. It can devise enhanced penalties under conduct codes for otherwise impermissible conduct. And this is just the regulatory approaches which are speech-neutral.

Of course, an organization also has a wide range of non-regulatory alternatives which in many cases will be more reasonable reactions to offensive conduct and include speech. They include leadership statements that abjure hatred, non-academic programs that embrace diversity, statements of tolerance and respect, training and orientation dealing with legal compliance or articulating the business case for diversity, and academic diversity programs. All of these are available, and many of them are going to reasonable.

Now there are times when employers and other potential defendants may have defenses available to them which require that they can articulate the ways in which they have responded reasonably to a hos-

93. For an instructive discussion of the manner in which these two sets of values, or narrative frames, conflict in higher education, see Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision,* 85 NW. U. L. REV. 343, 345 (1991).

94. The extent to which a public institution *must* seriously consider these speech-neutral alternatives before adopting speech-restrictive policies is an issue that I will leave for another day.

95. For an excellent discussion of what I call the "speech-neutral alternatives" available to higher education administrators, see WILLIAM A. KAPLIN & BARBARA A. LEE, 1 THE LAW OF HIGHER EDUCATION § 9.6.3. (4th ed. 2007).

tile environment.[96] But the reasonableness requirement can be measured by a number of standards, including the existence of policies and procedures to deal with it.[97] Unquestionably, there is an incentive here to be able to show that one has followed a grievance procedure and punished those who have been found to have violated it.

On the other hand, it seems to me that a proper reading of the law is that each of these requirements is not independently required and that, depending on the circumstances, punishing a speaker who engages only in protected conduct is not necessarily the reasonable way of addressing it as long as the organization can say that they haven't done nothing but they've reasonably engaged in one or more of the wide range of alternatives that are available to it. So, in other words, the cautious organization doesn't necessarily do as Professor Volokh suggested. Certainly, in a public context, that very much isn't the right way to go. Even in the private context, when an employer or other organizer chooses to censor speech as way of avoiding liability for a hostile environment, they've chosen that alternative rather than a speech-neutral alternative for reasons of their own and not because it is required by law.

The one last thing I'll say in closing is that one way out of the conundrum or answer to the question of whether it is appropriate to regulate what is, in fact, the viewpoint of certain forms of speech in order to avoid a hostile environment, can be found in Justice Scalia's opinion for *R.A.V.,* when he pointed out that since words can in some circumstance violate laws directed not against speech but against conduct, a particular content-based subcategory of prescribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.[98] "Thus, for example," he pointed out, "sexually derogatory fighting words, among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices."[99]

Now, admittedly, this conceptual framework of fighting words requires a great deal of development and certainly more than I can describe in the closing minutes of this talk. It's also much easier to apply to directed speech or one-to-one as opposed to ambient harassment. But it does give one suggestion for the way out.

96. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998).

97. EEOC, Notice No. 915.002, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisor (1999) (providing that the duty of reasonable care "generally requires an employer to establish, disseminate, and enforce an anti- harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment).

98. R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992).

99. *Id.*

As for the distinction that Professor Volokh gave between one-to-one speech and speech that's not one-to-one, the one thing I would say is that of all of the forms of harassment, it is not clear that individuals are always most damaged by what's done one to one and that, in many cases, the most dangerous form of harassment can include things that are gone not just one-to-one relationships but in activities, including speech activities, which affect a much larger range of people.[100]

So in closing, I would say that I do think that the issue is a real one but that there are potential ways out of it that are speech neutral and that can alleviate some of the problems that Professor Volokh has described.

. . .

PROFESSOR BEVIER: We're going to open the floor to questions now.

. . .

AUDIENCE PARTICIPANT: I have a question about this–what I hear is a claim that the right of expressive association is not very useful to invoke unless you are the Boy Scouts or Louis Farrakhan. I'm thinking specifically of a *Christian Legal Society v. Walker*.[101] In the majority opinion by Judge Sykes, I think she makes a very clear statement that when you have a religious organization, that has clear doctrinal statement, politically among other things, extramarital sex, and requires its officers and voting members to adhere to that to ensure that the organization continues to promotes this message that it'll do so in the future,[102] I'm wondering whether you all think that we're likely to see more *Walker*s in the future or whether we're more likely to see cases in which the courts are more dismissive of the claims of religious student organizations or religious organizations is any sort.

PROFESSOR KOPPELMAN: I guess that's for me. So, there are two basic approaches to the law of expressive association. One is the approach in *Roberts v. Jaycees*,[103] where the Court says that what you've got to do is you've got to take a look at the message of the organization, then you've got to look at the burden on the organization, and you've got to decide whether the message is being burdened by this particular restriction.

