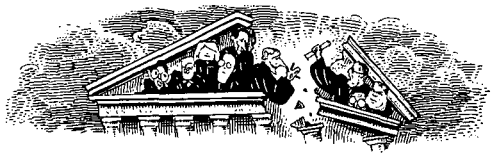

by Jeremy Rabkin

Strange Accommodations

The Boy Scouts would be better off as a hate group.

The U.S. Supreme Court seems to have been anxious to sidestep the most contentious social issues in the past year, but other courts have not had the same inhibitions. In August, the New Jersey Supreme Court stirred a fair bit of controversy with its ruling that the Boy Scouts must allow a gay activist to serve as a scoutmaster. A number of conservative commentators denounced this ruling and then expressed the hope that the U.S. Supreme Court would right this ruling.

But the case is not actually quite so easy. The Court might have to do a fair bit of backtracking to establish a secure reprieve for the Boy Scouts. It isn't at all clear that the Court's narrow conservative majority has the stomach for such rethinking.

The problem isn't that the Jersey court ruling is so compellingly reasoned. The ruling in *Dale* v. *Boy Scouts* held that a law banning discrimination in "public accommodations" could apply to a membership organization like the Boy Scouts, even when it meets in private homes. To reach this result the Trenton jurists had to argue that a "place of public accommodation" need not be in a publicly accessible place or even in any particular physical "place." This strained interpretation has been rejected by federal courts and the top courts of several other states. But the other courts were parsing similar language in generally parallel statutes. It remains up to the New Jersey courts to make the definitive interpretation of the New Jersey law invoked in *Dale*.

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For the U.S. Supreme Court to overturn this result, it would have to find that New Jersey's law, as interpreted by its own courts, violated some protected constitutional right of the Boy Scouts'. But what is that right? A number of critics insist the law violates the Boy Scouts' freedom of association. But this turns out to be a complicated and difficult argument.

Freedom of association is not mentioned in the Constitution. It has been recognized by the Supreme Court in a number of cases but generally in cases where groups could claim that their association was related to some aspect of advocacy or expression protected by the First Amendment. In 1958, for example, the Court held that Alabama could not demand that the National Association for the Advancement of Colored People make public its membership, lest this discourage people from joining and thus inhibit the NAACP's advocacy work. In a seemingly closer precedent, the Court ruled in 1995 that Massachusetts authorities could not force the organizers of a St. Patrick's Day parade in Boston to admit a group which sought to march as an avowedly Gay and Lesbian Irish American contingent (under a banner proclaiming themselves as such). To force the private organizers of the parade to admit such a group, the Court held, would deprive them of their right to determine for themselves the expressive content of their parade.

The New Jersey court was quick to distinguish the claim against the Boy Scouts. James Dale had been active in the Boy Scouts since he was eight years old and was only expelled from his position as an assistant scoutmaster when Scouting officials were alerted to an article in a local newspaper highlighting Dale's role in a gay rights advocacy group at his college. The New Jersey court found that Dale was denied eligibility to serve as a scoutmaster not because he sought to advocate anything contrary to the actual principles of the Scouts in the course of his scouting work, but because of who or what he was—an officer of a university gay—rights group. While acknowledging that the Scouts had a long-standing policy against gays, the court found that this was not essential to the purpose of the scouting movement which in other respects stressed its desire to be open and inclusive, in the manner of a "public accommodation."

On the face of it, there is something odd about the argument that a court knows better than a private organization which members are consistent with that organization's purposes. Moreover, the New Jersey court's ruling has the strange implication that if the Boy Scouts had been more insistent about holding to an anti-gay message, they could have been allowed to exclude gays—so they are, in effect, penalized for holding to a moderate or somewhat tolerant position.

In fact, this is not so odd as it seems. But if it does have a certain logic, it is all the more disturbing for that. The premise of the New Jersey judges comes down to this: If you are willing to cast yourself as a hate group, then you can claim First Amendment protection for your extremist stance; but if you want to be respectable, then the state reserves the right to classify you as a "public accommodation" and impose whatever norms of public respectability the state (or its judges) finds appropriate to that status.

