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Disentangling Symmetries: Speech, Association, Parenthood

Laurence H. Tribe*

There must be a reason why the search for symmetry fascinates mathematicians and has been so rich a source of insight for physicists studying not just matter and anti-matter, but the way the universe can be understood as composed of tiny vibrating strings.¹ Perhaps the search for symmetries and the tendency to see them even where they do not actually exist may be hard-wired into the human mind. Whatever the reasons, observers often tend to imagine that certain features of the legal landscape, particularly the landscape of rights, are more symmetrical than they really are.²

Ironically, observers similarly tend to overlook the symmetries that are there even when the logic of the legal situation should alert us to their presence. The 1999 Term decisions of the Supreme Court, and the work of the Rehnquist Court generally, provide fresh soil to plow for such symmetries. Thus, the thread, or perhaps string, which unifies the several topics discussed in this essay will be the theme of symmetries and asymmetries, real and imagined, in the constitutional law of rights, sometimes enumerated, but most often unenumerated, as the Court crosses the divide between two millennia.

A familiar example with which to begin is the set of Sixth and Seventh Amendment rights to criminal and civil jury trial in certain federal cases, made binding on the states by the Fourteenth Amendment in the criminal, though not the civil, context.³ A central purpose of these provisions is to protect individuals from officialdom by submitting their claims and defenses to groups of their fellow

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1. See generally BRIAN GREENE, *THE ELEGANT UNIVERSE: SUPERSTRINGS, HIDDEN DIMENSIONS, AND THE QUEST FOR THE ULTIMATE THEORY* (1999) (discussing string theory and its incorporation of the supersymmetry of a quantum-mechanical extension of space and time).

2. See, e.g., Barbara Flagg & Katherine Goldwasser, *Fighting for Truth, Justice, and the Asymmetrical Way*, 76 WASH. U. L.Q. 105, 105 (1998) ("For many, symmetry in law enjoys nearly the same status as mom, baseball, and apple pie: it is of the essence of the American way of life.").

3. *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968) (making the Sixth Amendment's provision for jury trial binding on the states through Fourteenth Amendment); *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217-18 (1916) (holding that the Seventh Amendment right to a civil jury trial is inapplicable to state trials).

citizens, their peers.⁴ But there are occasions when a litigant, fearing unpopularity with his peers, would like nothing less than to be thrown on their mercy. Particularly in the criminal context, is such a litigant entitled to a bench trial even where the prosecution insists on proceeding before a jury? Assuming that some sort of symmetry just *has* to prevail here, lawyers have often tried to argue for such a right, but the Supreme Court has regularly rejected these claims, stressing that trial by jury is a structural feature of our system: it helps make verdicts legitimate in the eyes of the community even if *neither* side requests a jury.⁵ The lesson for a student of symmetry is that a right to X might fail to imply a right to the opposite of X because the right in question may be less an aspect of personal liberty and freedom of choice than an aspect of the Constitution's institutional architecture.

A right might also fail to imply its opposite because the right, historically or functionally, is unusually concrete and specific in character. The Second Amendment right to bear arms is that type of right.⁶ Regardless of whether one views its preamble about a well-regulated militia as limiting the Amendment's substantive scope, or merely as putting the right in a motivating context, the right to bear arms is very much a part of the architecture of federalism.⁷ Thus, we should not expect that right to come paired with an equal and opposite right *not* to bear arms—that is, a right to refuse military conscription. Sure enough, no such right exists.⁸

4. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 696 (1973) (noting that the jury, being composed of members of the community as opposed to being drawn from an elite class, was thought to hold the "class instincts of the judge in check"). Cf. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (William S. Hein & Co., Inc. 1992) (1768) (stating that

[t]he impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity; it is not to be expected from human nature, that the few should always be attentive to the interests and good of the many.

Id.)

5. See, e.g., *Singer v. United States*, 380 U.S. 24, 36 (1965) ("We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him."). See also *United States v. Sun Myung Moon*, 718 F.2d 1210, 1217 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984) ("The ability to waive the benefit [of trial by jury] does not import a right to claim its opposite.").

6. U.S. CONST. amend. II.

7. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 895-96 (3d ed. 2000) (noting that "the Second Amendment provides fertile ground in which to till the soil of federalism and to unearth its relationship with individual as well as collective notions of rights").

8. See *Lichter v. United States*, 334 U.S. 742, 756 (1948) ("The constitutionality of the conscription of manpower for military service is beyond question."); see also *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918). Indeed, the text James Madison originally suggested for the Second Amendment makes this asymmetry all the more pronounced. His version concluded with "but no person religiously scrupulous of bearing arms, shall be compelled to render military service in person." NEIL H. COGAN, *THE COMPLETE*

The most common example of a pair of rights less symmetrical than widely assumed is the right to speak and the right not to speak—that is, freedom of speech and the right to be silent.⁹ The right to be silent brings to mind a subject revisited by the Supreme Court during the 1999 Term—“[You have] the right to remain silent, [and] anything [you] say can be used against [you] in a court of law”¹⁰—the famous *Miranda* warnings reaffirmed in *Dickerson*.¹¹ But that so-called “right to remain silent” may, as we all know, be overcome by a suitably broad grant of immunity from the prosecutorial use of your answers or their fruits as evidence against you.¹² With such immunity, and even without it if you are not the one who is at risk of personal incrimination, you have *no* right to be silent in response to lawful government inquiry.¹³

The only right to silence that one can conceptualize as the mirror image of the right to speak one’s mind is the right not to be forced by the state to express, convey, or support its message or, sometimes, the messages of other private citizens. Thus, school children cannot be compelled to pledge allegiance to the American flag,¹⁴ and adults cannot be compelled to put “Live Free or Die” on their license plates.¹⁵ Apparently suffering from an “irony deficiency,” the “Granite

BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (1997) (quoting 1 ANNALS OF CONG. (Veil H. Logan ed., 1789)). This “conscientious objector” provision suggests that, even if the Second Amendment as originally drafted encompassed an individualized right to bear arms, as well as a collective “right of the people” to maintain a militia, the only corresponding right to abstain from service in the militia would have been limited to adherents of certain religious faiths. Cases such as *Lichter* confirm the notion that there is no general contra-Second Amendment right to refuse conscription. As an aside, it is worth noting that, with respect to federal conscription, the Supreme Court has taken a broader view than Madison’s proposed exemption would have allowed, by holding that “[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time,” he is exempt from service under the statutory federal conscientious objector provision. *Welsh v. United States*, 398 U.S. 333, 340 (1970).

9. A related pair of First Amendment symmetries consists of the rights to receive or not receive information. The “First Amendment ‘necessarily protects the right to receive [literature, information, and ideas.]’” *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)). *Cf. Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 754 (1996) (expressing concern that the “‘written notice’ requirement will further *restrict viewing by subscribers*”) (emphasis added). Similarly, there is an unenumerated (and considerably narrower) but nonetheless “recognizable privacy interest in avoiding unwanted communication.” *Hill v. Colorado*, 120 S. Ct. 2480, 2489 (2000). *See also Am. Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 204 (1921) (noting that

[i]f, however, the offer [for information] is declined, as it may rightfully be, then persistence, importunity, following and dogging, become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free and his employer has a right to have him free.

Id.) This “privacy interest” is often overcome by the First Amendment right to engage in free speech, even if the speaker’s message may be offensive to her audience, for offended viewers can “effectively avoid further bombardment of their sensibilities simply by averting their eyes.” *Cohen v. California*, 403 U.S. 15, 21 (1971).

10. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

11. *Dickerson v. United States*, 120 S. Ct. 2326, 2329 (2000).

12. *Kastigar v. United States*, 406 U.S. 441, 444-46 (1972).

13. *Id.* at 443-44.

14. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

15. *Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

State” of New Hampshire had threatened to imprison those of its citizens who refused to adorn their cars with that “Live Free or Die” motto.¹⁶ But, there is actually a *double* irony here: By holding that individuals have a right to refuse this state slogan on their plates while letting the state keep *distributing* plates bearing the slogan, the Court was forcing those who are most offended by the slogan to come out of the closet. No longer able to just blend in as law abiding citizens whose views nobody could guess from their license plates, *now* those keeping the “Live Free or Die” slogan would be marked as having *no objection* to the sentiment it expressed, while those replacing it would be marked as having affirmatively *rejected the slogan*.

So too, any child who wishes to take advantage of the right recognized in *Barnette* would have to single herself out from her peers.¹⁷ Unlike the right of schoolchildren in *Santa Fe Independent School District v. Doe*¹⁸ not to have a state-sponsored system of prayer at football games, for example, the rights upheld in *Barnette* and *Wooley* paradoxically leave individuals with *less* ability to keep their thoughts private than they had before those cases were decided, when nobody could have mistakenly attributed the views expressed by the state-mandated words to the individuals who were required to recite or convey them on pain of being expelled from school or losing a driver’s license.

In the same way, *Boy Scouts of America v. Dale*,¹⁹ upholding the First Amendment right of the Boy Scouts to exclude an openly gay scout leader, cannot be understood as affirming a right of the Boy Scouts to take no public position on the morality of being openly gay. If the Boy Scouts had *lost* their case, they would have been *better* able to keep their views on this topic completely “in the closet” than they are by virtue of having won! That is what makes one of Chief Justice Rehnquist’s statements for the Court in *Boy Scouts of America v. Dale* especially curious. He wrote: “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.”²⁰ But just obeying the law prior to the Court’s ruling sent *no such message*. At most, it signaled a reluctance to “make a federal case out of it.” Moreover, had the Scouts lost, they would be accepting Dale only under protest, and because they have no apparent hesitation about making that protest public, it is hard to see precisely how reluctantly accepting the openly gay Dale as a leader would send a message of *acceptance* to anyone, whether in or out of the organization. Thus, a right to be silent, to keep one’s views to oneself, and to avoid sending a signal that *falsifies* what one believes cannot explain the *Boy Scouts* holding any more than it can explain the holdings of *Barnette* and *Wooley*.

16. *Id.* at 708.

17. *Barnette*, 319 U.S. at 624.

18. 120 S. Ct. 2266 (2000).

19. 120 S. Ct. 2446 (2000).

20. *Id.* at 2454 (emphasis added).

The right that all of these cases affirm is better understood as a right not to be *used* or *commandeered* to do the state's ideological bidding by having to mouth, convey, embody, or sponsor a message, especially the *state's* message, with one's voice or body or resources, on one's personal possessions, through the composition of the associations one joins or forms, or in their selection of teachers, exemplars, and leaders. The right not to be appropriated or conscripted as a *means* to the state's speech-related ends ought to be a particularly potent right: Whatever legitimate goals the state seeks to achieve when it *restricts* speech are goals the state is often hard-pressed to achieve by any other means. In contrast, any legitimate goals the state seeks to achieve by using individuals or associations to convey or endorse its views are likely to be achievable by the state speaking with its own voice, at the expense of all taxpayers rather than just those few who are singled out to bear the burden of serving as the state's megaphone.²¹

If this right sounds familiar, it may be because the most striking development in the law of federalism under the Rehnquist Court has been the evolution of the principle that the national government may not affirmatively "commandeer" any of the three branches of a state's government to do its bidding—by telling the state legislature what federal policies to enact into law,²² the state executive what federal laws to implement,²³ or the state judiciary what federal cases to hear.²⁴ Although the parallel is not perfect, this doctrine—and the sense it reflects that it is more intrusive of one's autonomy to be conscripted into a government's efforts than to be restricted and preempted by that government's policies—importantly echoes and reinforces the principles embodied in the *Barnette*, *Wooley*, *Boy Scouts* line of cases. To this line one must also, of course, add cases like *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*²⁵ and *California Democratic Party v. Jones*,²⁶ the first of which held that the state may not require the organizers of a private parade to include an openly gay contingent of marchers pursuant to the state's anti-discrimination laws²⁷ and the second of which held that the state may not force a political party conducting a primary election to accept as its nominee someone other than the first choice of its own members.²⁸

21. It is worth contrasting *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980), which upheld the power of California to require the owners of large shopping centers, private in title but public in function, not to interfere with the political messages that those lawfully on the premises choose to disseminate. The state in *PruneYard* wasn't conveying its own message or even private messages of its choosing, and could hardly be described as commandeering property as private as a car, or anything as intimate as an individual's voice, or as personal as a small Boy Scout troop, in order to make its point that freedom is more precious than life itself, or that the nation for which our flag stands is worthy of our allegiance, or that only the ignorant or the bigoted would have any objection to homosexuality or to the sexual lives some gay men lead.