Now, there are going to be winners under that approach. I think that *Walker* is this not the most transparent opinion in the world. Some of it is that, and some of it seems to be a suggestion that was

100. *See* Kenneth L. Marcus, *Higher Education, Harassment, and First Amendment Opportunism*, 16 WM. & MARY B. RTS. J. 1025, 1054-55 (2008).

101. 453 F.3d 853 (7th Cir. 2006).

102. *Id.*

103. *Roberts*, 468 U.S. 609.

viewpoint discrimination be engaged in by the school, and viewpoint discrimination is clearly out. But *Dale* purports to go farther than that and say, well, if you're not sure what the organization's message or even if you're quite sure that the organization's message is something else, you've still got to defer. That entails a much broader expressive association right, and that's the right that lower courts haven't known what to do with.

PROFESSOR BEVIER: David.

PROFESSOR BERNSTEIN: So, a couple of things. First, I think *Dale* might have actually gone a little too far in being deferential to the Scouts. I'm not saying the Scouts didn't have a legitimate, you know, view on this, and I don't have an opinion on that. But the courts say we always believe an association basically when they claim what their viewpoint is. I think that's a little dubious. I maybe there should be a presumption in their favor.

But for example, we know that *Bob Jones University*, which I talked about before, claimed to have this very strong theological belief that interracial dating was forbidden.[104] Yet, when they came under a tremendous amount of public pressure in 2000 after George Bush visited there and it became a controversy, suddenly they explained, oh, this was never really a theological belief; this was just something we did because some parents had complained and we got rid of it. So, sometimes expressive associations sort of lie about these things, so I would not be quite as deferential as the *Dale* Court was.

But I would say that, while Andy suggested that it's a little incoherent for the Court to talk about expressive association, the right of expressive association because all discrimination laws can be seen as prohibiting expression, the Court, of course, did distinguish between organizations that are formed for expressive purposes and commercial organizations. And this goes back to Justice O'Connor's concurring opinion in *Roberts*.[105]

Now, Andy on the left and Richard Epstein on the right both say that this distinction is incoherent, philosophically nonsensical, and a means, to Andy's dismay and Richard's delight, that all civil rights laws are unconstitutional. But even though I admit that philosophically I'm not sure I could justify exactly where the line would be, we do know, in practice, what organizations will come on one side of the line, and one group of those will be religious organizations.

104. *Bob Jones*, 461 U.S. 574.

105. *Roberts*, 468 U.S. 609, 631-32 (O'Connor, J. dissenting).

Given what happened in the *Smith* case, and in fact that it's so hard to bring Free Exercise claims, perhaps the main thing that *Dale*[106] will do is allow religious institutions like a religious school that wants to fire a pregnant teacher, to make an expressive association claim, where they really don't have much of a choice of doing that Free Exercise claim nowadays.

PROFESSOR BEVIER: On the other side, did you have something? Eugene.

PROFESSOR VOLOKH: Yes. I just wanted to ask Andy something.

So, by the time of *Dale*,[107] the Boy Scouts had been loudly (inaudible) in litigation, but still in a way that was nationally prominent, saying we don't approve of homosexuality. It may not have put it in the Boy Scouts Handbook, but it was certainly speaking that. It may have been triggered by the litigation for the very simple reason that, as many gay rights activists point out, the standard way of conveying an anti-gay agenda in the past has been to completely ignore homosexuality. That was, in fact, the Boy Scouts' way of doing that. We would prefer not to talk about homosexuality, pretend it's not there. But once you're pushing us into it, now we're saying it's wrong; you might not see morally straight meaning this, but we do and lots of our people do, and that's how we understand "morally straight".

On top of that, in the Boy Scouts Handbook, there's all this talk about sexuality. It's all heterosexual sexuality. It's all about keeping sex within marriage–and that was before there was any same-sex marriage. Why is–it seems to me that a finding that, well, the Boy Scouts never really can (inaudible), it should have been reversed, perhaps not even with much deference except the very modest deference that when people are using ambiguous terms like "morally straight", you kind of look to what community means by that and not what the rival communities mean by that.

Wasn't it pretty clear, especially by 2000, the Boy Scouts really were conveying a message that there's not something horrifically awful that we're going to declaim in every Boy Scouts meeting, but something not as good as heterosexuality about homosexuality.