But it is not obvious that the U.S. Supreme Court can or should reverse the result by viewing the Boy Scouts as engaged in expressive activity protected by the First Amendment. If hiking and knot-tying are "expressive," then perhaps dancing and handcuffing are too, and we come to the rather bizarre result that topless dancing is a protected "expressive" activity and perhaps also the nastier activities in sado-masochistic clubs. The Court has already taken a few steps down that road, but it may be rightly uneasy about going much further.

On the other hand, it is not much more attractive to argue, as the Boy Scouts tried to do in *Dale*, that they are protected by religious freedom guarantees because their opposition to homosexuality is grounded in a belief in God. At least as the First Amendment case law now stands, all sorts of disqualifications for government aid or "entanglement" suddenly emerge when an organization is classified as religious. To take an obvious example, public schools frequently sponsor recruiting events for the Boy Scouts while such ventures for actual churches would be regarded by many authorities as constitutionally improper. Is it fair, then, is it even sensible, to invite a group like the Boy Scouts to qualify for one sort of immunity at the risk of taking on a different sort of legal disability?

> ***"It is not much more attractive to argue that the Boy Scouts are protected by religious freedom guarantees."***

The seemingly obvious way out of these difficulties is simply to find a freedom to associate that does not depend on involvement in any particular advocacy or "expressive" activity. In a free country, people should be free to form private organizations with those they choose to associate with and to exclude those they don't want to associate with.

But this attractive path now has a lot of precedent against it. The most important precedents are those dealing with all-male clubs: There is no constitutional problem, the Supreme Court has held, in requiring the Jaycee (Junior Chamber of Commerce) clubs to admit women against their will (*Roberts* v. *Jaycees*, 1984); nor any problem requiring the Rotary Clubs to do so, even with smaller club memberships (*Rotary International* v. *Rotary Club*, 1987); nor any problem in forcing all private clubs in New York to admit women (*Club Association* v. *New York*, 1988). In all of these cases, the Supreme Court persuaded itself that forcing these organizations to admit women would not change their essential character or force the organizations to express a different viewpoint. By just this reasoning one can argue that forcing the Boy Scouts to admit girls would not change its character. (And under the New Jersey court's ruling, it seems entirely open for the next challenger to demand that the Boy Scouts become Boy Scouts with Girls, at least in New Jersey.)

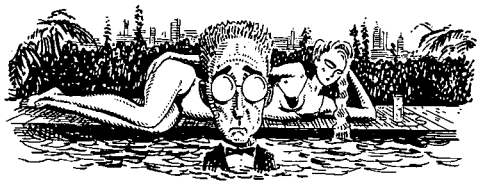
Of course, what drove the Supreme Court to such reasoning was the analogy pressed by feminist advocates between sex discrimination and race discrimination. If clubs were allowed to exclude women, then wouldn't they be allowed to exclude blacks? And if clubs, why not businesses? And then wouldn't the whole argument unravel the civil rights laws we have been building up since the 1960's?

Recognizing associational rights of this kind need not be totally disruptive to existing civil rights law, however. To start with, the Court might limit the claim to non-profit membership organizations. The Court has always insisted that commercial advertising has less protection than other forms of speech under the First Amendment. It would be easy to argue, in the same spirit, that commercial restaurants, hotels, and other such "public accommodations" remain subject to non-discrimination laws while non-commercial membership organizations should be able to claim greater protection for their associational freedom.

There are, in fact, hints of such a doctrine in existing case law. In the Jaycees case, for example, Justice Brennan spoke in expansive terms about associational freedom, relating it not to expressive advocacy but to wider claims of liberty. Private associations, he said, "have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.... [T]he constitutional shelter afforded such relationships...from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." It doesn't require much perspicacity to recognize that the role of private associations doesn't become less important in "transmitting shared ideals and beliefs" when a particular organization is very large or its ideals relatively broad and consensual.

In the New York club case, Justice Scalia made a point of emphasizing that associational rights need not be tied to public advocacy or expression. And he made the further point that New York's law may not have made a clear or convincing distinction between the private social clubs it sought to regulate and those fraternal lodges, often based on explicit ethnic criteria (like the "Jewish War Veterans"), which New York's law explicitly exempted.

