

## ASSOCIATION AND EXCLUSION: THE PARADOX OF LIBERAL CONSTITUTIONALISM

H. N. Hirsch\*

### Introduction

Has the United States Supreme Court coherently articulated a right to associate under the First Amendment? In the process of articulating that right, has it thought in a sophisticated and accurate manner about the nature of private biases and societal prejudice? Has it drawn a coherent line between private association and state action? Have modern liberal theorists fared any better in thinking about freedom of association? Does the ideal liberal citizen—an individual freely choosing among available associates—really exist? What is lost when we blur the line between public and private, or between ascriptive and chosen affiliations?

Careful thought about these questions leads directly to a paradox of liberal constitutionalism. Freedom of association includes the right not to associate, which is to say, to exclude; thus a regime of strong individual rights facilitates the creation of marginalized individuals and groups.<sup>1</sup> If perpetually excluded, such groups then seek social recognition, which liberal constitutionalism cannot easily grant, unless the state itself becomes complicit in discriminatory action.<sup>2</sup> Therefore the existence and protection of a sphere of non-governmental civil society, where like-minded citizens can find each other, share their opinions, and organize for social purposes and political action, is, at one and the same time, a key mechanism of both freedom and injustice.

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\* *Professor of Politics and Comparative American Studies, Oberlin College, Oberlin, OH USA.*

<sup>1</sup> On the right to exclude, see the introductory comments by Amy Gutmann in her edited volume *Freedom of Association*, Princeton: Princeton University Press 1998, p. 11, and the essay in that volume by George Kateb, p. 35.

<sup>2</sup> The requirement that the state be complicit in discriminatory action before courts can respond is accomplished through the 'state action' doctrine. In a series of cases beginning with *The Civil Rights Cases*, 109 U.S. 3 (1883), and in a doctrine that has waxed and waned over time and been hotly debated, the Court, in considering this issue, has essentially held that the law cannot reach private conduct unless that conduct prevents a member of a minority group from enjoying the fundamental rights of citizenship, such as the right to travel between states or to enter into a contract. For recent iterations of the debate see *Jones v. Mayer*, 392 U.S. 409 (1968) and *Runyon v. McCrary*, 427 U.S. 160 (1976). For a fascinating recent analysis complicating this standard interpretation, see Pamela Brandwein, "A Judicial Abandonment of Blacks? Rethinking the 'State Action' Cases of the Waite Court," *Law and Society Review* 2007-41. While I find Brandwein persuasive on many points, I do not believe her conclusions change the analysis here. For example, although she finds that the early Waite court would have allowed judicial intervention in some cases in which a private individual denied the vote to former slaves, my analysis of *Terry*, below, rests on a distinction between voting and the endorsement of a candidate. For a general discussion of state action see L. H. Tribe, *American Constitutional Law*, New York: Foundation Press 1978, Ch. 18.

In the modern era, the Supreme Court has been tempted to ignore this paradox; when social exclusion had been clearly directed against a group of which the Court has become solicitous, it has been tempted to breach the wall between civil society and government action.

#### I.

The text of the First Amendment does not mention the freedom to associate. The modern Supreme Court began delineating such an implied right rather late, and did so mostly in cases involving the rights of African Americans. In the first major case in which it most directly addressed an implied First Amendment right to associate, the state of Alabama had demanded that the National Association for the Advancement of Colored People (NAACP) reveal the names and addresses of all of its members in that state; the organization refused.

The Court upheld the right of the organization to refuse to provide such information about its members, stating that “effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” The Court went on to say that “it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” “Of course,” the Court continued, “it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters...”<sup>3</sup>

This last statement is a bit disingenuous; it is the close nexus between association and *political* speech—in this case, speech the Court had finally come to regard as of paramount societal importance, the speech of a discriminated-against minority seeking equal citizenship—that leads the Court to take a strong stand in this case. Freedom to associate, in this view, is the amalgamation of the free speech of many different individuals, acting in concert; it is such amalgamation that makes the speech ‘effective.’ And effective it was; for twenty years, the NAACP brought case after case to the Court, always winning.<sup>4</sup>

But what of rights on the other side, the rights of different or competing societal groups? Did whites in the South (or anywhere) have a right to associate only with each other? If they acted as private citizens only—not involving or invoking the machinery of the state—did they also have a freedom to associate, and not associate, with whomever they chose?

<sup>3</sup> *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

<sup>4</sup> The NAACP’s consolidated winning streak began with *Brown v. Board of Education*, 347 U.S. 483 (1954), and ended with *Milliken v. Bradley*, 418 U.S. 717 (1974), the Detroit bussing case, in 1974. In *Milliken* the Court held, by a 5-4 vote, that the federal district court judge in Michigan had erred in ordering school bussing across city/suburban lines.

