

ON THE FRONT LINE
OF THE CULTURE WAR:
RECENT ATTACKS ON THE
BOY SCOUTS OF AMERICA

SECOND EDITION

WILLIAM A. DONOHUE



CENTER for the STUDY
of the NATURAL LAW

THE CLAREMONT INSTITUTE

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Note to the Second Edition

This volume was originally published in 1993. Since then, several important court cases with direct bearing on the issues discussed herein have been either filed, argued or decided in several different states and jurisdictions. Edward J. Erler's Afterword to this edition offers a comprehensive update on the state of this litigation as of February 1996.

Foreword

On May 24, 1993, Roberta Achtenberg was confirmed as U.S. Assistant Secretary for Fair Housing and Equal Opportunity. This was a ballyhooed "historic first" of the Clinton era: Achtenberg is a homosexual activist.

Less than two weeks later, President Clinton scuttled the politically-disastrous nomination of his long-time friend and political ally Lani Guinier for the nation's top civil rights post. More startling to the public was that he had nominated her in the first place: Guinier had built her entire reputation on challenging the idea of majority rule, both in elections and in legislatures.

These events are related, and their connection is related to the theme of this booklet.

What Winston Churchill and others have admired about Scouting over the years is that it supports the work of family, church, and country, attaching boys' loyalties to—in Churchill's words—"Right and Truth, however the winds may blow." It stood against the strange 19th-century philosophical view that winds (or history) is all there is—that right and truth change with time and circumstance. This philosophy, called "historicism," animated both German National Socialism and Soviet Communism earlier in this century. In a more benign form, it came to roost in American universities and is now making inroads in American government.

We know this philosophy as moral relativism. Its adherents speak not of morals but of "values," none of which are objectively superior to any others. For instance, one person's

values may tell them that the best kind of family consists of a man and a woman and children. Others' values may say that the best kind of a family consists of a man and *five* women and children, or two *men* and children, or two *women* and children *and a rabbit*. And no one can legitimately hold that any of these is superior, except merely subjectively. Nor can the government take a legitimate interest in promoting one arrangement over the others. That would be "legislating morality." In fact, the government should legislate *against* morality, or against the right of private citizens and organizations to make moral distinctions.

This is the view of Roberta Achtenberg who, in fact, gained fame as a San Francisco Supervisor with her heavy-handed efforts to force the Boy Scouts to reverse their ban on homosexual Scoutmasters. And it is the view endorsed by the Clinton administration, not only by the fact of Achtenberg's appointment to high federal office, but also of Clinton's Interior Department's official endorsement of a National Park Service ban on using Boy Scout volunteers in America's national parks.

But homosexuals and atheists (who have also dragged the Boy Scouts into court, seeking to outlaw the right of private citizens and organizations to make *religious* distinctions) have a big problem: Most Americans, while not inclined to snoop into each others' private lives, believe that sodomy is wrong and want to raise their children in that view. Most Americans, while not inclined to talk overly-much about it, believe in God and want to raise their children in that view. And most Americans think our country is tops precisely because its principles, based on "the laws of nature and of nature's God," support their views and their right to raise their children as they see fit.

And there's the rub. What the majority thinks of as freedom isn't what organized homosexuals and atheists and their modern (as opposed to Jeffersonian) liberal supporters think of as freedom—namely, freedom from all social constraints. The solution, according to Lani Guinier—whose views President Clinton knew perfectly well before he nominated her, and whose views he shares, according to her, despite his public denials when he cut her loose under fire—is that judges and bureaucrats

should rule us despite our druthers, according to their "enlightened" views.

Back in the Reagan years, Attorney General Ed Meese became embroiled in a remarkable running debate with Supreme Court Justice William Brennan, over how judges should decide cases involving the Constitution. Meese said they should look to the original meaning of the Constitution and respect majority rule. Brennan, referring to the founding era as "a world that is dead and gone," explained why he would prohibit the death penalty despite its popularity and its explicit authorization in the Fifth Amendment: "On this issue, the death penalty, I hope to embody a community striving for human dignity for all. . . ." With his use of the personal pronoun, Brennan suggested that he, an unelected judge, is better able to "embody the community" than Americans' elected representatives.

The American Civil Liberties Union—a major player in recent attacks on the Boy Scouts, as Bill Donohue recounts in this booklet—stood foursquare with Brennan. In a cover letter to a petition calling for Meese's ouster, ACLU Executive Director Ira Glasser wrote: "It is only a very small and special group of Americans (less than 1%) who understand the importance of fighting to sustain individual freedom." A friend and I responded in a newspaper editorial at the time: "What arrogance! And what a threat to liberty!"

We continued:

Vladimir Lenin once made the argument that representative democracy was not really democratic at all, because the majority of people in democracies do not have the requisite knowledge to vote in their own true interests. Democratic majorities are much too concerned with their families, for instance, and with obtaining better working conditions and better pay, with utilizing their right to start their own businesses, etc., ever to vote to abolish private property.

How stupid, said Lenin. It's a good thing I'm here to "embody the community," because the people

themselves would never vote for their true representatives.

That is how Lenin used to talk, and how communists still talk. And it appears—by his suggestion that we should be embodied or represented, for our own good, by nine unelected lawyers with life tenure on the Supreme Court—that William Brennan considers the court to be something like an American Politburo. . . . But if the “liberal” anti-democratic faction [represented by Brennan and the ACLU] ever gains full control of our government, then we will say, after Lincoln, that we would prefer emigrating to Russia, where we can take our despotism unalloyed.

What a goofy world: Seven years later, Leninists have been expelled from the Kremlin and Brennanists have taken over the White House.

This investigation of recent attacks on the Boy Scouts shows us clearly how the enemies of morality and religion operate pseudo-democratically, and suggests how to defeat them with the real thing.

Douglas A. Jeffrey
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**On the Front Line of the Culture War:
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[The Boy Scout Movement] speaks to every heart its message of duty and honour: 'Be Prepared' to stand up faithfully for Right and Truth, however the winds may blow.

Sir Winston S. Churchill

The Assault on the Boy Scout Tradition

"On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight."

For seven decades, the Boy Scout Oath was considered wholly unexceptional by almost everyone. But in the 1980s it became the target of homosexuals, atheists and (to a lesser degree) feminists. Acting in concert with these groups is the American Civil Liberties Union (ACLU), the legal arm of modern liberalism. At stake is whether private organizations that support traditional morality are protected by the law against assaults by their enemies. Despite its desire just to be left alone, the Boy Scouts of America has found itself on the front line of the culture war.

Scouting was introduced to America in 1910 by its founder, Lord Robert Baden-Powell. In the first articles of incorporation, the Boy Scouts of America (BSA) defined its purpose: "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are in common use by Boy Scouts."

The Scout Oath, which was first published in 1911 in *The Official Boy Scout Handbook*, requires every Scout to obey Scout Law. Scout Law provides that every Scout be trustworthy, loyal,

helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent.