22. *New York v. United States*, 505 U.S. 144, 149 (1992).

23. *Printz v. United States*, 521 U.S. 898, 902 (1997).

24. *Alden v. Maine*, 527 U.S. 706, 712 (1999).

25. 515 U.S. 557 (1995).

26. 120 S. Ct. 2402 (2000).

27. *Hurley*, 515 U.S. at 559.

28. *Cal. Democratic Party*, 120 S. Ct. at 2414.

In recent years, the Supreme Court has not always appreciated how deep this anti-commandeering principle runs, or how thoroughly it is implicated whenever people are forced to take part in, or to pay for, the speech of others. In such cases, the Supreme Court has not always heeded the call of the anti-commandeering objection. In *Glickman v. Wileman Bros. & Elliott*,²⁹ for example, a closely divided Court (five-to-four) held that tree fruit growers could all be compelled to contribute to a collective fund for the generic advertising of such fruit, even though some of them objected strongly to the implied message that “if you’ve seen one nectarine or peach, you’ve seen ‘em all.” According to Justice Stevens’s majority opinion, it was enough that the message “peaches are good; buy a bunch,” seemed innocuous and non-ideological and that the law imposed no barrier to individual apricot growers putting out their own ads.³⁰ For Justice Souter’s dissent, those features provided no answer to the basic objection that this was forced participation in a state-sponsored speech project.³¹ The majority stressed the highly regulated, tightly collectivized nature of the tree fruit market, arguing in effect that the apparent departure from principles of autonomy in the realm of speech was really but a corollary of the fact that what the objectors characterized as compelled support of commercial speech was nothing beyond an attempt to offset the disincentives to advertise inherent in the economic collectivization of the underlying regulatory regime.³² The Sixth Circuit, in a 1999 case involving United Foods,³³ found *Wileman* distinguishable because United Foods grows mushrooms rather than nectarines or peaches, and the mushroom producers are not closely regulated or tightly collectivized at all—a sharp contrast to the nectarine and peach people in California.³⁴ The Solicitor General successfully sought certiorari, asserting a conflict with *Wileman*,³⁵ and the case was argued on April 17, 2000.³⁶

Somewhat similar to *Wileman* is *University of Wisconsin v. Southworth*.³⁷ There, the Court upheld a state program forcing all students at the state university to contribute to a fund covering the cost of various discussion groups, campus publications, and other activities devoted to extracurricular student speech.³⁸ Writing for a unanimous Court, Justice Kennedy recalled that a challenge to the

29. 521 U.S. 457 (1997).

30. *Id.* at 469-70.

31. *Id.* at 477 (Souter, J., dissenting).

32. *Id.* at 461.

33. *See generally* *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), *cert. granted*, 121 S. Ct. 562 (2000).

34. *Id.* at 223.

35. *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), *cert. granted*, 121 S. Ct. 562 (2000).

36. I represent United Foods and argued the case before the Court, urging affirmance of the Sixth Circuit’s decision.

37. 529 U.S. 217 (2000).

38. *Id.* at 221-22.

use of such a fund for a religious student magazine had been rebuffed by the Court just five years earlier on the ground that the state's viewpoint-neutrality in distributing money from the fund would assure that reasonable observers would not confuse the religious magazine's message with the state's own views.³⁹ He concluded that, as a matter of "symmetry," it seemed reasonable that viewpoint-neutrality should also suffice to meet the objections of students opposed to being compelled to support speech that was not their own.⁴⁰ Why that should be so remained something of a mystery, leaving *Southworth*, like *Wileman*, to drift awhile beyond the broad current otherwise running through the cases, until later decisions hopefully steer both precedents into the mainstream.

Returning now to the basic theme of symmetry and its absence, one pervasive attribute is that the cases supposedly standing for the proposition that there is a right *not to speak* turn out, in many instances, to stand for something quite different. Specifically, the cases stand for a right that is *related* to speech, in the sense that it involves the right not to be used as a *vehicle* for speech, but not for a right that is reducible to a *right to be silent* or a right to prevent *misattribution*, the two rights in this area that one might imagine deriving from the freedom of speech itself.

The paired freedoms of association and of disassociation which sometimes arise in these same cases are similar in character. Like the right not to be used by the government for the purpose of speech—the right vindicated in *Barnette* and *Wooley*, the right not to have government force on you an unwanted associate cannot be overcome by the fact that it might be as clear as day to the whole world that the unwanted associate is not *your* idea, and that your agreement to let him or her into your group reflects nothing more than your obedience to the law. Thus, the fact that the Chief Justice overplayed his hand when he said that forcing the Boy Scouts to accept an openly gay scout leader would compel them to send a pro-gay signal to the world at large should not lead anyone to conclude that the majority's result in that case was necessarily wrong.⁴¹

At the oral argument in *Boy Scouts*, counsel for Respondent Dale observed in passing that freedom of association is guaranteed only "as an instrumental right in furtherance of the expression of the members,"⁴² at which point the Chief Justice interjected: "Well, now, I don't—what's your authority for saying that freedom of association is simply an instrumental right to further expression of the members?"⁴³ Counsel might have done well to remind the Chief Justice of his opinion eleven years earlier in *City of Dallas v. Stanglin*, upholding a local ordinance that limited the use of certain dance halls to children between fourteen

39. *Id.* at 233-34 (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995)).

40. *Id.* at 235.

41. See *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2274-75 (2000).

42. Transcript of Oral Argument at *29, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), available at 2000 WL 489419.

43. *Id.* at *30.

and eighteen and refused to permit either children under fourteen or anyone over eighteen to enter.⁴⁴ The lower court had found the ordinance to infringe a “fundamental right of ‘social association’” and had concluded that it could not survive strict scrutiny.⁴⁵ Writing for a unanimous Court, Chief Justice Rehnquist reversed, holding minimum rationality to be the right standard and easily finding the law rational.⁴⁶ He reasoned that the Constitution protects association for the purpose of engaging in First Amendment activities like speech and religion, usually called “expressive association,” and association involving the choice to enter into and maintain certain highly personal relationships, usually called “intimate association,” but that it does not protect social association for its own sake and certainly does not protect “chance encounters in dance halls” among the “patrons, who may number 1,000 on any given night,” who “are not members of any organized association,” and “[m]ost [of whom] are strangers to one another.”⁴⁷

That the Boy Scouts differed in basic ways from the “kids in the hall” was fairly obvious. The organization has an oath that all members must take, a creed that defines its moral outlook, and a mission of inculcating not only squirrel-catching and knot-tying skills but also a set of norms and values in the young people who become members.⁴⁸ The dissenters searched the record for proof that the messages *explicitly* transmitted in the official (pre-litigation) literature of the Scouts were clearly hostile to homosexuality or to homosexuals.⁴⁹ They found none, and the majority opinion wasn’t very helpful when it came back with little beyond the injunction of the Boy Scout Oath and Law that Scouts should be “clean” and “morally straight,”⁵⁰ which seemed more like pun than a relevant discovery. But it would be an awfully strange doctrine that made a constitutional exemption from anti-discrimination laws turn on an organization’s overt articulation of a specifically *negative* message, however nominal, about members of the group it chooses to exclude. Worse than strange, it would trade the right of expressive association for freedom of speech. Why? Because that freedom must surely include the right to express one’s philosophy in implicit rather than explicit ways, to prefer inculcating one’s beliefs with a velvet glove rather than an iron fist, and to opt for articulating one’s views positively rather than negatively, focusing on the part of the glass that is “half full” rather than on the part that is

44. 490 U.S. 19 (1989).

45. *Id.* at 23.

46. *Id.* at 28.

47. *Id.* at 24-25.

48. THE BOY SCOUT HANDBOOK 9 (11th ed. 1998). The Scout Oath and Law remain unchanged since the first edition of their handbook was published in 1911. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1276 (7th Cir. 1993), *cert. denied*, 510 U.S. 1012 (1993).

49. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2460-62 (2000) (Stevens, J., dissenting).

50. *Id.* at 2452.

“half empty.”⁵¹ “Negative advertising” may have become a staple of modern elections, but it is not the only way the Constitution permits individuals or groups to identify themselves!

It turns out, quite suprisingly, that the very pages in the Boy Scout Handbook that are quoted by Justice Stevens’ dissent to prove the Scouts are agnostic on the subjects of sex and sexual orientation contain language that he had for some reason replaced with ellipses but that, once brought to the surface, tells a fairly plain if not particularly broad-minded story.⁵² The Boy Scouts, as their pre-litigation literature makes clear, are dedicated to teaching that the good life is one that foreswears promiscuity, practices sexual abstinence *until marriage*, respects and protects the *young woman* who is the object of the scout’s romantic and lustful impulses, and looks forward to the ultimate satisfaction of *fathering children* with her after she has become his *wife*.⁵³ While it is true that this litany does not include a statement that homosexuality is evil or depraved, to force the Scouts into that negative and vile a mold as a condition of selecting as leaders and role models only young men whose heterosexual orientation is affirmatively reflected in and exemplified by their experiences and their aspirations is akin to requiring the Sierra Club to attack capitalism in its advertisements as a condition of exercising its right to choose as spokespersons only those whose protective orientation toward the ecosystem is positively mirrored in and illustrated by their lives and hopes for the future.

In my own initial analyses of *Boy Scouts*, I made what I now regard as the mistake of concentrating, in a purely instrumental way, on precisely how the inclusion of James Dale or even an army of James Dales, all of them admitted under what the world would know was protest, would undermine the ability of the Boy Scouts as an organization to disseminate their desired public message. Unlike the forced inclusion of a gay contingent in the St. Patrick’s Day Parade,⁵⁴ Dale’s mandated inclusion, however open he was about being gay, would not directly alter any collective *speech act* in which the Scouts as a corporate body are engaged. And unlike the forced inclusion of the opposing party’s members in the

51. *Id.* (noting “the Scout Oath and Law provide ‘a positive moral code for living; they are a list of ‘do’s’ rather than ‘don’ts’”) (quoting Brief for Petitioners at 3). *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O’Connor, J., concurring) (“It is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service.”).

52. *Boy Scouts*, 120 S. Ct. at 2462 (Stevens, J., dissenting) (quoting THE BOY SCOUT HANDBOOK). To appreciate the full extent of the dissent’s mischaracterization of the *Boy Scout Handbook*, see John C. O’Quinn, Comment, “*How Solemn is the Duty of the Mighty Chief*”: *Mediating the Conflict of Rights in Boy Scouts of America v. Dale*, 24 HARV. J. L. & PUB. POL’Y 319, 335-39 (2000).

53. THE BOY SCOUT HANDBOOK 527-28 (10th ed. 1990) (the section on “Sexual Responsibility” in the 10th edition is reproduced identically in the 1998 11th edition at pages 376-77); see also O’Quinn, *supra* note 52, at 337-39.

54. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding this forced inclusion to be impermissible).

vote count to select a political party's nominee,⁵⁵ the inclusion of openly gay scout leaders cannot be assumed to result in infiltrating the Scouts with individuals interested in undermining the group from within, radically changing the Scouts' Oath, or modifying the Scouts' other defining documents.