That question was faced in a series of cases stretching back to 1927 dealing with the rights of African-Americans to vote in Texas elections and primaries, and the endless variety of mechanisms devised to exclude them. White Texas Democrats first passed a law explicitly stating that “in no event shall a Negro be eligible to participate in a Democratic Party primary election held in the State of Texas.” The Court declared that law unconstitutional on the basis of the Fourteenth Amendment.<sup>5</sup> Texas then rewrote the statute, and provided that the State Executive Committee of the party in power could prescribe the qualifications of its members for voting.<sup>6</sup> In 1932, the Court again declared this an unconstitutional abridgment of the right to vote.<sup>7</sup> The Court reasoned that since the Committee was acting under authority specifically delegated by a state, the action was in fact state action.

The Democratic Party then adopted, at a party convention, a policy of excluding African Americans, without specific statutory authority. This was initially accepted by the Supreme Court, in 1935; the Court accepted the argument that the Democratic Party was a private organization, not a creature of the state.<sup>8</sup> Then the Court overruled itself in 1944, declaring in *Smith v. Allwright*—this time on the basis of the Fifteenth Amendment—that the State was unconstitutionally delegating its power to a party to fix voting qualifications, and doing so in a discriminatory manner. “The privilege of membership in a party may be...no concern of the State,” the Court said, conceding that parties are not governmental entities. “But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State.”<sup>9</sup> A crucial background fact of all of these cases is, of course, that at the time Texas was a one-party state; nomination by the Democratic Party for virtually any office was tantamount to election. The Court in *Smith* also pointed to an intervening decision from 1941 emphasizing the “unitary character of the electoral process” and the general importance of primaries.<sup>10</sup>

After *Smith*, the next, rather ingenious step taken by white Texas Democrats was to create the Jaybirds, ‘a self-governing voluntary club.’ The Jaybirds would recommend candidates; these candidates would then, as a matter of course, win the primary and go on to win the general election. The Jaybirds admitted no African Americans into their ‘club’; the Jaybird president openly testified

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<sup>5</sup> *Nixon v. Herndon*, 273 U.S. 536 (1927).

<sup>6</sup> G. R. Stone, L. M. Seidman, C. R. Sunstein, and M. V. Tushnet, *Constitutional Law*, 2<sup>nd</sup> Edition, Boston: Little Brown 1991, p. 1649.

<sup>7</sup> *Nixon v. Condon*, 286 U.S. 73 (1932).

<sup>8</sup> *Grovey v. Townsend*, 295 U.S. 45 (1935). On the private nature of political parties, see Nancy Rosenblum’s recent discussion, *On the Side of the Angels: An Appreciation of Parties and Partisanship*, Princeton: Princeton University Press 2008, pp. 219, 283-84, 381-82.

<sup>9</sup> *Smith v. Allwright*, 321 U.S. 649, 664 (1944).

<sup>10</sup> *Smith v. Allwright* at 660, citing *United States v. Classic*, 313 U.S. 299 (1941). See Kathleen M. Sullivan and Gerald Gunther, *Constitutional Law*, 14<sup>th</sup> Ed., New York: Foundation Press 2001, p. 875.

that a purpose of the organization “was to exclude blacks from the voting process.”<sup>11</sup> Did white Democrats have the right to do this?

The Supreme Court, in *Terry v. Adams*, said they did not, but could not agree on a reason, and their failure to agree on an opinion is telling, for the constitutional violation in this case is far from clear; the trial court, in fact, had found a “complete absence” of state involvement.<sup>12</sup> Justice Black, writing only for a plurality of three, found that “the combined Jaybird-Democratic-general election machinery” violated the Constitution; the Fifteenth Amendment, Black writes, included “any election” in which public officials are chosen, although Black concedes the Amendment does not reach “social or business clubs.” “The only election that has counted in this Texas county,” Black writes, “has been that held by the Jaybirds.” The Democratic primary and then the general election “have become no more than perfunctory ratifiers of the choices already made,” he continues. “It is immaterial,” he boldly states, “that the state does not control that part of this elective process which it leaves for the Jaybirds to manage.”<sup>13</sup>

Writing only for himself, Justice Frankfurter found the constitutional violation to lie in the fact that state officials were themselves members of the Jaybirds; this “infusion of conduct by officials,” Frankfurter wrote, essentially created state action.<sup>14</sup> Four other justices joined an opinion by Justice Clark, who found that the Jaybirds operated “as part and parcel of the Democratic Party, an organization existing under the auspices of Texas law.”<sup>15</sup>

But many entities functionally operate as ‘part and parcel’ of the Democratic Party, including reliably Democratic newspapers and unions and business organizations of various stripes; this does not mean they are acting on behalf of the state when they choose a candidate. If a particular Texas town had only one newspaper—quite common in mid-twentieth century America—and that newspaper had been reliably Democratic for fifty years, and that newspaper routinely endorsed candidates who then went on to win the primary and the general election, would the Court find that newspaper ‘part and parcel’ of the Democratic party? Surely not. If the candidate for local sheriff endorsed by the local Elks club in another town always won, would that turn the action of the Elks into the action of the state?

The First Amendment exists to protect ideas, even hateful ideas; the Supreme Court has said so repeatedly.<sup>16</sup> The white citizens of Texas in 1950 had the right to think, and to say to each other, and to organize themselves around the idea that African Americans did not have the knowledge or the skills necessary to

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<sup>11</sup> *Terry v. Adams*, 345 U.S. 461 (1953), at 463.