In addition to the Boy Scouts, for boys from 11- to 17-years-old, there are the Cub Scouts and the Tiger Scouts, which begin in the first grade. There is also the Explorers, focusing on exploring careers, for young people of both sexes, ages 14 to 20. Scout troops are sponsored at the local level by churches, schools, and various civic organizations.

The BSA has 4.3 million members and 1.1 million adult volunteers. Approximately one-half of all American boys try Cub Scouting and about one in five become Boy Scouts.

Gays, Godless, and Girls Want In

In 1980 a 17-year-old Scout named Timothy Curran decided to take a male date to his senior prom. The *Oakland Tribune* published a photo of the couple and Curran was called to appear before the Boy Scouts' Mount Diablo Council office in Walnut Creek, California. Executive Director Quentin Alexander told Curran that he could not continue in scouting, stating that "homosexuality and Boy Scouting are not compatible."¹ Curran sued the Boy Scouts, seeking an injunction to prevent them from excluding him from membership and from being a troop leader.

Curran enlisted the ACLU, which claimed that in barring him the BSA violated the "equal public accommodations" section of the state Civil Rights Act. Similar lawsuits have subsequently been filed by James Dale and Chuck Merino, homosexual Boy Scout leaders in Monmouth, New Jersey and San Diego, California, respectively.

In 1989 Elliott Welsh agreed to his 6-year-old son Mark's request to join the Tiger Cubs. But when he discovered at a recruiting meeting in Burr Ridge, Illinois that Mark would have to abide by a religious requirement, he sued the BSA. Two years later attorney James Randall, the Anaheim, California father of nine-year-old twins, sued the BSA for a similar reason: he

¹ Quoted by Carol McGraw, "Gay's Suit Over Expulsion From Boy Scouts Begins," *Los Angeles Times*, September 2, 1980, p. A1.

objected to the Cub Scout Oath for mentioning God. He was assisted by the ACLU.

In 1991 an eight-year-old Florida girl, Margo Mankes, filed suit against the Boy Scouts for excluding her from joining. Though the ACLU was not active in her case, it did express interest in representing several girls from Quincy, California who sought to become Boy Scouts.

The immediate issue in these cases is whether the BSA can continue to function according to its own precepts or will have to abide by those of others. The longer term question is whether traditional morality can be sustained in our democracy. And as a corollary: Can our democracy itself be sustained?

Boy Scout Thinking on Homosexuality

At the Timothy Curran-BSA trial, a Scout official testified that, from the beginning of the Boy Scouts, "it was clearly understood that homosexuality was an immoral behavior and had no place in Scouting for youth or leaders."² Lee Sneath, a national spokesman for the BSA, explained that "as an organization that stresses the values of the family, we believe that homosexuals do not provide the proper role model for youth membership."³

The idea that homosexuality is wrong did not originate, nor will it end, with the Boy Scouts of America. As political scientist Harry V. Jaffa has written:

From ancient—and biblical—times, this practice has been regarded by the greatest legislators and moralists as a vicious sexual perversion. It is condemned equally by the Old and New Testaments, and by Plato in his *Laws*. Thomas Jefferson, in a criminal code written during the American Revolution, made it a felony in the same

² Quoted by Laurie Becklund, "Scouts Can Bar Gay Man as Leader, Judge Rules," *Los Angeles Times*, May 22, 1991, p. B8.

³ Quoted by Carol McGraw, "Gay's Suit Over Expulsion From Boy Scouts Begins," p. A38.

class as rape. In this he only followed the common law.⁴

Nor is the connection between this idea and the family unprecedented or unreasonable:

Mankind as a whole is recognized by its generations, like a river which is one and the same while the ever-renewed cycles of birth and death flow on. But the generations are constituted—and can only be constituted—by the acts of generation arising from the conjunction of male and female. . . . Equally with rape and incest, homosexuality strikes at the authority and dignity of the family. The distinction between a man and a woman is as fundamental as any in nature, because it is the very distinction by which nature itself is constituted.⁵

This philosophical (and common sense) view is of course compatible with traditional religious views: As has been cutely (and acutely) noted about the biblical account of creation, God made Adam and Eve, not Adam and Steve. Thus *The Official Boy Scout Handbook* explains the meaning of “morally straight” in the Boy Scout Oath in these terms: “[w]hen you live up to the trust of fatherhood your sex life will fit into God’s wonderful plan of creation. Fuller understanding of wholesome sex behavior can bring you lifelong happiness.”

Practically speaking, of course, the BSA is also concerned about pedophilia. Although most homosexuals may not be pedophiles, as BSA spokesman Sneath pointed out, the Scouts “provide a natural hunting ground for pedophiles.”⁶ Thus the BSA has launched an aggressive anti-abuse campaign, and guidelines now discourage such traditional practices as skinny-

⁴ Harry V. Jaffa, *Homosexuality and the Natural Law* (Claremont, California: The Claremont Institute, 1990), p. 8.

⁵ *Ibid.*, p. 33.

⁶ Quoted by David Whitman, “Beyond Thrift and Loyalty,” *U.S. News And World Report*, p. 51.

dipping and forbid boys to sleep in the tent of adults other than a parent or guardian.

Article VIII of the BSA Bylaws states: "Our membership standards have been developed to ensure that we have the best possible individuals in our organization, and the enforcement of these standards should not be construed to suggest that any individual in question is not a decent citizen. It simply means that the individual does not possess the requirements necessary for membership in the Boy Scouts of America."

This policy is comparable to that of the American Lung Association, which because of its principles on health probably would not want to be represented by smokers.

Judge Sally G. Disco of the Los Angeles County Superior Court understood that exclusion of homosexuals was critical to the Boy Scout mission:

Inclusion of a homosexual Scoutmaster who has publicly acknowledged his or her homosexuality would either undermine the force of the Boy Scout view that homosexuality is immoral and inconsistent with the Scout oath and law, or would undermine the credibility of the Scoutmaster who attempts to communicate that view.⁷

For Judge Disco—whose decision we will say more about below—the case against the Boy Scouts hinged on whether promoting traditional morality, like promoting public health, is protected by the First Amendment.

Boy Scout Thinking on Atheism

About 30 percent of all Boy Scouts are sponsored by churches, with support coming most heavily from The Church of Jesus Christ of Latter Day Saints, the United Methodist Church and the Roman Catholic Church. This is not surprising: The BSA promotes belief in God and a sense of responsibility to God. On

⁷ Quoted by Laurie Becklund, "Scouts Can Bar Gay Man as Leader, Judge Rules," p. B8.

the other hand, it is nonsectarian in its attitude toward religious training. Boys are encouraged to respect other religions. Indeed, God and religion are understood so broadly that in practice even Buddhists, who do not believe in a Supreme Being, are welcome to join.

Still Elliott Welsh found room to carp. Of course Welsh is no stranger to courtrooms: In 1970 he achieved notoriety when the Supreme Court threw out his three-year prison sentence for claiming conscientious objection status to the Vietnam War on ethical (as opposed to religious, since he is not religious) grounds.