But expression worthy of First Amendment protection need not be explicit or broadcast to the public at large, and a threat to associational activity built around such expression need not be particularly dramatic. If a group chooses to teach by example, selecting as instructors and leaders only those whose lives appear to embody its ideals,⁵⁶ that too is a choice the Constitution should protect, if not through the First Amendment as such, then as a basic if unenumerated right. If the group's ideals, however much many of us might think them stunted or benighted, treat heterosexuality as an essential, even if barely articulated, ingredient in any life truly worth living, then forcing the group to include as teachers or leaders people whose own lives are shining *counter*-examples to its philosophy seems hard indeed to square with the freedom of expressive association protected in past cases.

Justice Stevens' dissent denied all of this, essentially because his parsing of the Boy Scouts' documents and public pronouncements revealed no "shared . . . common moral stance on homosexuality."⁵⁷ Reading those materials the way one might read a prospectus for an IPO, he went so far as to insist that, because the Boy Scouts' bylaws commit the organization to a "nonsectarian . . . attitude toward . . . religious training" and because some "religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals, it is exceedingly difficult to believe that [Boy Scouts of America] nonetheless adopts a single particular religious or moral philosophy when it comes to sexual orientation."⁵⁸ The logic of that argument would mean that the Scouts must be assumed to have no views on any subject about which religious groups differ! Equally fundamental, there is something impossibly artificial about limiting the right in question to associations that formally and consistently disparage people of the type that those associations seek to exclude.

There remains the mystery of why a neutral rule of general applicability, such as the New Jersey law against discrimination based on race, sex, or sexual orientation in institutions with a certain public character,⁵⁹ should give way to any First Amendment objection, whether one involving association or otherwise, simply because the rule has the incidental effect, as applied to a particular group, of interfering with its freedom of expression. After all, the Court did not apply

55. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (holding this forced inclusion to be unconstitutional).

56. *See, e.g.*, THE SCOUTMASTER HANDBOOK 6 (1998) (noting that Scoutmasters are expected to set "an example for themselves and for others by living the Scout Oath and Law to the best of their abilities").

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

58. *Id.* at 2462-63.

59. N.J. STAT. ANN. §§ 10:5-4, 10:5-5 (West Supp. 2000).

heightened First Amendment scrutiny when a neutral rule about keeping promises or paying damages to those who relied detrimentally on them was employed to uphold a monetary award against a newspaper for publishing the name of a source to whom it had promised secrecy.⁶⁰ Similarly, Justice Scalia has successfully championed an analogous rule for the free exercise of religion in *Employment Division, Department of Human Resources of Oregon v. Smith*.⁶¹ Further, in *Barnes v. Glen Theatre, Inc.*,⁶² Justice Scalia demonstrated that the Court, even when invoking the so-called *O'Brien* test,⁶³ had never actually invalidated a neutral general rule of conduct as applied to a violation of the rule that happened to express something.⁶⁴

Anti-discrimination rules, it seems, furnish exceptions to that generalization. The Court in the *Hurley* case, for instance, was fully cognizant that the rule it was striking down as applied to force the St. Patrick's Day Parade to include a gay contingent did not target expression and was, itself, content-neutral.⁶⁵ The reason anti-discrimination rules seem not to be treated the way the anti-peyote rule in *Smith* or the promise-keeping rule in *Cowles Media* were treated may well be that one man's discrimination is another's expression of a moral view.⁶⁶

The state's objection to the exclusion of openly gay men by groups like the Boy Scouts cannot be simply that such groups must be acting on ignorant stereotypes, using sexual orientation as a statistical proxy or as shorthand for something else that really matters to them—the sort of objection conventionally made to the use of race, and sometimes to the use of gender, as proxies for something else.⁶⁷ That kind of objection would not carry the day against the Boy Scouts, who are, for better or for worse, using heterosexual status *as a defining component of their ideal*.⁶⁸ As a result, it becomes difficult to regard the application of the anti-discrimination laws in this setting as a “neutral” instance of mere error-correction. Rather, it becomes a direct clash of competing images of ‘the good life.’ And, in such a clash, the teaching of the First Amendment has

60. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991).

61. 494 U.S. 872 (1990).

62. 501 U.S. 560 (1991).

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

[A] government regulation is sufficiently justified 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.

Id.

64. *Barnes*, 501 U.S. at 572 (Scalia, J., concurring).

65. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572 (1995).

66. *The Supreme Court, 1999 Term—Leading Cases*, 114 HARV. L. REV. 179, 266-67 (2000) (“[The Boy Scouts’] exclusion of gays seems to have been an attempt by the organization to define itself ideologically and to express its belief that homosexuality is axiomatically incompatible with what it considers ‘morally straight’ and ‘clean.’”).

67. *Id.* at 266 (“BSA’s discriminatory membership policy did not appear to be a means of screening out those bearing some other, unstated quality.”).

68. See THE BOY SCOUT HANDBOOK 376-77 (11th ed. 1998).

long been that the state loses.

In contrast to this direct clash, the Supreme Court has typically articulated the constitutional objection to state classifications along gender lines in terms of the habitual, knee-jerk stereotypes about the relative capacities or proclivities of men and women that such classifications, serving as proxies, inaccurately express.⁶⁹ Although, at times, the Court has recognized that the real objection is less to the inaccuracy of gender as a proxy than to the stratifying and debilitating social consequences of allowing the state to take the correlation (however strong) between gender and something else (e.g., a juror's likely attitude toward the alleged offense, the accused, and the evidence) into account in a particular context like jury selection.⁷⁰ The same is true with respect to race, where the constitutional objection that triggers strict scrutiny may on occasion be the skewing effect of race-based prejudice in the course of enacting "we/they" generalizations⁷¹ but may also go directly to the substantive unacceptability of resting state action on, and using state action to express, the supposed superiority of one race over another⁷² or the supposed evil of allowing the races to mix even in places of public accommodation.⁷³ Even the most sophisticated theorists have tended to conflate (a) objections going to a systemic tendency to err in favor of the dominant group with (b) objections going to a substantive rejection of the values the dominant group seeks to enforce, as though both kinds of objection could be expressed without viewing the equality principle as embracing some substantive values and

69. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (holding that a statute which provided that, between persons equally qualified to administer estates, males must be preferred to females, was prohibited by the Equal Protection Clause of the Fourteenth Amendment); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that statutes providing, solely for administrative convenience, that spouses of male members of the uniformed services are automatically deemed dependents, but that spouses of female members are not deemed dependents unless they are in fact proven to be dependent for over one-half of their support, violated the Due Process Clause of the Fifth Amendment); *Craig v. Boren*, 429 U.S. 190 (1976) (holding that a distinction between males and females for determining minimum age for the sale of beer was unconstitutional); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (striking down a statute distinguishing between benefits to widows and benefits to widowers on the assumption that widowers were not dependent upon their spouses).

70. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring).

[T]he import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.

Id. Justice O'Connor described the *J.E.B.* decision as "a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact." *Id.* (quoting *Brown v. North Carolina*, 479 U.S. 940, 941-942 (1986) (O'Connor, J., concurring in denial of certiorari)).

71. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 159-60 (1980).

72. See *Loving v. Virginia*, 388 U.S. 1 (1967). In *Loving*, the trial judge had declared: Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Id. at 3.

73. See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

rejecting others, simply by identifying areas of likely failure in processes of political representation.⁷⁴

I have criticized that conflating tendency elsewhere,⁷⁵ and others have undertaken to tease out of the equal protection requirement a number of substantive ideals.⁷⁶ When the state decides to prohibit refusals to associate based on a given characteristic—whether race, gender, sexual orientation, religion, political affiliation, or something else—it is rarely, if ever, enacting a “neutral” rule of general applicability akin to a rule against destroying government property⁷⁷ or using a dangerous and addictive substance,⁷⁸ where there is something approaching consensus that the activity banned is objectively harmful and that the debate must, therefore, focus on the strength of the reasons for nonetheless exempting some category of individuals or groups from the ban. Rather, in such anti-discrimination instances, the state is making an intrinsically contestable statement about the *rightness* or *wrongness* of using the characteristic in question as a criterion for association.⁷⁹

When the state’s position on the matter can prevail only by significantly undercutting a particular individual’s or group’s ability to carry out its expressive or otherwise constitutionally protected mission, one cannot automatically assume that the state’s condemnation of the contested practice as “discrimination” furnishes a compelling justification sufficient to negate the liberty of the individual or group. For that “discrimination” is but a pejorative label for the very thing the individual or group must do in order to express its contrary philosophy and transmit that philosophy to the next generation. At least until one is convinced that the characteristic in question is a forbidden, or presumptively forbidden, basis for line-drawing by the *state*—something that is now the case with respect to race and gender, but not yet with respect to sexual orientation—a state that chooses to treat that characteristic as a forbidden basis for *private* line-drawing might plausibly be regarded as having failed to supply the requisite compelling

74. See ELY, *supra* note 71, at 74-77 (discussing the role of courts in facilitating “participational” goals of broadened access to representative government).

75. See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1075 (1980) (observing that “[v]iews about the ‘differentness’ of groups generally, therefore, may reflect an interacting set of judgments about activities or options or roles, expressed sometimes harmoniously and sometimes dialectically by both ‘we’ and ‘they’”). Thus, “the conclusion that a legislative classification reveals prejudicial stereotypes must, at bottom, spring from a *disagreement with the judgments that lie behind the stereotype . . .*” *Id.* In sum, “[a]ny constitutional distinction between laws burdening homosexuals and laws burdening exhibitionists, between laws burdening Catholics and laws burdening pickpockets, must depend on a *substantive theory* of which groups are exercising fundamental rights and which are not.” *Id.* at 1076 (emphasis added).

76. Cf. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 560 (1982) (arguing that “equality analysis logically collapses into rights analysis and that analyzing legal problems in terms of equality is essentially redundant”).

77. See *United States v. O’Brien*, 391 U.S. 367 (1968) (applying general prohibition on destroying government draft cards despite claim of expressive activity).

78. See *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (applying general prohibition on peyote despite claim of use for religious purposes).

79. See Tribe, *supra* note 75, at 1076.

justification for overriding the private liberty at stake.

Indeed, even when a particular characteristic has come to be seen as presumptively impermissible for the state to employ in classifying persons, as I believe sexual orientation ought to be, the state's interest in imposing that particular egalitarian and liberty-enhancing vision upon a private person or association cannot automatically be deemed compelling without further inquiry into the size and nature of the association and the adverse social or economic consequences for those "discriminated" against.⁸⁰ Thus, for example, a state rule forbidding private persons from taking the race of their prospective marital partners into account would surely be unconstitutional, as would a state rule forbidding private individuals from taking the gender and sexual orientation of their prospective prom dates into account or a state rule forbidding parents from taking into the account the gender and the sexual orientation of would-be babysitters, tutors, or camp counselors for their children.

This does not mean that the state *invariably* loses. If the state can invoke a compelling objective or interest other than that of imposing its vision of the good life on everybody, then it stands a chance.⁸¹ That may well be the best way to prevent *Boy Scouts of America v. Dale* from jeopardizing the application of anti-discrimination laws to force the Jaycees, the Rotary Clubs, and similar business-related groups to admit women along with men,⁸² or to force nominally private schools to admit racial minorities.⁸³ But precisely where the Boy Scouts fit in the spectrum from a parent's selection of a tutor or camp counselor to a business networking group's admission of a member—a setting in which a state's interest in enforcing non-discrimination with respect to factors like sexual orientation would certainly trump the group's interest in enforcing whatever criteria it wishes in determining its membership—is debatable. What should be beyond debate is the proposition that cases like *Boy Scouts* cannot be resolved by incanting the mantra that neutral rules of general applicability need never give way to liberty-based objections in particular instances.

One more point, or pair of points, about *Boy Scouts*: Although the Court did not rest on a right of *intimate* association, the argument for such a right in the context of a scout troop is not a trivial one. The national organization is, of course, large and impersonal, but individual scout troops are typically quite small,

80. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-20 (1984).

81. Cf. *Hurley v. Irish Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S.557, 578-79 (1995).

Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective.

Id.