<sup>12</sup> See Sullivan and Gunther, *supra* note 10, p. 876.

<sup>13</sup> *Terry v. Adams* at 469.

<sup>14</sup> *Terry v. Adams* at 473. This is, of course, an argument with far-reaching implications.

<sup>15</sup> *Terry v. Adams* at 482.

<sup>16</sup> See for example *Gertz v. Welch*, 418 U.S. 323 (1974).

make wise political choices. That idea may be hateful and prejudiced, but it is still an idea, held privately, unless and until these white citizens in some way use the power of the state, or sufficiently implicate the power of the state, in the implementation of that idea. An endorsement, however effective, does not mean it is the state that is acting, and assuming that it does has chilling implications. As one standard legal casebook poses the question, “are the various opinions finding state action in *Terry* sufficiently cognizant of the need to maintain a sphere free from governmental control for those wishing to influence government policy?”<sup>17</sup> The simple answer is no. White Texas Democrats are here taking a non-binding, straw vote; a straw vote is not a real vote.

To say, in response, that the state is here allowing a private entity to conduct a public function<sup>18</sup> is false. The ‘public function’ here is an election—that is, voting for candidates; that function the state cannot delegate to an entity that discriminates. But the Jaybirds are not conducting the election, or even the primary; they are gathering together like-minded citizens to declare a preference among available candidates and making their endorsement known. The two functions are different. One involves the actual vote in a contested, (presumably) two-party election; the other is the endorsement—not election or nomination—of a candidate for one of those parties.

Political science research clearly shows that voters often do not take the time to inform themselves about candidates, but rather rely on cues from various sources they trust in casting their vote.<sup>19</sup> The existence of that trust, the reliability of the recommender, or even the uniformity of opinion in what turns out to be a majority voting bloc, does not turn the source in question into a state entity. Imagine that a series of presidential elections turn on the abortion question, and that the women’s vote is decisive. Imagine then that a majority of American women routinely choose the candidate endorsed by NARAL Pro-Choice America, even if other indicators about the bulk of these women suggest they would otherwise vote for a different candidate. These facts—the trust of these women in this organization, the salience of the issue to the outcome, the decisiveness of this voting bloc—does not turn NARAL into a government agent, or their endorsement process into state action. We would be appalled if the Supreme Court declared NARAL ‘part and parcel’ of the state, and many would argue that the health of the polity depends on the freedom of organizations like NARAL to seek influence over public opinion.

The Court’s motive in *Terry* may be admirable—the elimination of racial discrimination—but that does not excuse its blurring of the line between public

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<sup>17</sup> Stone *et al.*, *supra* note 6, p. 1651.

<sup>18</sup> See for example W. F. Murphy, J. E. Fleming, S. A. Barber, and S. Macedo, *American Constitutional Interpretation*, 3<sup>rd</sup> ed., New York: Foundation Press 2003, p. 897-98.

<sup>19</sup> See Arthur Lupia and Matthew McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?*, New York: Cambridge University Press 2003. See also Richard R. Lau and David P. Redlawsk, “Advantages and Disadvantages of Cognitive Heuristics in Political Decision-making,” *American Journal of Political Science* 2001-45.

and private, between civil society and government, as it does in another case dealing with a civic organization, *Roberts v. Jaycees*. In *Terry*, the key legal concept is the state action doctrine; in *Roberts*, it will be the definition of a 'place of public accommodation.' Like many crucial but vague concepts in constitutional law, these phrases are elastic, and the Court can change their exact boundaries as it struggles with the facts and the ideological thrust of each case at hand.<sup>20</sup>

The Jaycees consist of local chapters of a national non-profit organization, founded in the early twentieth century to provide young businessmen with an "opportunity for personal development and achievement and an avenue for intellectual participation [in] the affairs of [the] community." Their mission statement says they are "designed to inculcate in the individual member... a spirit of genuine Americanism and civic interest," and "to develop true friendship and understanding among young men of all nations." By the 1980s the Jaycees admitted 'associate members,' including women and older men, who could participate in the activities of the association but could not vote, hold office, or participate in certain leadership training programs.<sup>21</sup>

Two local Jaycees chapters in Minnesota violated the organization's bylaws by admitting women as full members; the national organization then threatened revocation of their charters. The local chapters filed lawsuits, claiming the protection of the Minnesota Human Rights Act. That Act prohibits discrimination, including gender discrimination, in 'places of public accommodation.'

Justice Brennan begins his opinion for the Court by distinguishing between two types of association, 'intimate' and 'expressive.' Intimate association is based on "personal bonds," and offers a "critical buffer between the individual and the power of the state." Intimate association is vital, Justice Brennan says, to the "ability to define one's identity," and thus "is central to any concept of liberty." It is the place of "deep attachments" and "family." The attributes of intimate association, according to Justice Brennan, are "relative smallness," a "high degree of selectivity," and "seclusion from others." Such relationships are worthy of the highest form of constitutional protection.<sup>22</sup>

But the Jaycees do not provide this form of intimate association; their chapters are "large and basically unselective." There is a "spectrum," a continuum "from the most intimate to the most attenuated of personal attachments," and, although he does not say so in so many words, Justice Brennan clearly places the Jaycees at the "attenuated" end of the spectrum. As such, the Jaycees are entitled to "expressive association,"<sup>23</sup> a different kettle of fish.