At issue in the Welsh-BSA case were the Tiger Cub Promise and the *Declaration of Religious Principle*. The former consists of 16 words: "I promise to love God, my family, and my country, and to learn about the world." The latter says in part: "The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God and therefore recognizes the religious element in the training of the member." Elliott Welsh characterized this as "bigoted, outmoded boilerplate."⁸

The burden of proof is on Welsh. No less than George Washington held the opposite view. He said in his Farewell Address:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. . . . Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in the Courts of Justice? And let us with caution indulge the supposition that morality can be maintained without religion.

⁸ Elliott Welsh, "Why I Am Suing the Boy Scouts," *Christian Century*, May 9, 1990, p. 484.

Indeed, this view has been held by all of our presidents down to the modern day.⁹ It is woven deep in the fabric of our national life. Alexis de Tocqueville observed in 1848: "An American sees in religion the surest guarantee of the stability of the State and the safety of individuals."¹⁰ And Justice William O. Douglas in 1952:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. [We] sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.¹¹

The BSA prevailed against Welsh's suit, but not James Randall's. Randall has not only sued the BSA on behalf of his sons, but a San Diego Girl Scout troop as well, for denying 6-year-old Nitzya Cuevas-Macias entrance into meetings for refusing to pledge to serve God.

As we will see below, the issue here is whether Justice Douglas's worst case scenario will be enacted into law—whether the *old* liberal idea of freedom *of* religion will be replaced by the *modern* liberal idea of freedom *from* religion.

⁹ See "Statements on Religion and Politics: Washington to Bush," Appendix A in *Moral Ideas for America* (Claremont, California: The Claremont Institute, 1993).

¹⁰ *Ibid.*

¹¹ *Ibid.*

Boy Scout Thinking on Girl Applicants

The Boy Scouts don't accept girls for the same reason the Girl Scouts don't accept boys. Blake Lewis of the BSA explained: "The emotional, psychological and physical needs of young boys are very different in this age group from the needs of young girls."¹² Same sex programs and institutions have been a staple of youth organizations for decades. There is no reason to interpret this as discrimination in the pejorative sense of the word. Indeed, as mentioned above, the BSA's Explorers include girls. And women now comprise three percent of Scoutmasters nationwide.

This wasn't enough for Mark Rubin, the attorney who unsuccessfully represented Margo Mankes. "The Scouts are training boys to be successful," he said. "The Girl Scouts' purpose is to make women better homemakers. There is no alternative as good as the Boy Scouts."¹³

Clearly this is a less serious threat to the BSA, at least for now, than the threats from homosexuals and atheists. So we will not belabor it except to point out that there *are* more reasonable alternatives than suing the Boy Scouts to admit girls, e.g., working to reform the Girl Scouts or founding a new organization for girls.

That such an obviously *unreasonable* route was taken indicates an ulterior motive.

¹² Quoted by Bryan Caplan, "How Do You Get the ACLU Badge?" *Pittsburgh Post-Gazette*, July 27, 1991, p. 7.

¹³ Quoted by William A. Henry III, "Tying the Boy Scouts In Knots," *Time*, July 1, 1991, p. 66.

The Culture War Against the Boy Scouts

Levi Strauss Company, Bank of America and Wells Fargo yanked their donations to the BSA in the summer of 1992 over the exclusion of homosexuals. The United Way of DeKalb County, Illinois, has denied funding to the local BSA council, as has the United Way of the San Francisco Bay Area, which used to donate nearly \$500,000. (Nationwide, the United Way contributes roughly 25 percent of the BSA budget.) In 1993, the San Diego school board voted unanimously to oust the Scouts from running school-day programs in the eighth-largest district in the nation.

In an unusual effort, Lewis S. Albert, the western region acting director of the National Park Service, told his subordinates that they should terminate all agreements with the BSA, such as the use of Boy Scout volunteers in the parks. This directive was overridden by the Bush administration, which told the National Park Service bureaucrats that it was not their business to interfere with the policies of private associations like the Boy Scouts. But less than three weeks into the Clinton administration, Clinton's Interior Department rescinded the Bush override.

How does one make sense of this?

Most Americans have never found the Boy Scouts to be anything but commendable. Recently, however, a very

influential group has come to find it anachronistic. More than that, they want to force the BSA to change or (as they might say) “drag it into the modern world.”

The term “new class,” as employed by social commentator Irving Kristol and others, refers to modern liberals, usually educated at America’s elite colleges and universities, who work in the media, the academy, government, and other non-profit sectors of the economy. Ideologically alienated from “bourgeois” society, they are strategically placed—e.g., in New York, Washington, D.C., Hollywood, and on the faculties of most college campuses, particularly in the humanities, the social sciences and law—to undermine the traditional beliefs and way of life of the American middle class. This “new class” espouses “politically correct” thinking: the view that any departure from the modern liberal agenda is racist, sexist or homophobic, and thus beyond the pale in modern society. Increasingly they resort to the courts, in effect criminalizing politically *incorrect* (i.e., traditional or conservative) policies and even speech.

This tendency to resort to coercion to get their way is the most obvious behavioral trait distinguishing *modern* liberals from their *classical* liberal forbears. Whereas liberals even a generation ago (like Justice William O. Douglas) believed deeply in the Bill of Rights and democracy, modern liberals use charges of racism, sexism, and homophobia as clubs to stifle free debate and bully the majority into submission.

These are the people who have singled out the Boy Scouts for extreme measures.

Discriminating Discrimination

The attackers of the Boy Scouts draw some astounding comparisons. Consider Jon Davidson, Timothy Curran’s ACLU lawyer:

If the Boy Scouts claimed to espouse anti-Semitism, would that excuse exclusion of all Jewish Scoutmasters? If they stated that they believed that blacks

were inferior, would they have a 'right' to practice discrimination against African-Americans?¹⁴

Likewise, Elliott Welsh called the argument that the Boy Scouts should be able to exclude the nonreligious "every bit as compelling as the argument that because black players were excluded from major-league baseball in 1910 they should be excluded today."¹⁵

Let us consider these points one by one.

To compare the exclusion of homosexuals to the exclusion of Jews and blacks—from any organization—is illogical. Those who object to Jews or blacks joining an organization may not rationally assert that what they object to is related to character or behavior. The opposite is true of homosexuals. To speak of homosexuals without addressing sodomy, which is what homosexuals do, is as irrational as talking about vegetarians without discussing vegetables, which is what vegetarians eat. It is precisely their sodomite behavior that defines homosexuals and that the Boy Scouts and the great majority of Americans find objectionable.

Curran explained his goal as being to secure "the same kind of opportunities as everyone else in this country and *not be judged differently because of whom I love*" (emphasis added).¹⁶ Understood this way, homosexuality is akin to adultery and incest and bestiality. It is clearly *not* akin to being black or Jewish.

Nor does the analogy of black ballplayers and atheists work. Blacks were excluded from baseball not for what they believed or didn't believe, which is related to character and behavior, but for their skin color, which is not related to belief or character or behavior and which is not therefore a rational category by which to discriminate between people.