82. See, e.g., *Roberts v. U. S. Jaycees*, 468 U.S. 609 (1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988).

83. *Runyon v. McCrary*, 427 U.S. 160 (1976).

and the interactions among the youngsters and the leader are close-up and personal. The picture that emerges is nothing like that of a thousand teenagers crowded into a Dallas dance hall.⁸⁴ We will address that dimension of the case shortly.⁸⁵

A final dimension along which the Scouts had a stronger case than might at first appear was that individual chapters or troops might plausibly be seen as extensions of the parents' right to choose the mentors and companions, and shape the upbringing, of their own children.⁸⁶ Indeed, when the Court handed down its decision in the case about visitation rights, *Troxel v. Granville*,⁸⁷ shortly before deciding *Boy Scouts*, it looked for all the world as though Justice Souter, concurring in *Troxel*, was preparing to rule for the Boy Scouts and against Dale on parental rights grounds⁸⁸—for Justice Souter pointedly included a passage in his opinion to the effect that parents have a right to decide what the indoctrination of their children is to be, a right he said includes choosing their children's companions and tutors.⁸⁹ If the state may say that no organization dedicated to giving youngsters the kind of out-of-school training the Boy Scouts offer is permitted to propound and to teach by example a purely heterosexual image of the satisfying and moral life, then the state necessarily enjoys the power to prevent parents from entrusting their children to any such organization.⁹⁰

To be sure, that sort of power over parental choice offends nothing in the Constitution more explicit than the Liberty Clause (or maybe the Privileges or Immunities Clause) of the Fourteenth Amendment. For Justice Scalia, as he made clear in his dissent in *Troxel*, this alone is enough to show that such state power does not at all violate the Constitution.⁹¹ For him, therefore, the *Boy Scouts* decision has to rest on the First Amendment (albeit applied only through the Fourteenth) rather than on parental rights. For the rest of the Court, however, the extension of parental rights would have been a viable alternative.⁹²

84. *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).

85. See *infra* notes 110-112 and accompanying text.

86. See O'Quinn, *supra* note 52, at 361-64.

87. 120 S. Ct. 2054 (2000).

88. *Id.* at 2065 (Souter, J., concurring in judgment).

89. *Id.* at 2067.

90. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (holding that the First and Fourteenth Amendments prevent a state from compelling high school attendance when it "impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that a state statute requiring parents to send their children to public, rather than private, school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control" in violation of the Fourteenth Amendment).

91. *Troxel*, 120 S. Ct. at 2074 (Scalia, J., dissenting).

92. The New Jersey ban on discrimination based on sexual orientation cannot be defended as a means of protecting gay boys who join the Boy Scouts from being indoctrinated into the view that only a heterosexual life style is moral and viable, for the simple reason that the law was not designed to achieve any such goal. As interpreted by the New Jersey Supreme Court in *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000), the Law Against Discrimination, N.J. STAT. ANN. §§10:5-1 to 10:5-49, just told the Boy Scouts that they could not exclude scout leaders based on their sexual

What seems most interesting for an investigation of how the right of disassociation, much like the right not to speak, goes beyond the First Amendment parameters of its mirror image is this: It seems that the right to express oneself—whether in a solitary outcry as in the cases of draft-card-burning,⁹³ camping on the capitol mall,⁹⁴ or in association with others as in the case of a labor boycott⁹⁵—receives no special First Amendment protection from neutral rules of general applicability (with the evident exception of the civil rights boycott involved in the *Claiborne Hardware*⁹⁶ case), while the right *not* to be used to express another’s message and the right not to be forced into *association* with another⁹⁷ appear, with some frequency, to be sheltered under the Constitution even from neutral, general rules against what the state deems “discrimination.”⁹⁸

Looked at strictly as a First Amendment case, *Boy Scouts*⁹⁹ may be something of a stretch, or at least an anomaly. The group was as free after New Jersey enforced its anti-discrimination rule as before to state in no uncertain terms its corporate disapproval of the “life style” it saw Dale as representing, to demand that he not advocate or even discuss his homosexuality with the boys in his troop, and to insist that he not wear his scout uniform or identify himself as a scout

orientation, not that they could not exclude scout leaders based on their tendency to indoctrinate scouts into heterosexuality, regardless of the individual needs and proclivities of the children involved. The New Jersey law is not just over and underinclusive with respect to a goal of protecting gay boys from heterosexual indoctrination; it is virtually unrelated to such a goal. If that were the goal, it would most likely be condemned as a form of viewpoint-based speech suppression and perhaps as an intrusion on parental rights. A state law directed toward such a goal, as applied to a summer camp or a scout troop selected by such gay boys’ parents, would be hard to distinguish from a state law intruding into a family determined to raise their gay or lesbian children as though they were straight and to teach them the lesson, however misguided we might deem it, that the only good life is the straight life.

93. See, e.g., *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

94. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289 (1984).

95. See, e.g., *Int’l Longshoremen’s Ass’n v. Allied Int’l*, 456 U.S. 212, 218 (1982).

96. *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 926-27 (1982) (holding civil rights boycotters could not be held liable for damages resulting from non-violent boycotts).

97. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 581 (1995) (holding that parade organizers could prevent a gay and lesbian group from marching); *Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990) (holding a state bar’s use of membership fees to finance political activities with which members disagreed violated the First Amendment); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) (holding that the First Amendment prohibited the teacher’s union from requiring any teacher to pay dues to support objectionable political activities); *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (holding that the state could not constitutionally require an individual to display an ideological message on his car); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1943) (holding that a state may not force students to salute the flag and recite the pledge of allegiance).

98. It is worth noting that, even though the shopping center owner in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77 (1980), could find no shelter from such state rules of general applicability and had to permit speakers of all imaginable views to use its property to circulate petitions, it is unlikely that the mom and pop grocery store on the corner, to the extent such places still exist, would suffer a similar fate. Even so, both *Hurley*, 515 U.S. 557 (1995), and *Boy Scouts*, 120 S. Ct. 2446 (2000), illustrate departures from the model of *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), *Cohen v. Cowles Media*, 501 U.S. 663 (1991), and *Employment Div. v. Smith*, 494 U.S. 877 (1990), which all upheld generally applicable laws against First Amendment challenges.

99. 120 S. Ct. 2446 (2000).

leader when taking part in gay pride parades or otherwise talking up his sexual orientation in public.¹⁰⁰ Yet, as we have seen, once we view scout leaders as the role models through whom the group inculcates values in the young entrusted to its care, and once we treat such value transmission by example as itself a form of speech, the case for constitutional protection hardly seems far-fetched, especially when augmented by the fact that we are dealing with the young, whose parents have a recognized right to bring them up as those parents see fit.¹⁰¹

Probably the most accurate way to describe the freedom vindicated in *Boy Scouts of America v. Dale*¹⁰² would be as a species of “unenumerated” right protecting personal, albeit not entirely intimate, association revolving around the formation and transmission of values from one generation to the next—i.e., a right of intergenerational, values-transmitting expressive association—although obviously that mouthful is not a label calculated to win the right a permanent place in the hearts of the American people.

Another way to see the problematic, or at least unconventional, nature of the First Amendment credentials of *Boy Scouts of America v. Dale* is to ask what would happen if someone were to open a bar and grill called “*Boy Scouts Forever Ollie’s Barbecue—Gays Not Welcome!*” right off the coastal highway in Malibu. That commercial establishment’s bare announcement of its exclusionary policy—which is a more explicit statement of opposition to homosexuality than anything the Boy Scouts could put in evidence—ought to suffice, if *Boy Scouts* were truly a First Amendment case, to give a First Amendment grounding to the restaurant’s claimed exemption from California’s anti-discrimination laws, a grounding at least as solid as that relied on by the Boy Scouts of America to claim exemption from the laws of New Jersey. After all, even if one deemed the sign announcing the restaurant’s policy to be “commercial speech,” that would not strip it or the speaker of First Amendment protection; commercial speech is subject to somewhat tighter regulation than other speech, mostly to control deceptive advertising, but it is fully protected from any restriction premised on its ostensibly second-class status in the world of discourse.¹⁰³ And action taken in pursuit of profit is, of course, entitled to no less First Amendment protection, and in some

100. See *id.* at 2472-76.

101. See *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that parents have the right to bring up children and control their education). See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

102. 120 S. Ct. 2446 (2000).

103. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-19 (1993) (“The major premise supporting the city’s argument is the proposition that commercial speech has only a low value. . . . We cannot agree. In our view, the city’s argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.”); see also 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in judgment). For the view that commercial speech is but a form of commerce and thus should be subject to regulation on the same minimum-rationality standard as wages and prices have been ever since 1937, see *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U.S. 557, 583 (1980) (Rehnquist, J., dissenting); *Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel* 425 U.S. 748, 781 (1976) (Rehnquist, J., dissenting). This view has, of course, been roundly and consistently rejected by the Court.

cases even more, than mere advertisement.¹⁰⁴

Yet, few of us imagine that the *Boy Scouts* decision would in fact be applied to protect this hypothetical *Ollie's Barbecue*. If it would not, the ground would have to be that a gathering of strangers, united only by a product they are all consuming or imbibing or by services they are all receiving, is not an "expressive" or "intimate" "association" for purposes of the constitutional right, much as the Court held in the Dallas teenage dance hall case.¹⁰⁵ This suggests drawing a line analogous to that proposed in Justice O'Connor's concurring opinion in the *Jaycees* case, a line between associations grounded in commerce and associations dedicated primarily to expression, a line quite alien to anything in ordinary First Amendment jurisprudence.¹⁰⁶ This latter category (associations that exist for non-commercial purposes), in turn, suggests that the *association* element in the right to expressive or intimate association (and disassociation) has independent constitutional significance—that the right functions as substantially *more* than a means to the First Amendment ends of speech, petition, assembly,¹⁰⁷ or religion. Indeed, it is not entirely clear that a connection to the First Amendment ends of speech, religion, petition, or assembly, in its political or religious sense, is

104. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283-84 (1964).

105. *City of Dallas v. Stanglin*, 490 U.S. 19, 21 (1989).

106. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring) (discussing a "dichotomy between rights of commercial association and rights of expressive association").

107. The "right of the people peaceably to assemble" representing as it plainly does more than a right merely to locate in proximity with others for limited times (the way people who all happen to attend the eight o'clock P.M. showing of a particular movie at the same theater do, cf. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973)), might furnish a fairly strong textual basis for a right of personal association beyond the realms of the intimate and the expressive. Indeed, in *Roberts* the Justices noted that

the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, *assembly*, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

Roberts, 468 U.S. at 618 (emphasis added). However, the Court subsequently emphasized only the speech, religious, and political aspects of association. See *id.* at 622 ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."); see also *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) ("[T]he Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities.").