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<sup>20</sup> See my discussion of this point in *A Theory of Liberty: The Constitution and Minorities*, New York: Routledge 1992, p. 79-80.

<sup>21</sup> *Roberts v. Jaycees*, 468 U.S. 609, 612-13 (1984).

<sup>22</sup> *Roberts v. Jaycees*, at 618-20.

<sup>23</sup> *Roberts v. Jaycees*, at 621-22.

Brennan concedes that expressive association is “especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” And freedom of association “plainly presupposes a freedom not to associate.” Nevertheless, this strong language does not settle the matter. The rights of expressive association are not absolute, and can be trumped by compelling state interests “*unrelated* to the suppression of ideas.”<sup>24</sup> Minnesota has an “expansive definition of public accommodations,” which “reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.”<sup>25</sup>

We should examine the phrase ‘social integration’ in Justice Brennan’s description of the state’s interest in this case; we should remember that the Jaycees’ mission statement speaks of ‘friendship’; and we should contemplate whether the violation of the Jaycees’ right to choose its own members is truly “unrelated to the suppression of expression.”

Neither state nor the federal government has the authority to compel ‘social integration’ or ‘friendship’ in the absence of state action; the Supreme Court has (more or less) said as much in a series of cases interpreting the Thirteenth, Fourteenth, and Fifteenth Amendments after the Civil War. The Court then began creating the state action doctrine; the state could not discriminate against the newly freed slaves, but the Constitution did not touch private behaviour unless that behaviour restricted a fundamental right of citizenship in some way.<sup>26</sup> As it has been commonly understood since that time, in order for the state to control discriminatory behaviour by an individual, “there must be a palpable connection between the state and the private individual or group doing the discriminating.”<sup>27</sup> Allowing the government to press ‘social integration’ could have far-reaching implications.

Moreover, as Justice O’Connor says in her concurring opinion in *Roberts*, Justice Brennan gives “insufficient protection to expressive associations and places inappropriate burdens on groups claiming the protection of the First Amendment.” The protection of the ‘message’ of a group, Justice O’Connor reasonably argues, should be judged by the “same standards as protection of speech by an individual.” An organization has a First Amendment right to create a “voice,” O’Connor argues, and “the selection of members is the definition of that voice.”<sup>28</sup>

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<sup>24</sup> *Roberts v. Jaycees*, at 621, 623. Emphasis added.

<sup>25</sup> *Roberts v. Jaycees*, at 626.

<sup>26</sup> See note 2 and sources cited therein.

<sup>27</sup> Murphy, Fleming, Barber, Macedo, *supra* note 18, p. 897.

<sup>28</sup> *Roberts v. Jaycees*, at 632-33.

What might the all-male ‘voice’ of the Jaycees be saying? It’s not difficult to imagine, especially when we keep in mind that the Jaycees were created in 1920—the same year as women got the vote. It could be saying ‘we don’t think women do terribly well in business.’ The voice could be concerned by the number of women in business who take time off to have or care for children. ‘Yes, I’ve hired young women in my office,’ one can imagine the voice saying. ‘But they often aren’t willing to put in long days, they have to go home and take care of their family. Or they take a year off to have a baby. Or they get distracted by having to care for their sick parents. It just doesn’t work, and I end up losing money.’

Such sentiments are ideas, and, if we know anything about the First Amendment, we know that it is meant to protect ideas that society’s majority finds distasteful. Moreover, a club such as the Jaycees is hardly a ‘place of public accommodation.’ It does not offer goods or services to the public. It does not invite the public onto its premises, in the manner of an amusement park or even a college campus. It is not an inn. It does not provide transportation.

Justice O’Connor sees the First Amendment dilemma posed by Justice Brennan’s opinion, but wiggles out of dilemma by defining the Jaycees as yet a third type of association—it is, she says, a ‘commercial association.’ The Jaycees is an organization that “promotes and practices the art of solicitation and management.”<sup>29</sup> As such, it can be more readily regulated by the state. But this attempt to define away the problem is quite weak; surely a commercial association may also have a message, a voice, as O’Connor herself puts it. ‘Women should not be corporate leaders’ is an idea, a message, even if expressed by a group of stupid men rather than one stupid man in particular.

Justice Brennan speaks of an association as a “critical buffer between the individual and the power of the state.”<sup>30</sup> Since Tocqueville, we have recognized that the panoply of American organizations, the health of such entities in civil society, and their diversity is what is perhaps most distinctive about American democracy, and a chief guarantor of its health. Would we want to say that NOW, the National Organization for Women, is a ‘place of public accommodation’? Would we allow a state to force it to accept as members evangelical men who oppose abortion under any circumstances? Should Focus on the Family be forced to accept gay members? Should the American Nazi Party be forced to accept African-American members? After all, they have a newsletter offered to the public; is that not a form of economic engagement with the marketplace? Justice O’Connor is absolutely right. An association—any association—is entitled to create its own voice, and the choice of members is essential to that creation.