¹⁴ Quoted by Laurie Becklund, "Scouts Can Bar Gay Man as Leader, Judge Says," p. B8.

¹⁵ Elliott Welsh, "Why I Am Suing the Boy Scouts," p. 485.

¹⁶ Quoted by Laurie Becklund, "Scouts Can Bar Gay Man as Leader, Judge Rules," pp. B1, B8.

A much more logical analogy to the Boy Scouts' exclusion of atheists is the exclusion by Honor Societies of students who don't maintain a certain grade point average. In these cases, the exclusion is related to the purpose of the organization. Not so with baseball before Jackie Robinson. Quite the opposite: It was contrary to the purpose of baseball to exclude talented players who could help their teams win games.

When asked when discrimination is permissible, Jon Davidson answered that it "is only permissible under the Constitution when without it the reason for the organization would cease to exist."¹⁷ But this point is in favor of the Boy Scouts: The BSA is a private organization that exists to form boys to be "morally straight," "practice wholesome sex behavior," and love and serve God and country. This purpose obviously precludes the membership of homosexuals and atheists.

By seeking in the courts to force homosexuals and atheists on the Boy Scouts, its enemies seek to destroy the BSA as now constituted.

Who Stands for Diversity?

Why don't those who are excluded from the Boy Scouts establish their own organizations? Isn't that the American way? To found the Gay Scouts or the Godless Scouts of America? Or the Girl Boy Scouts? No doubt the BSA would only greet such news with relief, as its resources could go again to fulfilling its mission rather than to paying its attorneys.

The truth of the matter is that the modern liberal "political-correctness police" are in the business of *limiting* choices rather than offering more. What is perverse in their case is that, unlike real policemen, they pose and are portrayed by the media as the high priests of tolerance and diversity. For example: A task force of the United Way of the San Francisco Bay Area recommended that the BSA "adopt a local policy that is in harmony with the

¹⁷ Quoted by Michael deCourcy Hinds, "In Tests of Who Can Join, Scouts Confront Identity," *New York Times*, June 23, 1991, p. 12.

social diversity, values and spirit of the Bay Area."¹⁸ Ditto *Time* magazine: "What is most troubling in the Boy Scouts' new emphasis on privacy is the hint that the group serves as a retreat for parents who dislike the diverse and tolerant world of today."¹⁹

Time, of course, knows that the BSA's interest in privacy rights is not new; it extends to its origins in 1910. As for who really supports diversity and tolerance, let's be real: it is not the BSA which is suing gays, the godless and girls, but the latter, along with the ACLU, who are suing the BSA.

Culture and Politics

More than 90 percent of Americans proclaim allegiance to God. A similarly huge majority finds sodomy objectionable. The Boy Scout Oath, law, and mission are highly reflective of what most Americans hold dear. It follows that, to a large extent, the BSA's status under the law reflects the status of the American majority. In this way we begin to see the culture war as inseparable from current political and constitutional controversies in America.

Culture reflects the higher ideas, theological and philosophical, that unite society and inform politics. Moral precepts drawn from these higher ideas instruct not only the mores of society, but the legal code as well. "Thou shalt not kill" is at once a biblical commandment, an expression of the natural law of reason, and a positive or man-made law. Such integration of religion's moral prescriptions with the moral tenets of natural and positive law went largely unchallenged until the late 1960s, when those who now form America's "new class" became hostile to American morality and religion.

Today it is no exaggeration to say that America's cultural elite—another description of the "new class"—is at war with the actual culture. This was clear during the controversy over

¹⁸ Jane Gross, "Scouts Warned Over Anti-Gay Stand," *New York Times*, February 19, 1992, p. A7.

¹⁹ William A. Henry III, "Tying the Boy Scouts In Knots," p. 66.

the NEA-subsidized photography of Robert Mapplethorpe. Americans' anger at having their taxes used to create and exhibit pornographic and sacrilegious art was routinely characterized by the media, academics and "progressive" politicians as censorious in the worst sense of the term.

The BSA has been targeted by modern liberals precisely because it promotes the morality that was offended by Mapplethorpe—the morality that upholds marriage and sees the family as the primary force for the elevation of character and thus culture. Against this the cultural elite touts moral neutrality. As we have seen, though, this "neutrality" is deceptive. It claims to accept every faith and every creed, but tolerates no departure from its own relativism. And to enforce its orthodoxy it supports big and intrusive government—especially government's least accountable, nonelected branches, the courts and the bureaucracy.

From the perspective of the cultural elite, then, the central problem with the BSA is not its penchant for exclusivity, but *who* the BSA excludes. Indeed, the elite itself seeks to exclude traditional morality and religion from American society.

The Role and Significance of the ACLU

Coercion is the means of choice of the cultural elite. It seeks to seize the legal arsenal of the state and impose on society a set of rules and regulations that run contrary to existing mores. Whether the issue is speech codes on college campuses, crèches on public property, racial quotas in the workplace, male-only clubs or mother-daughter dinners, the coercive thrust of political correctness is evident. Its motto is not "Inclusiveness or Bust," but "Inclusiveness or Else."

Since the rank-and-file that constitute the American public are not, like the elite, alienated from the traditional American culture—since, in fact, they are resistant to radical social change—the elite must work its will from the top down, using the club of the law. And no one knows better how to swing this club than the American Civil Liberties Union.

A New Understanding of Liberty

In 1920, ten years after the BSA was founded, Roger Baldwin founded the American Civil Liberties Union. At one level the organizations have something in common: they are private, draw heavily on volunteers, and promote freedom. The overarching difference is in their understanding of freedom. Put

simply, the ACLU promotes rights without duties and the BSA promotes the two together.

In the traditional view, there is no contradiction between rights and duties. Both are needed in a free society. As political scientist Francis Canavan has written,

The basic American ideal, in a phrase that the Supreme Court regularly uses, is "ordered liberty". . . . It is a liberty that exists within and depends upon an order of law, of social institutions, and ultimately on moral principles that are widely enough accepted that we can say that they represent society's consensus.²⁰

The new idea held by modern liberals is quite different. According to it, liberty connotes "a radical individualism that rejects all social norms and institutions that the individual has not agreed to."²¹ Subscribers to this idea defend the right of Nazis (who themselves despise the idea of rights) to march through Skokie, Illinois but not the right of Skokians and their elected leaders to maintain order and defend the dignity of the principles and customs they hold most dear. Likewise they support the right of homosexuals and atheists to invade and destroy the Boy Scouts.

The ACLU and Statism

ACLU activists and their supporters seek to restructure American society using the law as their weapon. Their contempt for traditional America is not new: the ACLU was named as a Communist front in the 1930s by Earl Browder, the general secretary of the Communist Party U.S.A.²² Roger Baldwin

²⁰ See "Answers to Questions Commonly Asked by Liberals," Appendix B in *Moral Ideas for America* (Claremont, California: The Claremont Institute, 1993).