It is also worth mentioning that in an early draft of his opinion for the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas relied on a First Amendment freedom of association, though not specifically assembly, for shielding the procreational choices of married couples from government interference. See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY* 578-79 (1983). In conference, Justice Black had rejected this notion, stating the right of association "is for me a right of assembly and the right of the husband and wife to assemble in bed is a new right of assembly for me." *Id.* at 577. Ultimately Justice Douglas adopted an approach suggested by Justice Brennan, grounding *Griswold* in a penumbral right of marital privacy and abandoning reliance on the First Amendment. See *id.* at 579-80.

necessary. If someone were, for example, to invoke the laws against gender discrimination to challenge the right of the Boy Scouts to exclude girls, or of the Girl Scouts to exclude boys, the Scouts might be able to defeat that challenge,¹⁰⁸ but they would clearly have to do it without much help from the First Amendment—except, perhaps from a First Amendment right of association derived directly from the concept of assembly.¹⁰⁹

Someone might be convinced that, because scouting organizations are built up from troops, dens, and patrols, the last of which contain roughly half a dozen boys or girls, and because they operate in close interpersonal proximity and meet in seclusion and share a collective oath,¹¹⁰ the right of *intimate* association governs here.¹¹¹ Most of us, though, would probably reserve that concept for matters more familial, or sexual, or both. By invoking a more general constitutional right of association and disassociation to shield the Girl Scouts from the forced admission of boys, one would necessarily be treating the *fact* of personal, non-commercial association as entitled to special constitutional protection even where it is not a means to the ends of speech or religion and is not what most would consider “intimate”—much as the Chief Justice seemed to be suggesting in his question from left field to Dale’s counsel.¹¹²

In drawing lines between protected and unprotected associational choices, we would thus not be looking principally, and at times not at all, to the text and traditions of the First Amendment,¹¹³ but to the jurisprudence of unenumerated or penumbral rights, a jurisprudence applied most unabashedly in *Troxel v. Granville*.¹¹⁴ There, the Court struck down a State of Washington statute insofar as it purported to give state judges authority to award third-party visitation rights to grandparents, or indeed to anyone else, whenever the judge found such visitation to be in the “best interest of the child” regardless of whether the parents had been adjudicated unfit to raise the child and to decide who should be permitted to visit and when they should be allowed to visit.¹¹⁵ Justice O’Connor’s plurality opinion (joined by the Chief Justice and by Justices Ginsburg and Breyer) held that this remarkably broad and intrusive law, as applied to the case at hand, where a

108. Cf. *Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm’n on Human Rights and Opportunities*, 528 A.2d 352, 359 (Conn. 1987) (holding a refusal to offer a female applicant a position as scoutmaster, in accordance with Boy Scout policy at the time, was not a “discriminatory accommodation practice”).

109. See *supra* note 107.

110. THE BOY SCOUT HANDBOOK 4, 9, 17 (11th ed. 1998).

111. For such an argument, see O’Quinn, *supra* note 52, at 352-54. Although addressing statutory and not constitutional dimensions, at least one Circuit Court has considered whether the Boy Scouts could be regarded as “selective” in membership and concluded that it could. *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1277 (7th Cir. 1993) (treating the Scout Oath and Law as evidence of Scouting’s selectivity).

112. Transcript of Oral Argument at *30, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), available at 2000 WL 489419 (asking counsel for authority to support the proposition that “freedom of association is simply an instrumental right”).

113. Except, perhaps, for the textual inclusion of “the right of the people to peaceably assemble.” U.S. CONST. amend I; see *supra* note 107.

114. 120 S. Ct. 2054 (2000).

115. *Id.* at 2057 (plurality opinion).

pair of grandparents sought and were granted rights to visit the daughters of their deceased son with no finding of parental unfitness to make these decisions, violated what she described as the “fundamental right of parents to make decisions concerning the care, custody, and control of their children.”¹¹⁶ Illustrative of how easily the Washington law could be used to abridge that right was the trial court’s finding in this case that more frequent visits with the grandparents than their mother found acceptable could “provide opportunities for the children in the areas of cousins and music.”¹¹⁷ The O’Connor plurality avoided a facial invalidation of the statute, resting instead on its application in a manner that made no determination of the mother’s unfitness, that gave no “special weight” to the mother’s own decision that more visits would be a bad idea, and that paid no attention to how reasonable the mother had been in allowing at least some visitation.¹¹⁸

Justice Souter, who dissented from the Court’s ruling in *Boy Scouts* only four weeks later, concurred in the *Troxel* judgment on the basis that the law’s completely open-ended invitation to intrude upon the family with unwanted visitation, and its astonishing breadth, rendered it *facially* invalid as a state usurpation of the parental role in child-rearing.¹¹⁹

Justice Thomas concurred in the judgment on the authority of the Court’s series of child-rearing decisions beginning with *Meyer v. Nebraska*¹²⁰ and *Pierce v. Society of Sisters*¹²¹ in the 1920s.¹²² Nonetheless, he hinted that he might prefer either to ground all such decisions in the Privileges or Immunities Clause of the Fourteenth Amendment or just to overrule them altogether as illegitimate excrescences on the face of the Constitution if anyone troubled to brief and argue the matter to him.¹²³

Justice Scalia’s dissent in effect said he needed no briefing or argument to notice that concepts like parental rights, however well grounded in divine law or in the Declaration of Independence, had no textual support in the Constitution itself and should thus be abandoned at the earliest opportunity.¹²⁴ He went out of his way to “diss” the Ninth Amendment, which he simply asserted, without argument, could not—despite its words¹²⁵—support judicial enforcement of “other [rights]” not within the “Constitution’s enumeration of rights.”¹²⁶

116. *Id.* at 2060.

117. *Id.* at 2058. Those were the trial court’s actual words. I’m not making it up.

118. *Id.* at 2056.

119. *See id.* at 2065 (Souter, J., concurring in judgment).

120. 262 U.S. 390 (1923).

121. 268 U.S. 510 (1925).

122. *See Troxel*, 120 S. Ct. at 2068 (Thomas, J., concurring in judgment).

123. *See id.* at 2067.

124. *See id.* at 2074 (Scalia, J., dissenting).

125. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

126. *Troxel*, 120 S. Ct. at 2074 (Scalia, J., dissenting).

Justice Stevens, joined by Justices Scalia and Kennedy, dissented—principally on the peculiar ground that the statute could not be *facially* unconstitutional inasmuch as it had *some possible* constitutional applications¹²⁷—even though Justice Stevens had written a meticulous opinion just twelve months earlier in *City of Chicago v. Morales*¹²⁸ striking down *on its face* that city’s gang loitering ordinance.¹²⁹ The basis of the *Morales* holding was that the breadth and open-ended nature of the power the loitering ordinance delegated to the cop on the beat doomed that ordinance across the board, given that the state’s law did not provide a natural way of severing permissible applications from impermissible ones.¹³⁰ Finally, Justice Kennedy dissented in *Troxel* on the merits, finding himself unprepared to say that the growing trend toward third-party visitation was necessarily trumped by the more traditional role our law has assigned to parents.¹³¹

Justice Scalia’s assault in his *Troxel* dissent on substantive due process, on the Ninth Amendment, and on the whole realm of unenumerated rights,¹³² was followed shortly by his joining the Rehnquist majority in *Boy Scouts*.¹³³ That must be viewed as something of a puzzle, despite Justice Scalia’s attempt to bridge the chasm by dropping a footnote in his *Troxel* dissent insisting that a mother’s claim to be “asserting, *on behalf of her children*, their First Amendment rights of association or free exercise,” a claim not involved in *Troxel*, was different from a “substantive due process right to direct the upbringing of her own children” (and therefore to regulate visitation privileges).¹³⁴ But if the First Amendment is elastic enough to accommodate the rights of children to control their choice of companions and if a First Amendment analysis can use those rights as stepping stones to the right of the Boy Scouts to exclude openly gay scout leaders, then the judicial discretion and creativity that are to be countenanced in the name of the First Amendment are sweeping indeed. They are so sweeping, in fact, that one wonders just what hidden terrors Justice Scalia imagines he is holding at bay when he rails against unenumerated rights.

It is also noteworthy that Chief Justice Rehnquist, despite his stinging rebuke twenty-seven years earlier of anything beyond rationality review for unenumerated

127. *See id.* at 2068 (Stevens, J., dissenting).

128. 527 U.S. 41 (1999).

129. *See id.* at 52-53.

130. *See id.* at 59-66 (plurality opinion). Professor Michael Dorf argues that the Court’s current facial challenge doctrine can be squared with the right to be judged by a valid rule of law only if the Court is employing a federal law presumption of severability—that unconstitutional aspects of a statute can be severed from constitutional ones by a process of judicial interpretation. Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 235-250 (1994). He concludes that this presumption cannot properly apply when federal courts are reviewing *state* (and local) law. *Id.* at 284-85. In those situations, state law governs severability, so Dorf suggests that “a federal court might justifiably choose to abstain from ruling on a facial challenge pending resolution of the severability question by the state courts.” *Id.* at 286.

131. *See Troxel*, 120 S. Ct. at 2075 (Kennedy, J., dissenting).

132. *See id.* at 2074 (Scalia, J., dissenting).

133. *See Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

134. *Troxel*, 120 S. Ct. at 2075 n.2 (Scalia, J., dissenting).

rights, such as a woman's right to end her pregnancy,¹³⁵ not only wrote *Boy Scouts* but also joined *Troxel*. This form of substantive due process, to borrow from the Chief Justice's locution when reaffirming *Miranda* in *Dickerson*, has evidently become part of the "national culture."¹³⁶

Most of the prior cases about parental rights to shape children's upbringing had a fairly straightforward First Amendment dimension: They involved choices of the *language* one's children would learn to speak,¹³⁷ of the *books* they would read or have read to them,¹³⁸ or of the *schools* they would attend.¹³⁹ One of the few exceptions was the case of the grandmother prosecuted for bringing into her home grandchildren who were not siblings.¹⁴⁰ Her conviction was reversed five-to-four in *Moore v. East Cleveland*.¹⁴¹ Ironically, therefore, whether they win, as in *Moore*, or lose, as in *Troxel*, grandparents seem to be at the forefront of making "unenumerated rights" law.

The very fact that the Court agreed to hear the *Troxel* case may encourage lower courts to constitutionalize disputes over how many weekend visits are too many to give to the grandparents, or to the step-grandparents, or to the lesbian ovum donor, or to the gay sperm donor, or to someone else in today's increasingly "extended" family. Already, in the Missouri case of *Hampton v. Hampton*, an intermediate state court has evaluated just how many weekends the grandparents and step-grandparents may be allowed to visit without abridging the father's "constitutionally-protected substantive due process rights."¹⁴²

Among the most perplexing of the potential spin-offs is likely to be the question of just who *counts* as "parent" or "grandparent" for these purposes. There can already be at least four or five "parents" if one counts sperm donor, ovum donor, gestational birth mother, sociological mom(s), and sociological dad(s), and that in turn yields two dozen or so "grandparents" for any given child! It seems plain that the Constitution can supply only the most general guidelines as to how the claims and needs of this multitude might be managed by a state's courts. Probably a genuinely facial resolution followed by a remand would have made that point more clearly in *Troxel*.

What the parenting cases have in common with the cases involving stomach-pumping,¹⁴³ the surgical extraction of a bullet,¹⁴⁴ selective forced sterilization,¹⁴⁵

135. *See Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting).

136. *Dickerson v. United States*, 120 S. Ct. 2326, 2336 (2000).

137. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

138. *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963).

139. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

140. *See Moore v. City of E. Cleveland*, 431 U.S. 494 (1977).

141. *Id.* at 495.

142. 17 S.W.3d 599, 600 (Mo. Ct. App. 2000).

143. *Rochin v. California*, 342 U.S. 165 (1952).

144. *Winston v. Lee*, 470 U.S. 753 (1985).

145. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

a ban on the use of contraceptives,¹⁴⁶ and a woman's right to terminate her pregnancy¹⁴⁷—apart from the obvious fact that some, like the latter three, involve conception or gestation of children—is that all of them, at a deep level, relate to the body—its integrity, its penetration, its perpetuation, and its place in the world.

That brings us to a final symmetry—that asserted by the Court in 1992 when it reaffirmed the core of *Roe v. Wade* in *Planned Parenthood v. Casey*: The plurality said that, although it would rely on *stare decisis* to conclude that the state's interest in the life of the fetus could not trump the woman's autonomy until fetal viability, it was convinced even without benefit of *stare decisis* that the underlying interest of the woman in deciding whether or not to remain pregnant was a specially protected liberty.¹⁴⁸ This was so partly because the plurality reasoned that, if this liberty could be usurped by the state on the basis of any minimally rational justification, then the state would need no more justification to *force a woman to abort* than it would need to *prevent her from aborting*.¹⁴⁹ Coerced pregnancy and coerced abortion were mirror images of one another.¹⁵⁰

Justice Scalia, dissenting in *Casey*, treated that supposed symmetry as the ultimate proof of the “bankruptcy” of the plurality's method.¹⁵¹ He could tell the difference, even if Justices O'Connor, Kennedy, and Souter could not, between killing a fetus and preventing its death: There was a long tradition outlawing the first, but none outlawing the second.¹⁵² The plurality in essence responded that this showed only that the *state interests* involved in banning abortion or compelling abortion are very different—not that the *underlying liberty* is different in the two situations or that the *standard* the government must meet in order to justify interfering with that liberty changes as one shifts from the abortion restriction scenario to the mandatory abortion scenario.¹⁵³

In ways that the Court failed to acknowledge, the partial birth abortion decision, *Stenberg v. Carhart*,¹⁵⁴ smashed through that symmetry by introducing an axis perpendicular to the one on which the abortion decisions had turned in the

146. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

147. *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

148. *See Casey*, 505 U.S. at 857-59 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

149. *Id.* at 859.

