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Summary

The U.S. Supreme Court recently upheld the constitutional right to freedom of association in a case that involved the Boy Scouts. The same principles are at the heart of a current Court case regarding a Texas law prohibiting adult homosexuals to engage in consensual sex. To be consistent, the Supreme Court should embrace the rule of law and uphold the principle of freedom of association in this case.

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“[T]he principles underlying the Boy Scouts decision provide powerful support for the couple’s challenge to the Texas anti-sodomy law.”

Equality before the law for Boy Scouts and gays

Clint Bolick, J.D.

Before this month is out, the Supreme Court will likely issue its second major decision in three years limiting government’s power to infringe freedom of association. Both cases should be applauded by all who believe our Constitution is a charter of liberty.

Despite the fact that both cases embrace the same constitutional values, many of those who cheered the first decision will revile the second, and vice versa. That is because the first decision upheld the right of the Boy Scouts to exclude homosexuals as assistant scoutmasters, while the second likely will strike down a Texas law that prohibits homosexuals from engaging in voluntary sexual acts.

That one’s position on freedom of association depends on one’s position on homosexuals demonstrates how ideologically polarized — and divorced from transcendent neutral principles — constitutional debate has become. Fortunately, the Supreme Court, or at least one or two swing justices, is likely to apply the rule of law to uphold precious liberties in both cases.

Conservatives who agitate for “states’ rights” strongly defend the authority of Texas to criminalize homosexual conduct. Yet they also support action by federal judges against the state of New Jersey when it seeks to prohibit discrimination aimed at avowedly gay scoutmasters. Liberals who champion the right of homosexuals to freely choose their partners on the basis of sexual orientation would deny Boy Scouts the freedom to choose their leaders on the same basis.

The underlying similarity between the two claims can be seen in the way the Boy Scouts framed their constitutional claim. In words that echoed the gay couple’s claim in Texas, the Boy Scouts contended that the New Jersey anti-discrimination law violated their constitutional right “to enter into and maintain . . . intimate or private relationships.”

Although most Americans count freedom of association among their most cherished rights, the Supreme Court rarely has applied that right in unequivocal terms, instead (often somewhat awkwardly) shoehorning freedom of association within other jurisprudential doctrines. In the Boy Scouts case, the court ruled

that the application of New Jersey law to forbid the exclusion of gay scoutmasters violated the First Amendment right of “expressive association” because it would “force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.” Still, the court acknowledged the more fundamental principle that “freedom of association . . . plainly presupposes a freedom not to associate.”

Predictably, the five most conservative justices (Rehnquist, O’Connor, Kennedy, Scalia and Thomas), along with conservative groups, backed the Boy Scouts. The four liberal justices (Stevens, Souter, Ginsburg and Breyer) just as predictably found New Jersey’s interest in protecting homosexuals against discrimination sufficiently compelling to override the Boy Scouts’ right to expressive association. Backing their view were liberal and leading gay rights organizations.

Except one. Gays and Lesbians for Individual Liberty, represented by my organization, the Institute for Justice, submitted a brief disdaining the Boy Scouts’ discriminatory policies but defending their right to maintain them. The brief argued that “[w]hile a creeping infringement of [freedom of association] would harm all Americans, it would particularly threaten the welfare of gay and lesbian Americans, who have historically suffered when government has not respected citizens’ right to gather together free from government harassment.”

John Lawrence and Tyron Garner discovered exactly that when Texas police raided their dwelling on other grounds and arrested them for engaging in homosexual conduct. Although grounded in “expressive association,” which the court has not willingly extended to sexual expression, the principles underlying the Boy Scouts decision provide powerful support for the couple’s challenge to the Texas anti-sodomy law.

Except that the sides have flip-flopped, with conservative groups this time wrapping themselves in the government’s power to police morally offensive behavior, which they eschewed in the Boy Scouts case, and liberals opposing a moral judgment imposed through a law enacted by democratic processes, which they supported in the Boy Scouts case. If past practice holds, at least seven of the justices will flip-flop as well, jettisoning the principles they applied in the Boy Scouts case in order to reach a result in this case more congenial to their ideological predilections. In all likelihood, however, one or two justices — enough to swing a majority — will recognize transcendent neutral principles and reach the right result in the Texas sodomy case, just as the majority did in the Boy Scouts case. In both cases, a slender majority of the court will embrace the rule of law, essential to a free society.

The general rule ought to be that freedom of association prevails and that narrow exceptions to that rule can be justified only by the most compelling justifications. But for such a rule to endure, it must be applied universally, not selectively — to both homosexuals and those who would choose not to associate with them.

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