Contrary to its stand in *Roberts*, in two other cases dealing with the question of whether an association can be forced to admit members who contradict its

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<sup>29</sup> *Roberts v. Jaycees*, at 639.

<sup>30</sup> *Roberts v. Jaycees*, at 619.

voice, the Court held in favour of the organization's right to exclude those it finds objectionable. Interestingly, both cases involve gays and lesbians demanding inclusion—a group that has not yet achieved the constitutional stature of African Americans or women.

In the *Hurley* case in 1985, the Irish-American Gay, Lesbian, and Bisexual Group of Boston attempted to force their presence in the city's annual St. Patrick's Day parade, a public event organized by the South Boston Allied War Veterans' Council, a private organization. The Council claimed that the First Amendment protected their right to refuse participation to groups carrying messages they did not endorse; it asserted that the exclusion of "groups with sexual themes merely formalized [the fact] that the Parade expresses traditional religious and social values."<sup>31</sup>

The gay group argued that the parade was a form of 'public accommodation' and therefore subject to the Massachusetts public accommodation law, a state statute quite similar to the Minnesota statute in *Roberts*. In the Massachusetts statute, sexual orientation is listed as one of the protected categories. The gay group attempted to get around the First Amendment by arguing that the Council was merely a "conduit" for the speech of the participants in the parade, "rather than itself a speaker."

The Supreme Judicial Court (SJC) of Massachusetts agreed with the gay group, and ordered the Veterans' Council to accept gay participation. The SJC implicitly endorsed the holding of the trial court that the Council's exclusion of the gay group was "paradoxical," since "a proper celebration of St. Patrick's Day requires diversity and inclusiveness."<sup>32</sup>

The Supreme Court reversed the SJC. Writing for a unanimous Court, Justice Souter says that the state court's application of the public accommodation statute to these facts was 'peculiar,' and had the effect of requiring petitioners to alter the expressive content of their parade. Souter rightly construes the question of the case to be "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey"—a voice. On the basis of strong precedent, the Court holds that parades are indeed a form of expression. Although the 'message' of the Veterans' Council in an annual St. Patrick's Day parade may be somewhat amorphous, "a narrow, succinctly articulable message is not a condition of constitutional protection."<sup>33</sup>

It is striking to note that much of what Souter here says about the Veterans' Council in Boston could be applied to the Jaycees in Minnesota—the existence of an amorphous message, the right of the group in question to resist being forced by the state to accept members it wishes to exclude. And it is striking

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<sup>31</sup> *Hurley v. Irish-American GLB Group of Boston*, 515 U.S. 557, 562 (1995).

<sup>32</sup> *Hurley v. Irish-American GLB Group of Boston*.

<sup>33</sup> *Hurley v. Irish-American GLB Group of Boston*, at 572.

that a St. Patrick's Day parade is far more public an event than the private meetings of a business club, and thus arguably even more of a 'public accommodation'—yet the Supreme Court resists the temptation to bring this parade under the umbrella of a public accommodation law, given the strong First Amendment rights on the other side of the equation.

In a second case concerning gay exclusion, the Court similarly refused to use a public accommodation law to require the Boy Scouts of America (BSA) to accept gay leaders. James Dale became a Scout at the age of eight, and stayed with the organization, later becoming a Scoutmaster. He was by all accounts an 'exemplary' Scout. He was also gay, and when he got to Rutgers University, became co-president of the Rutgers Lesbian/Gay Alliance. He eventually gave a newspaper interview in which he talked about gay teenagers' need for role models. After the interview the Scouts revoked his membership, and Dale sued. The Supreme Court of New Jersey sided with Dale, ruling that the Scouts were a 'public accommodation' within the meaning of state law.<sup>34</sup>

The U.S. Supreme Court overturned that decision, siding with the Scouts. It distinguished the *Roberts* case by claiming—almost certainly falsely—that in *Roberts*, the inclusion of women did not in any way contradict the message—the voice—of the organization, whereas the inclusion of a gay man in Scouting did. "The forced inclusion of an unwanted person in a group," Chief Justice Rehnquist writes for the majority in *Dale*, "infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."<sup>35</sup> We should note here Rehnquist's concern for an association's right to express some of its views privately; that was almost certainly what was at stake in *Roberts*, since it is doubtful that the male members of the Jaycees would have been willing to go public with their unease or unhappiness with women members.

In the current case, the Court accepted the Boy Scout's assertion that a gay Scout contradicts the organization's message; the Scouts require that their members pledge to "keep themselves morally straight... [And] clean." According to the leadership, a gay Scout is a contradiction in terms, and Rehnquist takes them at their word. Thus for the Court's majority, the case is analogous to *Hurley*, rather than to *Roberts*.