150. *Id.*

The soundness of this prong of the *Roe* analysis is apparent from a consideration of the alternative. If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example.

Id.

151. *Id.* at 980 n.1 (Scalia, J., dissenting) (“[I]t does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The Court's contention [] that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor.”).

152. *See id.*

153. *See id.* at 859 (joint opinion).

154. 120 S. Ct. 2597 (2000).

past. At issue in *Stenberg* was not the circumstances where, or the reasons for which, the state could prevent a woman from terminating her pregnancy or at least require her to undergo some sort of delay.¹⁵⁵ Rather, at issue were the conditions under which the state could require a woman *who would be terminating her pregnancy anyway* to use procedure A instead of procedure B, even though B might be marginally safer or healthier for her, because B bears an uncomfortable resemblance to an incomplete birth followed by what some regard as infanticide.¹⁵⁶ Nebraska had outlawed a procedure (“D&X”) in which the fetus remains intact as it is drawn into the birth canal before its skull, still inside the uterus, is punctured and the fetus thereby killed.¹⁵⁷ The Court concluded that the state’s law actually outlawed as well a far more common procedure (“D&E”), in which the fetus is dismembered as it is drawn into the birth canal—a procedure evidently less troubling to observers (real and virtual) because it less closely resembles actual birth, even though it is presumably more painful for the fetus (to whatever extent the fetus can feel pain) because dismemberment occurs while the brain is still intact.¹⁵⁸ Nebraska conceded that, *if* its law reached D&E as well as D&X, it imposed an “undue burden” and flunked the standard set out in *Casey*.¹⁵⁹ After viability, Nebraska’s problem was that it failed to require that the woman’s health be the decisive variable in choosing an abortion method.¹⁶⁰

Without pausing to discuss the details, what is most interesting is that the Court resolved the case by mechanically applying *Casey*’s tests and categories despite the dramatic asymmetry between the tradeoff involved in *Casey*—the tradeoff between fetal survival and a woman’s right to end her pregnancy—and the tradeoff involved in *Stenberg*—that between a woman’s control over her body given that she is ending her pregnancy, and the values of minimizing brutalization and dehumanization given that the fetus will not survive in any event.¹⁶¹

The implausibility of the proposition that the Constitution might enshrine a fundamental right to use a very specific abortion *method* as such shakes up the situation just enough to suggest a final, overarching asymmetry—that between the specific collection of particular positive rights we have addressed and the “negative space” out of which they all emerge. In a word, that “negative space” is the space for *self-determination* required if government is to be prevented from commandeering all our lives, from taking them over and thereby reducing us to little more than puppets.¹⁶²

155. *See generally id.*

156. *See id.* at 2612 (citation omitted).

157. *Id.* at 2607.

158. *Id.* at 2624 (Kennedy, J., dissenting).

159. *Id.* at 2634.

160. *Id.* at 2614 (Breyer, J., for the Court).

161. *See id.* at 2649 (Thomas, J., dissenting).

162. Justice Scalia rails against this notion of “negative space” as enshrined in the Ninth Amendment to the Constitution. *See e.g.*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 1000 (1992) (Scalia, J., dissenting); and *Troxel v. Granville*, 120 S. Ct. 2054, 2074 (2000) (Scalia, J.,

The precise contents of that space—and hence the specific spheres of private choice that will be off-limits to government in any given era—are contingent functions of our cultural and social history. The need not to be appropriated or dominated by the state is a universal one. The list of specific rights that must be protected in order to meet that need is not. Hence, the Supreme Court's shift in focus, from the 1920's and 30's, when it defined "fundamental" rights as those indispensable to any imaginable system of "ordered liberty,"¹⁶³ to the late 1960s and beyond, when it began defining "fundamental" rights as those that play a foundational role in *our* system.¹⁶⁴

The Constitution's call to action is a plea that we never forget the contingent and relative character of those rights even as we accept our fate to defend them as vigilantly as if they were absolute. Yet, we must always remember that it is really the absolute and eternal character of the anti-totalitarian axiom¹⁶⁵ that we have the privilege to translate into rights that are contingent and incomplete, at times almost accidental, and rarely perfectly symmetric.

dissenting). Yet, the Tenth Amendment "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992). If the Ninth Amendment is to be given meaning, then it must serve some function beyond that of reiterating the Tenth. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (Marshall, C.J.) ("It cannot be presumed that any clause in the constitution is intended to be without effect . . ."). Given the limited nature of the federal government, as evidenced by its enumerated powers coupled with the Tenth Amendment's reservation of powers, the "negative space" highlighted by the Ninth Amendment must be one that is to *some* extent "off-limits" to government regulation. *Cf. Raoul Berger, The Ninth Amendment*, 66 CORNELL L. REV. 1, 9 (1980) ("With Leslie Dunbar, I would hold that the ninth amendment 'is an affirmation that rights exist independently of government, that they constitute an area of no-power'"); Leslie Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 641 (1956) (noting that the role of courts in defending unenumerated individual liberties is consistent with this "no-power" theory). To what *extent* this "negative space" is off-limits and how best to define its contours remain highly controversial.

163. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969).

164. *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14 (1968) ("Earlier the Court can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection. . . . The [proper] question thus is whether . . . a procedure is necessary to an Anglo-American regime of ordered liberty."); *see also Benton v. Maryland*, 395 U.S. at 795 (1969) (inquiring whether a right is "fundamental to the American scheme of justice" (quoting *Duncan*, 391 U.S. at 149)).

165. This "anti-totalitarian" axiom has appropriately been called a "transcendental doctrine" of the Constitution. Jed Rubenfeld, *The Right to Privacy*, 102 HARV. L. REV. 737, 805 (1989).

PROFESSOR DOUGLAS W. KMIEC'S RESPONSE

PROFESSOR KMIEC: That was a truly fine presentation. Let me respond to its three essential parts. First, can a private association's identity be changed by force of law? Professor Tribe suggested that there is a critical difference between a forced association as a result of a neutral, generally applicable law and a compelled association based on a desire to change the association's identity. But the fact that the law is neutral and generally applicable is not enough to justify a compelled infringement upon an association's message. In its application of a general anti-discrimination law to a parade, *Hurley*¹ had already decided the contrary, as Professor Tribe admits, though confusingly, he still seems to want to treat *Boy Scouts*² as some kind of groundbreaking exception. It was not. The only example of a neutral generally applicable law not posing the difficulty that Professor Tribe describes is *PruneYard v. Robbins*,³ and there unconstitutional imposition was avoided because the case dealt more with property access to a quasi-public place (a private shopping center), than a true association. Some people may assume that parties leafleting in a shopping mall have the mall's endorsement, given their forum-like nature, but this is hardly a self-evident assumption.

So in the association context, a law's validity is not truly determined by its general application or neutrality. General application and neutrality may work for Justice Scalia in matters of free exercise, but as that remains a highly disputed proposition, I see no compelling reason to transfer that proposition to the freedom enjoyed by private association. The genuine standard ought to be that if the law is intended to or has the effect of changing the message of the association to that which is "governmentally approved," a compelling justification should be required. That's where the New Jersey public accommodation law and the California blanket primary law failed as both lacked a compelling justification.

In *Boy Scouts*, the application of New Jersey's public accommodations law was flat-out coercion: New Jersey sought to impose a government-prescribed (some might say "politically correct") message about the acceptability of a homosexual orientation on a private association that as a matter of reasoned determination and associational freedom had reached a different conclusion. In *California Democratic Party v. Jones*,⁴ California's blanket primary rule was, at least in part, an effort to change the substantive character of nominated candidates to a more moderate brand than political parties would normally select through closed primaries.

In neither case could the state cleanly articulate a non-content-based rationale or compelling justification for coercing these private parties to change their messages. Professor Tribe argued with the facts a bit when he

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1. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).
 2. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).
 3. *PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74 (1980).
 4. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

speculated that forcing the Boy Scouts to accept Dale wouldn't really change the association's message, since the association's attempt to expel him would always make that plain. Maybe that was true in the short run while the controversy was still fresh. But had the Scouts been forced to accept Dale, it is more likely that the Boy Scouts' message would become less clear over time as Dale and others similarly situated served in leadership roles. And in any event, what kind of like-minded association is it, if in coming to examine the membership of the association one finds not only members of different minds, but people leading not by invitation, but court order?

California Democratic Party actually was a more difficult case because California voters had more reasons than altering a political party's candidate-related message to justify the blanket primary. Other justifications, such as increasing voter participation and enhancing voter privacy, are indeed content-neutral. Those interests received very little attention from the Court, as did the state's argument that no private association, including a political party, has authority to commandeer the state electoral process as its own, a matter raised with some appropriate emphasis by Justice Stevens in dissent. The Court's unwillingness to credit either of these more benign motivations or the state's control of its own sovereign electoral process is far more remarkable than its unwillingness to allow New Jersey to coercively change the nature of the Scouts' message.

Of course, the level of proof in both cases that the message would change was *de minimis*. The Court more or less assumed the nature of party nominees would change since California brandished this constitutional defect as one of the blanket primary's salient features—an interesting litigation strategy. In *Boy Scouts v. Dale*, the Boy Scouts were given deference both to their assertions regarding the nature of their expression and to their view of what would impair that expression.

Too deferential? Professor Tribe may think so. Absent a fundamental right or suspect classification, I disagree. The dangers of government censorship, of interference with the right of individual citizens within their chosen intermediate associations to work through the difficulties or moral or political questions, is too sensitive and too important to allow a more demanding standard of proof. The freedom of expression and association is the individual's, after all, not the government's. This balance properly changes where moral consensus, derived from natural law or constitutional amendment or both, suggests that the boundaries of associational difference are built on invidious distinction, like race or gender, or where the exclusion of homosexual is based on hate or irrational animus. That more than adequately differentiates *Boy Scouts* from the racially discriminatory private

schools in *Runyon*,⁵ the gender exclusive *Rotary*⁶ and *Jaycee*⁷ decisions, or Justice Kennedy's perspective in *Romer*.⁸

All this is not to say that the Boy Scout's message was unproblematic or unassailable. Insofar as the Scouts were attempting to distinguish conduct from status, both their expulsion action and their message was unclear and unsettled. Perhaps that is understandable since, except in the highly rare circumstance of declared abstinence, differentiating status and conduct in homosexual matters perplexes philosophers, sociologists, and moral theologians alike. It is hardly easy. The Chief Justice did not have to help work through the nuances of the Scout's views, however, to know that the law was seeking to run roughshod over them.

Let's turn to Professor Tribe's second principal issue: Do parental rights support the Boy Scouts' right of association? In an insightful passage, Professor Tribe suggests that they do. Just as the school in *Pierce v. Society of Sisters*⁹ could derivatively assert the parents' right to have children educated in private schools and in *Meyer v. Nebraska*,¹⁰ to have teachers provide a foreign language, so too the Scouts can stand in for parents who have religious or moral or cultural objections to homosexuality. Larry admits this argument is a powerful one, but thinks it has no logical limit since it would then be difficult to distinguish between having young children avoid homosexual contact and "a parental belief in bringing up children in a single-race environment, etc." But this again ignores that existing jurisprudence already treats homosexual conduct and even status differently, and far less protectively, than race. If the jurisprudence of the Court is not sufficient to make that plain, then the natural law background of the Constitution should.