²¹ *Ibid.*

²² Frederick R. Barkley, "Calls New Deal Communist 'Front,'" *New York Times*, September 7, 1939, p. 26.

spoke cynically of feigning loyalty to America as he was launching the organization: "We want to get a good lot of flags, talk a good deal about the Constitution and what our forefathers wanted to make of this country, and to show that we are really the folks that really stand for the spirit of our institutions."²³ The ACLU became a vociferous supporter of Stalin's rule in the Soviet Union.²⁴ There was a period between 1940 and the mid-1960s when the ACLU moved to the center. But today it is as radical as ever.

The most direct and lasting way the ACLU impacts American culture and politics is by lodging lawsuits against private associations like the Boy Scouts. How does this work?

America is divided into state and society, or into public and private spheres. As the state grows in power, the authority exercised by individuals in society declines. As the public sphere grows, the private sphere shrinks. We are used to thinking about this give-and-take in regard to the economy, but it operates as well in other areas.

Private associations such as the family, schools, churches, businesses, service clubs, and political parties and organizations stand or mediate in society between the individual and the state. They facilitate the workings of the free market and democratic politics. They form character and transmit culture. American government has traditionally supported them, to the extent it has not just left them alone. Tyrannical states like the former Soviet Union seek to subvert and/or control them.

The autonomy of these associations is as important to a country's political freedom as the free market is to a country's economic prosperity. As Alexis de Tocqueville wrote in *Democracy in America*: "The morals and intelligence of a democratic people would be in as much danger as its commerce and industry if ever a government wholly usurped the place of

²³ Quoted by William H. McIlhany II, *The ACLU On Trial* (New Rochelle, New York: Arlington House, 1976), p. 194.

²⁴ William A. Donohue, *The Politics of the American Civil Liberties Union*, ch. 3.

private associations."²⁵ This is the ultimate stake in the culture war against groups like the BSA.

When the ACLU wins a case against one of these private associations in court, it crows about gaining a right for some individual. But at the same time it has transferred power from the association, thus from American society or the private sphere, to the state. In some cases, when a legitimate right is involved, this is warranted, e.g., when the state removes an abused child from the custody of its parents. But such interventions should be the extreme exception to the rule. If they become customary, the state has superseded the family, to the great detriment—not gain—of liberty as traditionally understood.

This reduction of traditional liberty, and its replacement with modern liberalism's quite new brand of liberty, is the ACLU's goal. For instance, it holds the view (with Hillary Rodham Clinton) that minor children should have standing in court to sue their parents. This would open the family to the same kind of arbitrary regulation by judges to which businesses are now subject under affirmative action laws—in the name, of course, of the rights of children.

The ACLU is driven by an atomistic vision of liberty. It envisions solitary individuals, armed with rights and unencumbered by duties. This vision doesn't conform with reality. When we look at society we do not see solitary individuals. Rather we see constellations of people in association—in families, tribes, cities, churches, businesses, clubs, etc. These groups arise naturally when people are left alone.

This explains the great paradox of the ACLU: its atomistic ideal is so unnatural that its realization (if possible) would require a great coercive power. Thus it is that an organization devoted solely to individual rights seeks in practice the total aggrandizement of the state.

²⁵ *Democracy in America*, ed. J. P. Mayer, trans. George Lawrence (Garden City, N.Y.: Doubleday, Anchor Books, 1969), p. 515.

The ACLU vs. the Family

The ACLU and its modern liberal supporters do not consider any one type of family to be definitive. They believe that children can be raised equally well in any sort of social arrangement. This relativistic approach to marriage and the family explains why they believe that homosexuals should be Scoutmasters.

The ACLU objects to laws which proscribe adultery, prostitution (including street solicitation), cohabitation and polygamy, as well as homosexual marriages. Its New Jersey affiliate has advanced a definition of the family that is so broad that it includes halfway houses for recovering alcoholics and drug addicts.²⁶

In 1986 the ACLU became the first organization in the country to endorse the legalization of homosexual marriages. Among the other rights and benefits it has sought for homosexuals are foster parenthood, employee fringe benefits, insurance benefits, income tax benefits, survivorship, and other economic benefits that accompany the hospitalization of a spouse. And its labors have born fruit: in 1989 New York's highest court held that two homosexual men who had lived together for a decade should be considered a family under New York City's rent-control regulations.

In addition to suing the BSA, the ACLU has gone after Big Brothers, whose central aim is to provide fatherless boys with appropriate role models. Naturally, like the Boy Scouts, Big Brothers reasons that homosexuals do not fit that description.

Columnist William Raspberry, for one, has taken the sane view that homosexuals "could very well destroy an organization like Big Brothers." He notes that between 1982 and 1987 five Los Angeles-area Big Brothers were convicted of sex offenses involving boys to whom they were assigned. He concludes that we should "draw the line at accepting gay couples as foster or

²⁶ "Affiliate Notes," *Civil Liberties*, Fall 1990, p. 10.

adoptive parents and in positions in which the function of role model is primary."²⁷

For both the Boy Scouts and Big Brothers, as for most Americans, children are best raised by a mother and a father. This arrangement is natural, moral, healthy, and holds the greatest promise for happiness. Society has a manifest interest in promoting it. Likewise those groups in society that supply role models.

Modern liberals disagree. The ACLU has successfully challenged laws, like one in Florida, that barred homosexuals from adopting children. In 1992 it persuaded a Surrogate Court judge in New York to approve the adoption of a 6-year-old boy by the lesbian partner of the child's natural mother.²⁸

Despite such victories, the Supreme Court ruling in *Bowers v. Hardwick*, the decision that failed to recognize sodomy as a constitutional right, buttresses claims that homosexuals may be excluded from positions as role models because their sodomite behavior renders them morally unfit. As we will explain below, however, the courts are ultimately undependable when it comes to defending American morality.

The ACLU vs. Religion

Given its atomistic vision of freedom, the ACLU and its supporters see the relationship between freedom and religion (especially monotheism, the antithesis of atomism) as essentially inimical. Thus they intentionally misread the First Amendment as guaranteeing freedom *from* religion, rather than what it plainly says it guarantees and what so many have come to America seeking: freedom *of* religion.

To get a sense of how far the ACLU would go in purging from society all public expressions of religion, consider the

²⁷ William Raspberry, "A Special Case of Discrimination," *Washington Post*, October 14, 1987, p. A19.

²⁸ Ronald Sullivan, "Judge Says Lesbian Can Adopt Companion's Child," *New York Times*, January 31, 1992, p. A16.

following list (it is not exhaustive) of practices the Union has opposed as unconstitutional:

- the tax exemption of churches and synagogues
- crèches and menorahs on public property
- the maintenance of chaplains by Congress
- the maintenance of chaplains by the Armed Services
- a city employees' Christmas pageant at a local zoo
- all blue law statutes
- the singing of "Silent Night" in the classroom
- Christian anti-drug groups who perform in public schools
- all voucher plans and tuition-tax credits
- the inscription "In God We Trust" on coins and postage
- government census questions on religious affiliations
- municipal funding of a platform to accommodate the Pope
- kosher inspectors on the payroll of Miami Beach
- a statue of Jesus underwater off the coast of Key Largo
- the word "Christianity" on town seals
- prayers said in a huddle before a football game

The ACLU's positions on church and state have become so unbending that even "strict separationists" like former board member and professed atheist Nat Hentoff have been taken aback: "When I was elected to the national board of the American Civil Liberties Union some years ago," he wrote, "I thought I would be the most anti-clerical kid on that block." Three years later he left with a bad taste in his mouth: "there are members of that board . . . who see the separation of church and state as so absolute that not a single religious word must be allowed to pass a schoolhouse door."²⁹ Yet recall: the ACLU customarily defends the most obscene and profane words, in schools and everywhere else.