PROFESSOR KOPPELMAN: So, Eugene, it sounds like on your approach, in any litigation at least, as long as the litigation goes on long enough for people to notice, the defendant is going to have a good expressive association defense because the defendant is going to be able to say, well, look, you know, we filed an answer to the complaint, and then after we lost in the trial court, we filed a brief in the appeals

106. 160 N.J. 562, 734 A.2d 1196 (1999).
107. *Id.*

court. Shortly, by the time we get to the oral argument, it's clear that we had a message. Why isn't this available in all anti-discrimination —

PROFESSOR VOLOKH: Because even if it's an expressive association that is claiming the right to choose not its members but its speakers, then in that case, if it doesn't matter to me, then I don't think it should matter to the court whether the expressive association has established the message it's trying to send before the litigation or after.

What's important is if it's an expressive association that is now on the record, now nationally known for taking a particular position, and it is choosing its speakers, it should be entitled to choose speakers whose identities and whose actions aren't in tension of that.[108] Well, why is that so bad? Just because they happen to bring it up or at least make it public during litigation–not entirely, mind you. It's also another context too.

PROFESSOR KOPPELMAN: So, now you seem to be proposing a different rule than rule the Court articulates in *Dale*,[109] which is a rule that antidiscrimination laws just don't apply to–I am not sure what the predicate is here–entities that engage in expression. That probably includes all businesses.

PROFESSOR VOLOKH: Well, I'm not sure, I mean, I'm not sure that's right.

PROFESSOR KOPPELMAN: Are there any businesses that don't engage in expression?

PROFESSOR VOLOKH: Well–I'm sorry.

PROFESSOR BEVIER: That's fine. I think we've joined issue here, and it's a very important issue, but we do have some, we've enticed a couple of questioners out of the audience.

AUDIENCE PARTICIPANT: Jordan Lawrence of the Alliance Defense Fund, and I'm representing Elane Photography in Albuquerque in the photograph, wedding photograph thing. And I just, I didn't want to say anything, but I wanted to ask some questions.

To Professor Koppelman, I just want to say the main trend in wedding photography is photojournalism, and it's not anything like passport headshots, and it's to basically make this photo essay of the wedding. And so you have both the expression of the photography with the messaging of the ceremony that's going on, so I think it's kind of a double-compelled speech thing going on there. And I think if somebody did say that in a passport photo situation, you would be

108. *See Dale*, 160 N.J. 562, 734 A.2d 1196 (1999).
109. *Id.*

right, but I think that many times these people are sought out because they're really good at enhancing the whole ceremony and recording it.

And the two questions that I would just like you all to speak to is, do you think that the First Amendment analysis is altered by the fact that most people, if you're looking at somebody else's wedding pictures, has no idea who took the pictures? Does it have to say, "I Elane Huguenin, took these photos" before there's, you know, like the Hurley situation?

And the other thing that I wanted to bring up is that we are having an argument that's sort of a secondary one on whether a photographer really meets the statutory definition of being a public accommodation. And I think that that's an issue that doesn't get–it's like any business of public accommodation. You know, a speechwriter can be forced to write something he doesn't disagree with because he's earning money by doing it. Is there a constitutional limitation to the police power of a state to just put, you know, make anything discrimination across the board? Or at least, the First Amendment would be. So, if you don't know who took the photos, and is there a limit to the (inaudible) discrimination law can have? Thank you.

PROFESSOR BEVIER: Did you have a particular panelist you wanted to address this to?

AUDIENCE PARTICIPANT: Any of them.

PROFESSOR BEVIER: All right, gentlemen. Start your motors.

PROFESSOR BERNSTEIN: I'll take the second part of that. With regard to places of public accommodation, one thing I point out in my book is that the framers of the '64 Civil Rights Act,[110] however you think of that act as it applies to private parties, they did try to be sensitive to civil liberties concerns, so they didn't limit Title II to places of public accommodations, not to private organizations or non-accommodations.[111] They did limit the scope of Title VII to employers of more than 50 employees.[112] When they passed the Fair Housing Act[113] and the Mrs. Murphy exception[114] so that it wouldn't apply to landlords who are renting in their own, where they lived themselves, so they wouldn't have to share their own personal space with people they didn't want to, some of that has to be done by federal.

Very quickly, federal courts held that "public accommodations" means any accommodation. But state laws since then have just oblit-

110. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h-6 (1964).
111. 42 U.S.C. § 2000a (1964).
112. 42 U.S.C. § 2000e (1964).
113. Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1968).
114. 42 U.S.C. § 3603(b) (1968).

erated all these limits, so state laws will apply to any employer regardless of how many employees they have. They will apply to, not just to any landlord–including roommate situations. There are circumstances–Eugene didn't mention this, but there is a New Jersey case where one instance of sending around dirty jokes was considered sufficient to be sexual harassment. And in particular, with regard to a place of public accommodation, there is no limit on what that means in many states.