But the mention of natural law brings us to *Troxel*,¹¹ where Justice Scalia writes:

In my view, a right of parents to direct the upbringing of their children is among the "unalienable Rights" with which the Declaration of Independence proclaims "all Men . . . are endowed by their Creator." And in my view that right is also among the "othe[r] [rights] retained by the people" which the Ninth Amendment says

5. *Runyon v. McCrary*, 427 U.S. 160 (1976).

6. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

7. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

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

9. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

10. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

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

the Constitution's enumeration of rights "shall not be construed to deny or disparage." The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to "deny or disparage" other rights is far removed from affirming any one of them, and even farther removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people. Consequently, while I would think it entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the state has *no power* to interfere with parent's authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me *as a judge* entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right.¹²

This, to me, is the big story beneath *Troxel v. Granville*. Parental rights are characterized as judicially unenforceable by dissenting Justice Scalia, and the majority that found the Washington law too intrusive on parental judgement seemed to rely more on the overbreadth of the statute than the strength or unassailability of the right. Said Justice O'Connor for the plurality: "We do not, and need not, define today the precise scope of the parental due process right in the visitation context."¹³ Only Justice Thomas gave indirect vindication of the compelling nature of parental direction. Given that the family is the first vital cell of civilization, a Court that protects the secondary intermediate association of the Scouts and the political preference of Democratic and Republican partisans made a serious oversight here.

Professor Tribe thinks the real difficulty is deciding what we mean by "parent" or "grandparent" and suggested these terms may include sperm and ovum donors, birth moms and dads, sociological moms and dads, and he continued, "two dozen or so grandparents for any given child." If that were true, it would be a curious (but wayward) vindication for the notion that "it takes a village to raise a child." Mrs. Clinton didn't tell us in her book that they would all be related. While Professor Tribe and Justice Scalia seldom see eye-to-eye in constitutional matters, here, their positions match. Justice Scalia thinks defining parenthood exceeds the Court's judicial capacity. This is odd from the Justice who employs the common law and tradition to define other unenumerated rights at the most specific level at which the tradition protecting or denying protection to, the relevant right can be identified. Surely, the most specific level of parenthood would be capable of eliminating

12. *Id.* at 91-92.

13. *Id.* at 73.

many of the possibilities that trouble Professor Tribe. The longstanding traditions of raising natural or adopted children within the marital shelter of man and wife is not invisible to the law.

One last irony of *Troxel* is Justice Scalia's footnote proposition that the mother was asserting only the unenumerated right to direct the upbringing of her own children and was not asserting, on behalf of her children, their First Amendment rights of association. Justice Scalia opined that he was therefore reserving "under what circumstances, the parent could assert the latter *enumerated* rights."¹⁴ Somebody will have to tell me when the associational rights become enumerated—that is, textual.

Does reaffirming parental rights matter? Yes, very much, and far more than the rare legal dispute between mom and grandma in a sadly fractured family. It matters to every parent who ever attempted to home school and found themselves confronted with hostile public authorities insisting that the parents be certified as "state approved instructors." It matters when local daytime curfew laws curtail parental direction. It matters when free exercise claims are not available to allow parents to opt out of generally imposed educational requirements which are contrary to the religiously or nonreligiously grounded customs of a family. And it matters because a vast body of sociological study confirms that parental involvement is the key to the educational and cultural success of any child, but especially children from economically deprived circumstances.

And finally, to Professor Tribe's third topic: the right to end pregnancy by any, even the most cruel and unnecessary, means. Professor Tribe and I have always respectfully disagreed in this area. Many in America remain divided over the constitutional *bona fides* of the claimed right in *Roe*¹⁵ and *Casey*.¹⁶ It would seem that even Justice Kennedy, who joined the plurality in *Casey*, misunderstood the sweep of the right. It is not just a right to terminate a pregnancy at any time, but by any means. Professor Tribe characterizes this case as confirming the structural inference that government is not to take command over the lives of the people. On this highly general principle, he and I agree, though I don't know how he fully squares that observation with his criticism of *Dale*. Nevertheless, he states eloquently that when "the state leaves little or no breathing room for self-governing determinations of life trajectories, [it] is not just to intrude *substantively* upon one or another of the enumerated spheres of private choice but to depart

14. *Id.* at 93 n.2 (emphasis added).

15. *Roe v. Wade*, 410 U.S. 113 (1973).

16. *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833 (1992).

structurally from our system of government and to move toward totalitarianism.”¹⁷

I was struck by the similarity of Professor Tribe’s plea to these words: when right “is made subject to the will of the stronger part[y] . . . democracy, contradicting its own principles, effectively moves toward a form of totalitarianism. The State is no longer the ‘common home’ where all can live together on the basis of principles of fundamental equality, but is transformed into a tyrant State.” Those are the words of the Holy Father in his encyclical *Evangelium Vitae* (The Gospel of Life).¹⁸ But, of course, the views of Professor Tribe and John Paul II are quite different on the topic of abortion.

Why are they different? Perhaps it is because while Professor Tribe urges us to think about how we might reconcile unenumerated rights jurisprudence with the state authority to pursue vital social ends, he offers no basis for doing so, while John Paul II would anchor that reconciliation upon the truth of the created human person. Importantly, Professor Tribe does acknowledge that freedom in the form of unenumerated rights cannot just be its own measure or absolute value. But here he stops. He does not explore what or where any limitation upon individual freedom that contradicts vital social values is to be found, nor does he say how “vital social values” are identified. By contrast, let this be submitted, freedom is not a good in itself. John Paul II writes:

Freedom negates and destroys itself, and becomes a factor leading to the destruction of others when it no longer recognizes and respects its essential link with the truth. When freedom, out of a desire to emancipate itself from all forms of tradition and authority, shuts out even the most obvious evidence of an objective and universal truth, which is the foundation of personal and social life, then the person ends up by no longer taking as the role and the indisputable point of reference for his own choices the truth about good and evil, but only his subjective and changeable opinion or, indeed, his selfish interest and whim. This view of freedom leads to a serious distortion of life in society. If the promotion of the self is understood in terms of absolute autonomy, people inevitably reach the point of rejecting one another. Everyone else is considered an enemy from whom one has to defend oneself. Thus society becomes a mass of individuals placed side by side, but without any mutual bonds. Each one wishes to assert himself independently of the other and in fact intends to make his own interests prevail In this way, any reference to common values and to a truth absolutely binding on everyone is lost,

17. Laurence H. Tribe, Address at the Pepperdine University Constitutional Law Symposium (Sept. 23, 2000).

18. John Paul II, *Evangelium Vitae*, ORIGINS, APR. 6, 1995.

and social life ventures onto the shifting sands of complete relativism. At that point, everything is negotiable, everything is open to bargaining: even the first of the fundamental rights, the right to life.¹⁹

The Catholic tradition is only one part of the American democratic tradition, of course. But at one time, the “self-evident” truths of both largely coincided. Now, in the insightful words of the title of Professor Tribe’s book on this subject, there is only a “clash of absolutes.” The title implies why the debate over abortion is so often acrimonious and unresolvable. As Professor Tribe suggested, those advocating abortion rights frequently elide difficult questions surrounding the moral obligations of pregnancy, while those in favor of unborn life view those questions and obligations as a wholly dispositive premise. Some thought, given the substantial public and legislative majorities against partial birth abortion (the Nebraska ban in *Stenberg*,²⁰ for example, passed with only one dissenting vote), that opposition to this singularly cruel, infanticide-like practice could be one of the few places of common ground upon which discussion (rather than shouting and recrimination) would be allowed to begin. Five-to-four, it was not to be.

MS. TOTENBERG: Professor Tribe, let me start with you and the subject of the *Boy Scouts* case. What happens now to the thirty-three or as many as half of the Boy Scout troops in New Jersey, for example, affiliated with public entities? New Jersey has a higher percentage of these troops than other places, but there are other states like it in which Scout troops are affiliated, formally affiliated, with the public schools. Don’t they fall under the public accommodations rule? And this was a Public Accommodations statute. True, it’s not a federal one, but there’s every evidence now that there may soon be—that sexual orientation may be included even at the federal level. So in some ways, some of the Boy Scouts are like quasi-public organizations. That of course excludes the troops that are associated with churches and the like and does not deal with whether or not they can use public campgrounds. I’m talking about formal affiliations. How should these associations be treated?

PROFESSOR TRIBE: It’s an important decision. What I think you’re basically asking, and tell me if I’m wrong, is whether the nature of the penetration between this scout troop or chapter and the municipal government or state government is great enough to make the troop and chapter state actors under

19. *Id.* at 697.

20. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

the symbiosis and symbolic connection analysis of *Burton v. Wilmington*.²¹

There's a whole body of doctrine to the effect that when an activity is so entangled with the state for purposes of applying the Constitution—and not just the state of New Jersey Public Accommodation Laws—it just *is* the state. If we assume for just a moment that we are talking about the Boy Scouts being in bed with the state, as it were, with all their sleeping bags—and it's quite an assumption, as I'll explain in a second—then the issue is purely a matter of equal protection law. May a state actor systematically discriminate based on sexual orientation? My answer is no. Here, I disagree with Doug. Apart from natural law—even though sexual orientation may not be a suspect classification in quite the same way that race is—*Romer v. Evans* will prohibit the complete exclusion of gays from a public entity. If you have the apparatus of the government behind you, then you cannot exclude. But there is a genuine question of whether the degree of connection that now exists with the Scouts approaches this level. It's a highly intensive fact-based inquiry in *Burton*.

There's a case in fact before the Court next term, *Brentwood v. Tennessee Athletic Association*,²² which touches on this. It raises an interesting and recurring issue that basically asks whether a private association, consisting of public school principals primarily, making the rules for interscholastic athletic competition, is a state actor. And the effort is being made to argue in the Supreme Court that, because the people who run this association happen to be public school principals, it is just like a public entity. I don't know enough about the question of with whom the Boy Scouts are affiliated and how their chapters are affiliated with particular governments, but it would have to be awfully close, I would think.

MS. TOTENBERG: They're sponsored by the public school.

PROFESSOR TRIBE: So is the U.S. Olympic Committee, but the Court said the Olympic Committee is not sufficiently identified with government, and therefore, that Committee may refuse to license a Gay Olympics pursuant to congressional authorization. The U.S. Supreme Court says that's not sufficiently governmental.

PROFESSOR KMIEC: Can I respond briefly to that? I concur entirely with Professor Tribe. If it's a state actor doing the exclusion, it's much more problematic. The other distinction I would want to draw is *Romer*. Whatever level of scrutiny was applied in *Romer*, it was largely based on an allegation of animus and hatred. I think that those were the words of the Court itself. That was not present in *Boy Scouts*.

PROFESSOR TRIBE: In the alternative holding only. There's a central holding

21. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

22. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, No. 99-901, 2001 WL 137474 (U.S. Feb 20, 2001).

both Akhil and I see, but I don't want to interrupt.

PROFESSOR McCONNELL: I'd like to interrupt about the federal equal protection challenge. In the first instance, this is going to be a matter of state law. That is, New Jersey or like-minded states might have a law which they say means that public entities, which after all belong to the state, will not sponsor or extend facilities to Boy Scout troops. It seems to me with regard to sponsorship, that the state is entirely within its rights to decide whom it is going to sponsor or not, and thus, the scout troops will not be sponsored. The very small number of them that are sponsored by public entities would not be, because no one has a right to be sponsored by the government. Now as to facilities, which is really all that matters because sponsorship is a fairly formal thing, it's going to be a much harder matter. Most states have a policy under which public school facilities, for example, are available to community groups on a nondiscriminatory basis, and I would think they could no more throw the Boy Scouts out for discriminating on this basis than they can a religious group for having a religious view. And the doctrine of unconstitutionality conditions would kick in here to protect the Boy Scouts against being thrown out of generally available public facilities on this ground, but that isn't sponsorship.