As for New Jersey's public accommodations law, Rehnquist correctly points out that these laws "were originally enacted to prevent discrimination in traditional places of public accommodation like inns and trains." Over time, he notes, the laws have expanded, and now sometimes "include [] places that often may not carry with them open invitations to the public, like summer camps and roof gardens." Here, "the New Jersey Supreme Court went a step further and applied its...law to a private entity without even attempting to tie the term 'place' to a physical location." And "as the definition of 'public accommodation'

<sup>34</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

<sup>35</sup> *Boy Scouts of America v. Dale*, at 648.

has expanded from clearly commercial entities...to membership organizations such as the Boy Scouts, the potential for conflict [with] the First Amendment rights of organizations has increased.”<sup>36</sup> Rehnquist is quite right here; neither the Boy Scouts or the Jaycees in *Roberts* come close to being a ‘place,’ and the inclusion of these entities in the category of ‘place of public accommodation’ stretches the meaning of words to the breaking point.

In a valiant but ultimately wrong-headed dissent, Justice Stevens, for four members of the Court, puts the Boy Scouts and their various pronouncements under the microscope, and finds that “BSA never took any clear and unequivocal position on homosexuality”; looking at various statements of the organization in the past, she sees a “failure to adopt any clear position” on gayness.<sup>37</sup> He is quite right; there is at minimum a great deal of ambiguity in what the Scouts had *previously* meant by the phrase “morally straight and clean,” and no clear statement or policy that a gay Scout contradicts this requirement—until now. What Stevens ignores is that the Scouts now, because of Dale’s demand, have been forced to clarify their position, have in fact done so, and do not want as a member an openly gay man who gives newspaper interviews.<sup>38</sup> Stevens says that “Dale’s inclusion in the Boy Scouts...sends no cognizable message to the Scouts or to the world,”<sup>39</sup> but this claim is clearly false—almost laughably so. Including Dale would send a clear message, and a powerful one, just as including the gay contingent in the St. Patrick’s Day parade in Boston would have sent a clear message—a message of social acceptance, a message many gays and lesbians spend a lifetime seeking. It is the precise message Dale wishes to convey; the Scouts are refusing to provide him a platform, and are instead sending their own, negative message about gay men.

Dale in his newspaper interview spoke of the need to offer role models to gay teenagers; he became an officer of a gay organization at Rutgers. Gays and lesbians all over the country, excluded from public celebrations such as St. Patrick’s Day parades, created LGBT pride parades of their own, and a whole slew of other organizations and events. To use a familiar cliché, the love that dare not speak its name became the love that would not shut up. Women created NOW and dozens of other feminist organizations to lobby for their rights, including their right to be taken seriously in public sectors previously

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<sup>36</sup> *Boy Scouts of America v. Dale*, at 656-57.

<sup>37</sup> *Boy Scouts of America v. Dale*, at 685.

<sup>38</sup> It is this factor that Andrew Koppelman ignores in his passionate denunciation of the *Dale* opinion in *A Right to Discriminate?*, New Haven: Yale University Press 2009. Koppelman characterizes the Boy Scouts as having no ‘express’ policy about homosexuality (p. 28). Although this may have been somewhat true before the Dale matter (the requirement that scouts be “morally straight” is, in fact, ambiguous), the organization has a right to clarify that this phrase now precludes the admission of homosexuals. Koppelman’s argument depends on characterizing the BSA as ‘silent’ on the issue of gay scouts; after Dale’s lawsuit they were anything but. As Koppelman concedes, “political associations must have the ability to exclude those who would change the association’s message” (p. 23). See also his discussion at p. 77.

<sup>39</sup> *Ibid.* at 694.

dominated by men, such as the worlds of business and commerce. And African Americans and their allies created the NAACP and other organizations to lobby for their rights.

These and other excluded groups counter-organized; they used the freedom of association to express their needs, advocate their rights, and challenge their exclusion. In doing so, they were forced, by prejudice, to embrace the trait that had previously been the cause of their exclusion, and to place it at the centre of their politics. Thus freedom of association begets both exclusion and counter-mobilization; it then begets—or wildly encourages—identity politics.

## II.

It is curious, however, that a number of modern liberal theorists, to whom this dynamic should be clear, and who are quick to defend freedom of association, are uncomfortable with the implications of identity politics. They are uncomfortable with a politics that puts too much emphasis on ascriptive characteristics; they prefer an ideal liberalism in which individuals make free choices about the kinds of groups to which they will give their allegiance, and shift their energy from group to group, issue to issue. They want identity worn lightly.