One of the major reasons given for suing the BSA for excluding atheists concerns Boy Scout meetings in public schools. The latter should not be open, opponents say, to promoters of religious faith. The question arises: Why should

²⁹ Nat Hentoff, "Even in High School," *Progressive*, August 1989, p. 13.

young atheists and/or Marxists be allowed to meet after school, and not young believers in God and country?

In 1984 a "Religious Speech Protection Act" was introduced in Congress to ensure students the right to voluntarily engage in religious speech. The ACLU opposed it. Rev. Barry Lynn of its Washington Office warned the House Education and Labor Committee that the bill would render it "hard to tell the classroom from the Sunday school room."³⁰ In the end the bill gained a majority but fell eleven votes short of the two-thirds majority necessary under the special procedure chosen for passage.

After considerable negotiation an "Equal Access" bill was introduced, requiring that if a school permitted one non-curricular and student-initiated (i.e., non-school sponsored) meeting to occur before or after school, it could not deny other student groups the right to hold similar meetings. It passed the Senate by a vote of 88-11, and won in the House by a margin of 337-77. The ACLU's Washington office remained warily neutral. This wasn't good enough for the national board, which came out squarely against the bill. It was this decision that led Nat Hentoff to charge that the ACLU "has become a relentless opponent of student religious groups trying to secure their First Amendment rights under the Equal Access Act."³¹

Wherever there is a nexus, however indirect, between the public sector, however broadly defined, and the promotion of religion, however broadly defined, the ACLU and its modern liberal supporters swing into action. The state grows more intrusive and Americans' natural and constitutional rights fall by the wayside.

³⁰ Quoted by Steven V. Roberts, "House Studies Bill on Student-Run School Prayer," *New York Times*, April 1, 1984, p. 17.

³¹ Nat Hentoff, "Even in High School," p. 14.

The Legal Case Against the BSA

"[T]he Boy Scouts are a public accommodation" according to ACLU executive director Ira Glasser.³² This is the linchpin of the case against the BSA.

Of course, none of its enemies charge that the BSA receives federal or state tax money. That would appear to make it private. But, they argue, the BSA receives indirect public subsidies from the United Way and the public schools, which provide free public space for Scout meetings. (Indeed, public schools sponsor 1.1 million Scouts.) The fine legal question, then, is whether every private organization that is allowed to use public facilities free of charge is thereby converted into a public accommodation and subjected to government regulation and control.

What is a Public Accommodation?

The most important federal public accommodations act is Title II of the 1964 Civil Rights Act. It prohibits private entities from discriminating on the basis of race, color, religion or national origin if it can reasonably be shown that such

³² Glasser's comment was made in the form of a letter to the editor, "Rights and Rules," *National Review*, August 12, 1991, p. 4.

establishments function as public accommodations. This has come to mean, essentially, that places like restaurants, hotels, movie theaters, and establishments covered by the interstate commerce laws cannot discriminate on the basis of race.

Title II uses the terms "place of public accommodation" and "place of entertainment." According to its legislative history, these terms should be interpreted as commonly understood. Thus organizations that do not have a physical site are not covered. Boy Scout activities do not depend upon or necessarily emanate from particular facilities or locations. Meetings typically take place at private homes, schools and churches. Lacking any court finding that suggests that an organization can qualify as a "place," the Boy Scouts have not been found to fall within the framework of Title II.

State public accommodation statutes cover more classes of persons and, more importantly, define public accommodations more broadly. This is especially true in California—the state that delivered the ACLU its victory over the Boy Scouts in the case of the atheist Randall twins—due to the uniquely worded Unruh Act:

All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

This was the crux of *Curran v. Mount Diablo Council of the Boy Scouts of America*. Though the Unruh Act does not mention sexual orientation, the California Supreme Court had previously interpreted it to prohibit discrimination based upon sexual orientation as well as on the categories actually listed. The question remaining was whether the BSA constituted a "business establishment of [any] kind whatsoever" (a phrase obviously much broader than "places of public accommodation"). The trial court ruled that it did not. The appellate court disagreed and reversed.

In the preliminary ruling in *Curran*, Judge Sally Disco homilized that to allow the BSA to discriminate against homosexuals in the name of "American values" would "send a stark message about what the ideals of this country really mean."³³ Nevertheless she ruled against the plaintiff on the grounds that the BSA's First Amendment rights took precedence over the Unruh Act:

[T]he issue, of course, is not whether the defendant's view is correct, or enlightened, or even best calculated to achieve the organization's broader goals. . . . The Supreme Court has long recognized a right to 'engage in association for the advancement of beliefs and ideas.' The converse, a right not to associate, or the right of the group to exclude unwanted members, is also recognized.³⁴

In overturning Disco's decision, the appellate court acted more in accordance with today's judiciary: it ignored the Constitution, relying primarily on a series of cases that had interpreted the Unruh Act broadly. The term "business" meant "everything about which one can be employed." The term "establishment" included everything from "fixed locations" to "permanent commercial forces or organizations." And non-profit organizations had been included. The BSA was nailed.

Again: Outside of California the definition of public accommodations is narrower. In at least four states, courts have rejected the idea that membership in an organization in and of itself is sufficient to qualify as a "place" for purposes of state laws prohibiting discrimination in places of public accommodations. This reasoning was critical in *Welsh v. Boy Scouts of America*.³⁵

³³ Quoted by Laurie Becklund, "Scouts Can Bar Gay Man as Leader, Judge Rules," p. B8.

³⁴ Quoted in "Judge Says Scouts Can Bar Scoutmaster," *New York Times*, May 23, 1991, p. A13.

³⁵ Much of the discussion on public accommodation laws was taken from *Welsh v. Boy Scouts of America*, 787 F. Supp. 1511-1541 (N.D.Ill. 1992). See also Paul Varela, "A Scout Is Friendly: Freedom of

Law and Politics

The anomaly in the above legal account is the decision of Judge Sally Disco: despite her openly stated opposition to the morality of the Boy Scout Oath, she ruled according to the Constitution. It is far more common today for judges to rule according to their personal view of what the outcome of a case should be.

This is no secret. Supreme Court Justice William Brennan, the very model of a modern judge to modern liberals, said the following in a major public speech at Georgetown University in the fall of 1985:

Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress. . . . For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and needs. What the constitutional fundamentals meant to the wisdom of other times cannot be their measure to the vision of our time.