PROFESSOR CHEMERINSKY: What's troubling to me about the discussion, and this includes Professor Tribe's and Professor Kmiec's positions, is no one's talked about the government having a compelling interest in stopping discrimination against gays. I read *Roberts v. Jaycees* as saying is that there is freedom of association and there is an infringement by forcing the Jaycees to include women, but the state has a compelling interest in stopping gender discrimination by places of public accommodation.

And I think that's what the New Jersey Supreme Court said here—there's a compelling interest in stopping discrimination against gays. And whether or not gays get strict scrutiny or immediate scrutiny or rational basis, I still think there's a compelling interest. And I disagree with Professor Kmiec, because I do think the exclusion of gays is based on animus and homophobia, and that's where I think this Supreme Court was fundamentally wrong in the *Dale* case.

PROFESSOR AMAR: Suppose someone says the exclusion of women from the priesthood or the papacy by the Catholic Church is misogyny. Does that mean because there's a compelling interest in affirming women's equality, which I very much believe, that would allow, you know, anti-discrimination law against the Catholic Church? I don't think so, because there are rights that trump sometimes.

PROFESSOR TRIBE: After all, Erwin, in those cases, in *Roberts v. Jaycees* and

all the rest, the Court made it pretty clear that, if it thought this was an actual interference with expressive association, that infringement would not be trumped by the overwhelming value of ending gender discrimination. I obviously believe that there is a compelling interest in ending discrimination against gays. Of course I think that. I also think that *Romer* stands for the principle that, if a government action is based on animus, then that's irrational. It also stands, in the principal holding, for a simple proposition: that you can't take any group, gays or anybody else, and simply exclude them from the protections of law, which I think is a core proposition of our constitutional system. But despite the people in the audience who applauded—and I love getting their approbation—I don't think it is clear that, every time a group is thus excluded, it's because of ugly animus toward that group.

I detest the view that the Boy Scouts hold—*detest* is the word. I detest their view that only the heterosexual life is a good life. I've got a good heterosexual life, and yet I think that view is terrible. But I do not think it is necessarily "homophobic." I don't think it's necessarily born of animus; it's just a different and misguided view. And it seems to me we should not jump to the conclusion that people who have a different view, one that we think is deeply misguided, are all sick or evil.

PROFESSOR KMIEC: Indeed, concern over homosexual practice may reflect both faith and moral regard for the well-being of marriage and family. No one here is arguing for hateful discrimination against homosexuals on the basis of status. Faith demands that one love one's neighbor as he finds him, but that love does not preclude pressing a moral reservation about individually or culturally hurtful practices.

MS. TOTENBERG: I want to ask Professor Kmiec about the California case. Do you think that this means that open primaries are now in jeopardy, or do you think this was, as you lawyers like to say, *sui generis*.

PROFESSOR KMIEC: I think they are open to question if they are imposed by law because they pose the same difficulty. The suggestion that Justice Scalia made for replacing the blanket primary was having a non-partisan primary. I don't know how that comports with the objective of allowing the political parties to select their particular candidates. So I think the open primary states do have something to worry about.

PROFESSOR McCONNELL: Just a clarification. Note that in the places where there are open primaries, it was at the request of the parties. They're not going to go away, open primaries. The extraordinary thing in California is that the state imposed blanket primaries on political parties that didn't want them.

MS. TOTENBERG: The evidence is of course, in New York for example, that political parties are often self-protection organizations, so I'm not sure that's true either.

PROFESSOR TRIBE: There's a basic distinction. I don't know if it will carry the day in the Court. But, unlike a blanket primary, an open primary is one where people have to affiliate themselves for the day at least in the sense that they'll only vote for people in that party. And I think that may well be enough of an associational link to make it seem different, distinguishable from the blanket primary.

MS. TOTENBERG: Putting your feet to the fire, Professor Kmiec, about the question of so-called partial-birth abortions, and understanding that here it is a given that we are talking about unborn children or fetuses, whichever one prefers, that could not survive, what is the difference between the state deciding what form of heart surgery someone may or may not have—all of which are within a parameter of methods considered to be safe by the medical profession—and the state deciding which form of abortion of a non-viable fetus someone may have? Why is it that the state usually evinces no interest in regulating heart surgery? And if they did and got rid of some procedure that the medical profession widely believed to be the safest procedure, I believe there would be a hue and cry over it.

PROFESSOR KMIEC: I think if they got rid of the safest procedure, that would be the case. But I think the state does regularly manifest an interest in the medical procedures of its health community in terms of licensing and certification and hospital accreditation—all kinds of rules.

MS. TOTENBERG: Do you know of any specific, widely-accepted surgical operation that has been singled out for banning by a state legislature?

PROFESSOR KMIEC: I guess, Nina, I want to challenge your premise, because partial-birth abortion could not even come close to being characterized as widely accepted, widely necessary, or any of the other adjectives or adverbs you have asked of it. The fact of the matter is in one legislature after another and in the Court, the medical testimony was this is an extraordinarily rare procedure that many within the most reputable parts of the medical profession said was entirely unnecessary and also posed its own risks in terms of maternal health, as well as being cruel and close to infanticide. So I think it's so factually different from ruling out the best available heart surgery, that your analogy is simply facetious.

MS. TOTENBERG: You don't dispute that every medical organization has said there are times when this procedure is the safest for the mother?

PROFESSOR KMIEC: I do. That was not clear, though some made the claim to be sure. But we have to get back to the contours of the claimed abortion right. In terms of the scope of the state's regulatory role, I thought—and Justice Kennedy thought—*Casey* was about the rebalancing of the interest between the right and the state's continuing interest in unborn life throughout the term

of the pregnancy. And what we now have is abortion at any time, by any means.

PROFESSOR TRIBE: I've got to interrupt because I think there are two or three mistakes that everybody seems to be making, and they're pointing in every direction. First of all, it is not correct, Nina, that this ruling applies only to fetuses that can't live. It applies to viable fetuses as well. The Court made clear that its ruling applies to pre- and post-viability abortions.

Nebraska, like most states, has a total abortion ban, except for when abortion is needed for the woman's health or life. What Nebraska then does is superimpose a rule that says if you are aborting a viable fetus because an abortion is needed for health, you can't use the procedure, even if yours is one of those few cases where that procedure is the safest and healthiest for you. So it's in those few cases that an argument can be made, and I think it's a powerful one though it doesn't follow obviously from *Casey*, that if the state must allow this abortion anyway for reasons of health, then for the state to say that health becomes irrelevant in the choice of procedure is unacceptable.

The other point relates to whether this is a rare procedure. There is a debate about whether, despite the words "partial-birth abortion," that's all Nebraska in fact sought to cover. The majority of the Court concluded, rightly or wrongly, that among the procedures prohibited by Nebraska is one used for ninety-five percent of all abortions between twelve and twenty weeks—that is, pre-viability.

MS. TOTENBERG: Although that is not a majority of abortions by any means.

PROFESSOR TRIBE: But that's a very substantial fraction of abortions, and it's not a truly rare procedure. We could debate whether it is correct to interpret the Nebraska ban that broadly. That's a different and more difficult issue.

PROFESSOR KMIEC: Yes, it very much is. We can disagree as to whether or not the Court got that right, whether D&E and D&X procedures were properly lumped together. I doubt the Court was right, but that part of the statute is easily fixable, because the state can clearly identify which procedure it was talking about by name.

PROFESSOR TRIBE: And the Court made that clear.

PROFESSOR KMIEC: What is not fixable and what can't be addressed is the exception for health which turns out to be a unilateral exception, capable of being exercised by anybody confronting the choice.

MS. TOTENBERG: But do you think it's really clearly fixable in an instance like this where there was an amendment proposed and rejected that specifically would have defined D&E and D&X in the way you propose fixing it, and it was rejected?

PROFESSOR KMIEC: I don't recall that aspect of the Nebraska record. I'll take your word for it. But we are quibbling over a fiction; the statute was plain enough. My only point is that as a matter of legislative drafting, I think it can be made plain if it wasn't. But I don't think such re-drafting solves the

objection to the procedure. The objection to the procedure is that it's unnecessary, that it is life threatening or maternally endangering, and that in fact, it debases the medical profession, and life itself.

MS. TOTENBERG: Let me ask you lastly, Doug, about unenumerated rights. It seems to me about fifteen years ago this was a very hot topic. It was the subject of a good deal of the Bork confirmation hearing struggle, and yet really there was only one vote in the *Troxel* case for the notion that unenumerated rights don't exist.

PROFESSOR KMIEC: The Scalia vote?

MS. TOTENBERG: The Scalia vote, right. And I just wonder whether this is a hobgoblin that's never going to happen. It seems that unenumerated rights, including the rights to privacy—witness *Reno v. Condon*²³ for example—have become so much a part of our culture and understanding that, in the words of Chief Justice Rehnquist, they can't be undone.

PROFESSOR KMIEC: This is a good note of agreement. The likelihood that Justice Scalia will carry the day is very small. Unenumerated rights jurisprudence remains necessary even if, as the Court says, it is also "treacherous." It was always, in my judgment, in the backdrop of constitutional interpretation. That was the whole point of having a Ninth Amendment. The founders didn't want to run the risk of leaving something vital off the list. And Justice Scalia himself qualifies his position, as you know, in the *Michael H.*²⁴ case, by saying in the context of an unenumerated right claim, that he will look for the most specific level of generality at which the right can be stated in custom or tradition. To me that is another way of articulating unenumerated rights. So he chose, in my judgment, a very poor case in which to fly his positivist flag. Parents need all the help they can get. They don't need to be told that the one natural right that probably doesn't exist is theirs.

DEAN SULLIVAN: Let's be clear though that the Court hasn't created any new unenumerated rights for individuals. It found no right to private adult noncommercial consensual sexual conduct in the privacy of one's own bedroom in *Bowers*²⁵ and found no right to physician-assisted suicide or controlling the conditions of one's death in *Glucksberg*²⁶ and *Vacco*.²⁷ So it hasn't expanded any sort of right to privacy since at least the marriage decisions of the '70s. There has been an explosion, though, of new

23. *Reno v. Condon*, 528 U.S. 141 (2000).

24. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

25. *Bowers v. Hardwick*, 478 U.S. 186, *remanded to* 804 F.2d 622 (11th cir. 1986).

26. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

27. *Vacco v. Quill*, 521 U.S. 793 (1997).

unenumerated rights in which Scalia has been a leader. That is the unenumerated rights of the states to enjoy structural immunities to civil damage actions against them in federal courts under the sovereign immunity principle, which is certainly not texturally based, as Professor Amar demonstrated earlier, and also to a structural right against a commandeering by federal officials of their legislative or administrative branches, which is certainly also not anywhere in the text of the Constitution. So unenumerated rights have been alive and well, and Scalia's been leading them. It's just that the people enjoying them happen to be the states.

PROFESSOR McCONNELL: I think the more pertinent point here is that the Court has been arguing, and I think has now reached at least a temporary resolution, about what kind of unenumerated rights are legitimate. I think *Glucksberg* is the clearest example of this, but *Troxel* is now following. The Court distinguishes between well-established rights that have a genuine pedigree in our national culture and tradition and the understanding of the people, versus the Supreme Court making up new rights in the interest of social transformation—that is, rights that had not existed before, but that the Court in their own wisdom, or lack thereof, thinks we ought to have.

I think the significant thing about *Troxel* is the Washington law that was struck down is so extraordinarily broad that to describe it to an ordinary person, they'd say that can't possibly be right. To say that a court, just because they think the child would be better off, can order your child to have visitation with any other human being is just off the map. And Washington was the only state to have such a law. For the Court to say that that is unconstitutional is entirely different from what it did say in *Roe*,²⁸ where it declared that the laws of at least five of the states were unconstitutional.

28. *Roe v. Wade*, 410 U.S. 113 (1976).