Nancy Rosenblum, for example, in an award-winning book, takes issue with ‘the politics of recognition.’ In spite of its “boasted solicitude for ‘difference’ and ‘identity,’” Rosenblum writes, “the politics of recognition violates the elementary lessons of the moral uses of pluralism. It fails to orient us toward the variability of actual associations and the vicissitudes of personal development.”<sup>40</sup> Individualism, she goes on, “is...subverted by categorical claims about the constitutive effects of membership on personal identity and self-respect.” Cultural groups should not get “caught up in an ideology of resistance,” Rosenblum says.<sup>41</sup> Subcultures “do not imprint their objective characteristics uniformly.” It is “extravagant” to “point [...] to cultural group membership as the source of whatever meaning members’ live have,” she writes. A politics based on any kind of group membership or ascriptive characteristic does not work; “in politics certainly, essentialism is spectacularly implausible.”<sup>42</sup>

In a similar vein, Amy Gutmann writes that “identity groups are not the ultimate source of value in any democracy committed to equal regard for individuals.” Group identity, she says, “is socially significant but not comprehensive of individual identity.” Politics or “solidarity on purely ascriptive lines even among the unjustly subordinated...threatens to be counter-

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<sup>40</sup> Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America*, Princeton: Princeton University Press 1998, p. 329-30.

<sup>41</sup> *Ibid.*, p. 329. Rosenblum is here criticizing the work of Will Kymlicka; see *Multicultural Citizenship: A Liberal Theory of Minority Rights*, New York: Oxford 1996.

<sup>42</sup> *Ibid.*, p. 340.

productive to the very cause of democratic justice that it adopts as its own.” What Gutmann calls “negative identity groups” have, historically, “rarely remained only or even primarily negative.”<sup>43</sup> Iris Marion Young writes that positioning in the social structure does not ‘determine’ individual identities. “Subjects are not only conditioned by their positions in structured social relation; subjects are also agents. To be an agent means that you can take the constraints and possibilities that condition your life and make something of them in your own way.” Members of groups “do not have some ‘fixed’ or ‘authentic’ group identity they share.”<sup>44</sup> K. Anthony Appiah worries that a minority group identity may “replace[...] one kind of tyranny with another,”<sup>45</sup> and Richard Rorty wants us to “refrain from thinking so much other otherness.”<sup>46</sup>

In response to these abstract and noble liberal sentiments, we should return to two of the social groups we have been considering, and look at them at different moments in American history: African Americans in the Jim Crow South, perhaps from 1880-1940, and Gays and Lesbians throughout the country, during most of the twentieth century, but especially during and after World War Two and before Stonewall (1969).

If you were a member of these groups in these times and places, there was little ‘variability’ in your situation (contra Rosenblum). You did not have the luxury of not thinking about your ‘otherness’ (contra Rorty). Your membership in this group—your categorization—was, in fact ‘comprehensive’ (contra Gutmann). Your status in society did not change for a very long time, probably for your entire life (contra Gutmann). You were, in fact, ‘subject’ to a regime of discipline and control; you were not an ‘agent’ (contra Young). If you were African American in the Jim Crow South, your education was disgracefully minimal and your chances of earning a decent living close to nil. You could not live wherever you chose. Chances are you risked your life if you attempted even to vote, and, as we have seen, you lived in a one-party state. Using the wrong drinking fountain could bring a beating, or death, as could failing to address a white person as ‘sir’ or ‘ma’am.’

If you were Gay or Lesbian in the United States in the post-war world, you risked arrest and a serious prison sentence for acting on your sexual impulses, in every state. If you were openly gay, you probably lost your job; you could also be institutionalized and subject to a lobotomy or, more commonly, electroshock treatment. The police would routinely harass you and the government would not employ you, or protect you. You could easily be evicted from your home. Even the American Civil Liberties Union (ACLU) would not take

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<sup>43</sup> A. Gutmann, *Identity in Democracy*, Princeton: Princeton University Press 2003, pp. 7, 10, 129, 11.

<sup>44</sup> M. Young, *Inclusion and Democracy*, New York: Oxford 2000, pp. 101-02.

<sup>45</sup> K. A. Appiah ‘Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction’, in A. Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition*, Princeton: Princeton University Press 1994, p. 94.

<sup>46</sup> R. Rorty *Achieving Our Country*, Cambridge: Harvard University Press 1998, p. 97.

up your cause. Every religious establishment condemned you. You were sick; you were a criminal; you were damned.

In short, substantial, ongoing, comprehensive, and enforced prejudice against these groups turned every member of them into a pariah, and a pariah cannot be an ideal liberal citizen, picking and choosing identities and commitments from a range of alternatives. A pariah must embrace her identity, organize around it, and use the freedom of association to challenge the majority's judgment.

This is the insight of, among others, Hannah Arendt. Herself a refugee from the Nazis, she never thought of herself as primarily a Jew until forced to do so by a brutal regime. "When the Nazis came to power...and friends, colleagues, and neighbours scrambled to forget they'd ever known her, the transformation of her identity stunned her... ."47 Ultimately she came to see that people in her situation had no alternative but to act politically in terms of their despised identity. In a memorable turn of phrase, she wrote that "when one is attacked as a Jew one must respond not as a German or a Frenchman or a world citizen, but as a Jew." The only path open to pariahs was "militant struggle against their subordinated status... When politically despised, you either fight on your feet or die on your knees."48

It is no exaggeration to say that for decades, America's majority kept African Americans and gays and lesbians on their knees.