But for the Court to take up a wider defense of associational freedom, it has to be ready to acknowledge that private groups may be more selective—may make more distinctions, or, if you like, discriminations—than would be possible or appropriate for the government itself. At a time when we have so much dispute about moral standards for government service, it might be particularly helpful to recognize that private organizations can uphold higher standards than government and need not transform themselves into crusading advocates to claim their constitutional right to do so.



by Benjamin J. Stein

My Hero

Sunday

Uh-oh. I do not like the sound of this at all. I am out here in Malibu with Alex and the dogs. It's morning. Last night, we had a lovely relaxing evening eating and reading and playing with the dogs while the surf crashed off shore. Or maybe that should be on shore. Tommy's at Nerd Camp as I call it, or Advanced Dungeons and Dragons Camp as he calls it. That means we can sleep really late. Anyway, I was sleeping my little head off this morning when the phone rang at about seven my time. "What maniac would be calling at this hour?" I thought as I heard the rings. A few minutes later, I dragged myself to the answering machine. It was my sister calling from Brooklyn.

"Pop is in the hospital," she said. "He had some bad chest pains, so he went in and he's at GW Hospital. But he says he's doing okay and he doesn't need or want for either of us to come see him."

Yeah, right. I called him. He told me about his episodes, about his nitrostat. About his tests. No, I do not like the sound of this one bit. I had better get there pronto and wield my scalpel. No, I had better just be there.

I had a million things to do, but I did the minimum I could, and then I made my airline arrangements, and then I went into town to pack.

Naturally, it was a spectacularly beautiful Los Angeles day. It's always that way when I have to leave town. With such late notice, using my AAdvantage miles so that I didn't have to pay the "no advance" fare, I could only get on the premium section of the "red eye" that left at 10 p.m.

Tina, our lively assistant, drove me to the airport. She told me horror stories about various people's lives to make me feel better about my father. Naturally, her stories didn't help a bit. We stopped at Del Taco and I had a chicken soft taco, and then I was at the airport. (I only mention Del Taco and the chicken soft taco because it was about fifty cents and tasted amazingly good. When you get good fast food it can be really good.)

My flight was almost empty in premium. I sat with one other paying passenger and the usual mob of flight attendants gossiping in the galley about their love lives. As I sat in the darkness, I thought about my father, just as you might expect.

My father sitting out in front of the house in Silver Spring when we lived on Caroline Avenue, smoking cigarettes and listening to the Washington Senators' baseball games while fireflies flew all around him. There were no little transistor radios so he ran a long extension cord through the window to hear the games. I think he had to be outside because my mother did not want him smoking inside—even though she smoked herself in those days, as everyone did. (This would have been about 1951.) There was a tiny little tree attached to a stake next to his chair. A few months ago my father and I went out to see that tree. It's a monster oak with immense branches covering an entire lawn of decent size.

My father sitting out on the deck of our next house, on Harvey Road, overlooking Sligo Creek Park in Silver Spring with another radio, this time a tube-type portable with batteries, also listening to the Senators while a wall of cricket noise rose like a tornado from the creek banks and the maples in the park, circled around like a banshee, and slammed against the house.

My father and I walking around the South Lawn of the White House when he was chairman of the Council of Economic Advisers for Nixon and I was a lowly speechwriter. We talked endlessly about Nixon and how could he ever get out of the mess he was in, and then we realized he couldn't. My father and I eating lunch at the White House Mess while names that are now in history floated around us: Elvis Presley, Bob Haldeman, John Ehrlichman, Maurice Stans, John Dean, Chuck Colson. We ate our steaks and our hot fudge sundaes and knew it would all come to an end some evil day, and sure enough it did. But how good that steak and that fudge tasted, and how sweet it all was.

My father in an earlier day coming up to meet me in New Haven when I took a leave of absence because I had such crazed nerves about being in law school with such mean and sadistic people as I had teaching me–and because I was treated for studying anxiety with drugs they use to treat psychotic serial murderers. (I wish I had known to sue them at the time.) Imagine, those of you who know medicine, treating someone who was anxious about his paper in civil procedure with massive doses of horrific Trilafon.

Most of all, my father these last two years waiting for me to come visit him after my mother entered immortality. He would be there sitting on his leather swivel chair under his lamp, thinner every time, with all of his news and views

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