This reasoning opens the door to that new understanding of liberty mentioned above: not liberty meaning that people are left pretty much alone to run their families and their businesses and their churches and to participate in other private associations, but liberty meaning that government (especially as composed by judges and bureaucrats) is left pretty much alone to regulate the private sector, according to the politically correct opinion of the day. The converse of this is a new understanding of limited government: not limited government meaning that the executive, legislative and judicial branches must stick to the powers assigned them in the Constitution, but meaning that the American majority must be limited in what it can do by elite

Association and the State Effort to End Private Discrimination," *William and Mary Law Review*, Summer 1989, pp. 919-965.

opinion, operating again through the bureaucracy and the courts.

Just how far modern liberals have departed from the principles of democracy has been pointed out by political scientist Thomas G. West:

A view of judging that allows justices to consult their personal views of "American justice and fairness," in complete opposition to the majority, and without recurring to the Constitution except as a starting point, is nothing more than a return to the state of things that existed prior to the emergence of democracy in the modern world. . . . In the medieval world, so-called experts unelected by the people—kings, priests, and hereditary aristocrats—ruled on behalf of the majority because the majority could not be trusted to rule itself.³⁶

Understood in this light, recent attacks on the Boy Scouts have little to do with the law and everything to do with politics. The same will be true of the outcome of the culture war.

The battle to defend the Boy Scouts will continue in the courts. But if left on its own there the battle will eventually be lost, given the trend in the law schools and among judges to dismiss the Constitution and the principle of majority rule. The battle must be won politically if it will be won at all.

³⁶ Paper prepared by Thomas G. West for a debate on the "Jurisprudence of Original Intent," held at Southern Methodist University, October 8, 1986.

Defending the Boy Scouts and America

Let us recap what is happening: Powerful groups in America are attacking the Boy Scouts of America, primarily because it teaches boys to believe in God and to follow a moral code that prohibits sodomy. Strangely, these groups launch this attack in the name of rights.

These rights aren't the natural rights in the Declaration of Independence, which were not open-ended and which clearly did not include an unnatural right to sodomy. Nor are they constitutional rights: As Judge Disco saw with regard to homosexuals, and Nat Hentoff with regard to atheists, the Constitution is plainly on the side of the Boy Scouts. In fact, to modern liberals, in Justice Brennan's memorable phrase, natural rights and constitutional rights are relics of "a world that is dead and gone." The rights in whose name they attack the Boy Scouts are new and different.

As most Americans are by now aware, modern liberal judges have transformed the constitutional and statutory prohibitions against unequal protection of the laws based on race into a *mandate* for unequal protection of the laws based on race, i.e., affirmative action. Fewer Americans are yet aware that this arbitrary designation of special rights and privileges is now the rule rather than the exception in most areas of American life. That is, the rights promoted by modern liberals and widely enforced by the courts are *special* rights that attach not equally to people as people, but unequally to people as members of special groups.

Does the Majority Have Rights?

Consider this ironic sidenote: The ACLU has itself been found guilty of violating the very California statute under which it sued the Boy Scouts: In 1987, it was forced to pay damages to Richard Long, who was arbitrarily ejected from a public meeting of the ACLU when he was identified as an off-duty police officer.³⁷ The moral is clear: Because Mr. Long was not a member of a special group with special rights—whether criminals, atheists, homosexuals, or a racial or ethnic minority—he was judged by these “civil libertarians” to have no rights.

Just as members of the majority like Mr. Long have no rights, the majority as a whole is deemed to have no rights under the modern liberal dispensation. It is now customary for judges to tell American majorities that they can't do as they wish, whether it is putting convicted murderers to death or keeping pornography out of their communities or putting their kids in organizations which exclude homosexuals and atheists.

The culture war is being waged in the courts because it can not be won through elections. It is anti-majoritarian. It is a powerful elite minority against the large and increasingly powerless middle class.

Does the Majority Rule?

In the 1980s, ACLU activist and New York University law professor Sylvia A. Law succinctly captured the modern liberal vision of liberty. It is regrettable, she wrote, that “the public/private distinction persists in constitutional doctrine” because in reality “the distinction between public and private is not sharp; it may indeed have no coherent meaning.”³⁸ This is perfectly illustrative of what the culture war means politically. It is also hogwash.

³⁷ See “ACLU Pays for Violating Rights of Cop,” *San Jose Mercury News*, November 15, 1988, p. 1C.

³⁸ Sylvia A. Law, “Economic Justice,” in Norman Dorsen, ed., *Our Endangered Rights* (New York: Pantheon Books, 1984), pp. 146-147.

In the American Constitution the distinction between public and private is very sharp and very coherent. Government is set up to protect our rights to life, liberty, and the pursuit of happiness from threats foreign and domestic. That the government may not become such a threat, it is limited in what it can do. Within those limits, and through the institutions into which government is divided, the majority rules. This arrangement provides for an immense private sector which has been the key to Americans' unprecedented personal freedom and unmatched prosperity for over 200 years.

It is important to remember that despite recent and even future setbacks, American morality and constitutional rights can still be defended. This is true for a very simple reason: The courts can not continue denying the constitutional rights of the majority without the support (whether active or passive) of the elective branches of government. The so-called culture war can still be won by electing leaders at the local, state and national levels who support the traditional family, uphold freedom of religion, believe in limited government, and will appoint judges who respect majority opinion and the Constitution.

"If civil liberties are ever destroyed in this country," Midge Decter has written, "it won't be by boys taking oaths but rather by people intent on stretching the delicate and complex social fabric of this free society beyond its breaking point."³⁹ The BSA is a pawn in the culture war. But it represents perfectly what modern liberals want to destroy and what Americans stand to gain, or save, by defending it.

As Winston Churchill suggested in our epigraph, the Boy Scouts teach boys "to stand up faithfully for Right and Truth, however the winds may blow." That is what Americans are called to do now, for the Boy Scouts and for the best in our tradition that the Boy Scouts uphold—the right and true laws of nature and of nature's God, the charter of our liberty.

³⁹ See Decter's letter, *National Review*, August 12, 1991, p. 4.

Afterword

Court Cases Recent and Pending

Despite continuing attacks on the Boy Scouts from the ACLU and other minions of the administrative state, there are some small glimmers of hope on the judicial front. Duty, honor, country, reverence, morality—these are the ideals that provoke the ideological ire of liberalism. Liberation, self-esteem, “global village,” self assertion and sexual diversity are the precepts of liberalism. And if ideological liberalism has its way, these precepts will be forced upon every organization in the country.

As William A. Donohue points out (pp. 25ff), the legal question is whether the Boy Scouts are a private or public organization. Indeed, liberalism’s assault upon the Boy Scouts is part of a larger war on the right of privacy itself—the annihilation of the individual as a moral actor responsible for his own actions. But courts throughout the nation, both state and federal, are beginning to throw up legal roadblocks to liberalism’s attempt to portray the Boy Scouts as a public organization.