So, that was exactly the basis for the New Jersey case in *Dale*.[115] And of course, the Supreme Court can't overrule what the New Jersey Supreme Court says about New Jersey law, but if you think about it, the Boy Scouts of America is not a place, it's not public, it's not an accommodation. That did not stop the New Jersey Supreme Court from saying that the Boy Scouts of America is a public accommodation for the purposes of New Jersey antidiscrimination law.[116]

PROFESSOR BEVIER: Do other panelists wish to address this issue? May I follow up on that just a minute, David? I take it that's state supreme courts interpreting state law, and the legislature has just let it go forward. So, the legislature could have come in and said that's not what we meant; we meant to protect more privacy. But the legislature has, in those cases, permitted the state supreme court to interpret state law in that way.

PROFESSOR KOPPELMAN: The fact that places get interpreted metaphorically sometimes works to the benefit of speech, as in *Rosenberger v. Rector and University of Virginia*,[117] where a student activities fund was held to be a public forum. The Court said, well, not really literally a forum since it isn't a place.[118] So, the fact that a place isn't a place can cut both ways.

PROFESSOR BEVIER: All right. Thank you. One more question. Yes.

AUDIENCE PARTICIPANT: Yes. This question is for Professor Volokh and anybody else who'd like to comment on it. But maybe this is kind of a theory from left field. But talking about the employment discrimination cases regarding First Amendment speech protection, has there been any arguments made regarding the secondary effects concept and applying that in the area of employment, harassment, or speech issues in employment? And if so–I know that whole line of jurisprudence seems to be somewhat confined to the adult entertainment area, but has there been anything in terms of justifying positions on

115. Dale v Boy Scouts of America, 160 N.J. 562, 734 A.2d 1196 (1999)
116. *Dale,* 160 N.J. at 591, 734 A.2d at 1211.
117. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).
118. *Id.* at 830.

free speech within the employment context using a secondary effects analysis? And if so, are there any counter-arguments that have been brought forth on that?

PROFESSOR VOLOKH: Yes. Very few courts actually talk about the First Amendment issue, I think in part because very few lawyers raise it. There's at least one case, early case, which mentioned this–just a bit of legal background. So, generally speaking, content-neutral restrictions are much more easily upheld than content-based restrictions. This, on its face, seems quite clearly content based. It restricts racist and sexist speech but not other kinds of speech. In fact, it's viewpoint based. It restricts speech bigoted speech as well as some other speech as well, but not (inaudible) speech. Now again, the motivation for it is the harm that the speech supposedly causes, but that harm stems from the message of the speech.

Now, the Court has come up with what I think is ultimately not a very defensible position, but it came up with it in the so-called "erogenous zoning" cases[119], in the cases having to do with zoning of adult movie theaters and the like, that if you're going after not the primary effects of the speech but the secondary effects, like the possibility that the speech will draw people who engage in crime or prostitution or whatever else, so it will diminish property values. That's a secondary effect, effect, and therefore the restrictions are permissible. If that were so, then all campus speech codes would be constitutionally permissible, then Congress could just have a law that says–not even severe or pervasive–saying, you know, we're going to ban all racist speech in all workplaces, in all educational institutions, all places of public accommodation. Why? Because it creates a secondary effect of hostile environments.

In fact, however, the Court has, in many cases since the early erogenous zoning cases, distinctly limited the secondary effects doctrine.[120] In particular, it said the emotional effects of the speech on the audience, be it either persuasive or the offensive effects of the speech, and the harms that flow from those persuasive and offensive effects do not counter the secondary effects.[121] Those are the primary effects, the very kinds of effects the government cannot go after through content-based restrictions. It held that in the *R.A.V.* case.[122] It held that in *Forsyth County.*[123] It held that in *Playboy Entertainment.*[124] It's held that in many, many cases.

119. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) *See also* United States v. Playboy Entertainment Group, 529 U.S. 803, 815 (2000).

120. *See id.*

121. *See Boos*, 485 U.S. at 321.

122. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

123. Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).

So, doctrinally, whatever arguments there might be for upholding it, I think they're not, I think the secondary effects doctrine, even though it's prevailed in at least one case, I think, is not defensible.

. . .

PANEL CONCLUDED

124. United States v. Playboy Entertainment Group, 529 U.S. 803 (2000).