"From the disgrace of being a Jew there is but one escape," Arendt wrote, "to fight for the honour of the Jewish people as a whole." As a whole—which is to say, as a group, a minority with an identity. "Only within the framework of a people," Arendt wrote, "can a man live as a man among men."49 For members of such a group—such a people—identity cannot be worn lightly; it cannot be but one of many identities and shifting involvements.<sup>50</sup>

The standard liberal response to the predicament of pariah groups is the offer of tolerance, but ultimately tolerance in these situations will not suffice. Rosenblum takes ultimate refuge in the idea of tolerance, writing that "the liberal democratic promise is tolerance and the civic respect of a public hearing" (in a paragraph discussing, among other groups, the Ku Klux Klan).<sup>51</sup> But, as Wendy Brown has recently and brilliantly argued, "tolerance" is not

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<sup>47</sup> Vivian Gornick, "All that is Given: Hannah Arendt on Being Jewish," *Boston Review* at: <http://bostonreview.net/BR33.1/gornick.php> (28 June, 2010)

<sup>48</sup> Quoted in *ibid.* Another source has a slightly different version of this quote: "If one is attacked as a Jew, one must defend oneself as a Jew. Not as a German, nor a world-citizen, not as an upholder of the Rights of Man, or whatever. But: What can I specifically do as a Jew?" Hannah Arendt, *The Jewish Writings* in Jerome Kohn and Ron H. Feldman (eds.), New York: Schocken Books 2007, p. lxxi.

<sup>49</sup> Quoted in Kohn and Feldman (eds.), *ibid.*, p. lix.

<sup>50</sup> The phrase is Rosenblum's; see Membership and Morals, *supra* note 40.

<sup>51</sup> *Ibid.*, p. 347.

equality; being tolerated is a second-class status.<sup>52</sup> When one is tolerated, one carries a 'marked' identity; the marking carries with it connotations of deviance, inferiority, and marginality.<sup>53</sup> The subject who is tolerated is "identified as naturally and essentially different"; by being tolerated, one's marginal status is "continuously inscribed."<sup>54</sup> That which is tolerated is a threat, and is seen as a threat when demands are made.

Brown poses the key question: When an individual or group is tolerated, "what retreat from stronger ideals of justice is conveyed?"<sup>55</sup> And the fact that tolerance persists over time leads Brown to ask, "what kind of fatalism about the persistence of hostile and irreconcilable differences in the body politic" does this demonstrate?<sup>56</sup> It is some of these "hostile and irreconcilable differences" of group identity which the Supreme Court, and liberal political theory, have not yet fully accommodated, or understood.

Justice for groups such as Jews in Nazi Germany or African Americans and gays and lesbians in a racist and homophobic America—which is to say, much of the twentieth century—does not come easily, or quickly. As the German example tells us, it may not come at all. But the pursuit of justice can only come when a group acts as a group, and individuals in that group embrace their despised identity and use their right to associate with each other as a weapon.

Even-handedness—essential to the law—means that racists and homophobes (and anti-Semites) have rights as well, perhaps an ultimate irony (if not paradox) of liberal democracy. But it is only when organized into the NAACP, or NOW, or Lambda Legal Defense that pariahs have a chance of challenging the status relegated to them by the majority and gaining political agency. Pariahs must associate with other pariahs, or the association of their enemies with each other will keep them subjugated, or will destroy them.

Moreover, in the end justice is not served by a Supreme Court which blurs the line between public and private, through a misreading of the phrase 'place of public accommodation,' or 'state action,' for what is today a blurring of constitutional meaning in favour of anti-racism or against the stereotyping of women could tomorrow become a decision enshrining prejudice in the nation's fundamental law. This is, of course, by no means a hypothetical possibility, as various Court decisions make clear, from *Plessy v. Ferguson* in 1896 to *Korematsu* in 1944 to *Bowers v. Hardwick* in 1986, a mere generation ago. These three decisions, one of them legitimating concentration camps on American soil, show us that the distance between America and Arendt's Germany is not as far as most Americans would like to believe. Second-class

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<sup>52</sup> For a gay man's perspective in this issue, see Martin Duberman's memoir, *Waiting to Land*, New York: The New Press 2009.

<sup>53</sup> W. Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire*, Princeton: Princeton University Press 2006, p. 13.

<sup>54</sup> *Ibid.*, pp. 15 and 207, n.2.

<sup>55</sup> *Ibid.*, p. 5.

<sup>56</sup> *Ibid.*, p. 6.

citizenship is an American staple; its victims must organize, around their identity and as a group. The ideal liberalism of an individual as a free agent is a character in a different story.<sup>57</sup> Freedom of association means that prejudice will persist, and that when it does, there is no alternative to identity politics.

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<sup>57</sup> See Michael Walzer, *Passion and Politics: Toward a More Egalitarian Liberalism*, New Haven: Yale University Press 2004. It is interesting to note that even as perceptive a critic of liberal theory as Walzer ignores—in a book published in 2004—sexual orientation as a trait creating a stigmatized group—a concept he otherwise analyzes with great precision; see p. 33. For other critiques of liberal theory along these general lines, see, among others, Kymlicka, *supra* note 41, as well as *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*, New York: Oxford University Press 2001, and Seyla Banhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton: Princeton University Press 2002.