The Federal Court of Appeals, Seventh Circuit, has determined that the Boy Scouts are a private association for purposes of the Federal Constitution and laws. *Sherman v. Community Consolidated School District of Wheeling Township* (1993) involved a challenge to the refusal of membership to an avowed atheist. The school district routinely allowed the Scouts to use school facilities for meetings and permitted the distribution of informational materials on the school grounds. Because the Boy Scouts require belief in a Supreme Being as a condition of membership, the allegation was that the actions of

the school district amounted to a violation of the first amendment's prohibition against the establishment of religion. The court ruled that since the Boy Scouts are a private association there was no official connection between the school district and the Scouts that could amount to "state action" in violation of the first amendment.

Some state courts have been even more emphatic. The Kansas Supreme Court, in its 1995 decision *Seaborn v. Coronado Area Council, Boy Scouts of America*, ruled that the Scouts' unwillingness to accept membership from atheists who refused to endorse the "religious principles of the organization" did not violate Kansas anti-discrimination laws. Although the Boy Scouts recognize and endorse the importance of religious training, the Court noted that "it is absolutely nonsectarian in its attitude toward that religious training." And, because the Scouts are not a "public accommodation" within the meaning of Kansas law, they may refuse to accept membership from those unwilling to profess a belief in and a duty to a Supreme Being.

In the extensive opinion *Dale v. Boy Scouts of America* handed down by a New Jersey superior court in 1995, the refusal to admit a homosexual to a Scout leadership position was upheld. As the court noted, the Scout Oath requires a member to be "morally straight" and the Scout Law requires a member to be "clean." The Scouts consider homosexuality to be a violation of both requirements. The court was emphatic that for the purposes of New Jersey law "Scouting is a sustained program of moral character development for boys," not a business or public accommodation. Indeed, there is no "right" to be a Boy Scout or a Boy Scout leader and anyone attempting to become a member must satisfy the standards and preconditions of membership established by the organization. As the court noted, "the exclusion or termination of an adult leader who openly advocates consensual homosexuality is no less rational than excluding one who advocates any other type of behavior . . . which BSA holds to be morally wrong." Any other decision "would be devastating to the essential nature of scouting." As the court rightly—and cogently—noted, the "basic purpose" of the Scouts is to mold the character of growing boys in such a fashion that at age 18 they could move into an adult world

armed with strong moral principles for their own good and for the good of those around them. That noble ideal (which our society needs so desperately today) requires of them, as boys, a belief in God (the benevolent and loving Creator) and, through the Scout Oath, the Scout Law and the Scout Handbook an adherence to the Ten Commandments and the Golden Rule."

The situation in the California courts—per usual—is somewhat more ambiguous, although even here there is some cause for optimism. In 1994, different districts of the California Court of Appeals handed down contradictory decisions regarding the legal status of the Boy Scouts. California has one of the most sweeping civil rights acts in the nation, the Unruh Act. As noted by Donohue (p. 26) the law forbids discrimination on the basis of sex, race, color, religion, ancestry, or national origin "in all business establishment of every kind whatsoever." In *Curran v. Mount Diablo Council of the Boy Scouts of America* (1994), the Court of Appeal, second district, upheld the right of the Boy Scouts to refuse a leadership position to an avowed homosexual (this was the second court of appeals case of the same name, decided after the one discussed by Donohue on pp. 26-7). Since, the Scouts are "a voluntary expressive association," they are not obliged to accept as leaders those who refuse to accept the moral viewpoints of the organization. Plainly, the court argued, the freedom to associate protected by the first amendment to the U.S. Constitution presupposes as its necessary counterpart the freedom not to associate. The concept of expressive association itself presupposes a community of like-minded individuals who wish to promote "shared ideas, values and philosophies." This associational purpose would, of course, be destroyed if the state could, under the pretext of preventing discrimination, force the association to accept membership from those who did not share these ideas and philosophies. It is odd, the court intimated, that the ACLU (who provided legal representation for the homosexual in this case) would support the expressive activities of the Ku Klux Klan but not those of the Boy Scouts! In reference to the Unruh Act, the court noted that it would be stretching words beyond credibility to rule that the Boy Scouts were a business for the purposes of the act. In any case, the Boy Scouts could assert first amendment freedoms

against state interference with its expressive activities—even if the putative purpose of the state interference was to prevent discrimination.

In *Randall v. Orange County Council, Boy Scouts of America* (1994), the fourth district court of appeals in a perfunctory and high-handed decision ruled that the Boy Scouts were indeed a business for purposes of the Unruh Act and therefore could not exclude potential members merely because they were atheists. Justice Sills demonstrated the absurdity of this ruling in a spirited dissenting opinion:

To read the majority opinion, one would think we are writing about a pizza parlor where the proprietor requires prayers before serving a medium pepperoni with anchovies. It may come as a surprise to my colleagues, but there are those who still seek membership in an organization which teaches duty to God and country and the virtues of order and discipline. The Scouts believe these values breed character and help young men to survive hardship and adversity, whether it be on a cold windswept hill or in the last few miles of a long hike.

The conflicting court of appeals decisions will be resolved by the California Supreme Court in the near future. There is some reason for optimism since a previous state Supreme Court opinion admonished judges “to give meaning to every word and phrase” of the Unruh Act. Most observers have interpreted this to mean that the Court will refuse to extend coverage to situations not clearly within the letter of the statute. And, it should go without saying that no reasonable interpretation can maintain that the Boy Scouts are a business or a place of public accommodation, rather than a private association to promote a common purpose inspired by religion, morality and patriotism.

Another issue involving liberalism’s assault on the Boy Scouts has recently been resolved in California. A number of activist homosexual judges agitated to change the code of judicial ethics to prevent judges from forming any associations with the Boy Scouts because of their alleged “discrimination” against

homosexuals. One judge who served in a Scout leadership position was pressured to resign by these activist judges. Said one homosexual judge, "If you belong to an organization that discriminates against gay men and lesbians then one is fair in assuming that you share that particular bias." The judge who provoked the ire of the homosexuals said that if forced to choose he would leave the bench rather than abandon the Boy Scouts. He noted the ridiculous character of the controversy:

[I]n a previous era, there were people who would have said, "You're not fit to be a judge if you're homosexual." Now some homosexual judges are saying, "You're not fit to be a judge if you're involved in the Boy Scouts."

Subsequently, a mandatory code of ethics was adopted in California barring membership in organizations that discriminate against homosexuals, as well as those that discriminate on the basis of sex, race or religion. *The new code, however, specifically exempts the Boy Scouts and other non-profit youth and religious organizations.* This result was, of course, a bitter disappointment to the ideological agenda of the "gay rights" lobby.

The assault on the Boy Scouts continues and is not likely to end soon. Those who know the vital importance of moral and religious training for young American boys deplore, not only the continued attacks on the Boy Scouts, but the attack on the very ideals that animate the Scouts. Morality and religion are the enemies of the administrative state and the battle to preserve these twin pillars of civilization will not be an easy one. But the stakes are too high not to be prepared.

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