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17.245 The Supreme Court, Civil Liberties, and Civil Rights
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Discussion 12: Freedom of Association

Herbert Wechsler, a professor at Columbia law school, was a famous critic of the *Brown v. Board of Education* decision. His opposition was not to the outcome of the decision, but to the rationale upon which it was rendered as a matter of constitutional law. He says that the Court effectively took political sides in the decision and that the 14th Amendment does not on its own terms address segregation. Instead, he says that segregation denies blacks and whites the freedom to associate with one another and therefore should be restricted. Professor Charles Black of Yale wrote a rebuttal saying that on issues such as slavery and segregation, there is no way to be neutral, and thus the political stance taken in the Supreme Court's decision and the decision's rationale were justified.

The text of the Constitution does not explicitly state that there is a freedom of association. The First Amendment guarantees the right to peaceably assemble and to petition the government for a redress of grievances. Some think the freedom of association comes from this right of free assembly. Other support for the idea of a right to free association comes from the due process clauses of the 5th and 14th Amendments establishing a right to liberty. Others find it implicit in the 1st Amendment right to free expression.

Discussion of NAACP vs. Alabama, 1958

Background: Attorney General of Alabama asks the local chapter of the NAACP for a host of information about its activities in the state because it was operating as an unregistered foreign corporation. The local chapter furnishes the state with all the information requested except the membership lists, which are not required by law. The NAACP challenges the state's right to require membership lists, saying that allowing the state to compel production of membership information could compromise the organization's members' freedom of association.

The first question the case addresses is the issue of standing. Alabama says that only the members can have standing to bring such a suit, not the NAACP as an organization. The court says that in this case, the only group that could possibly assert standing is the NAACP, and if it didn't have standing, that would preclude the ability of the members to exercise their rights of association:

If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. (NAACP v. Alabama, Findlaw.com)

The court decides that the 14th Amendment protects the members' freedom of association and even though Alabama has not violated members' rights, the only interest the government might have in obtaining membership lists would conflict with the freedom to engage in expressive and associational activities protected by the First Amendment:

*We thus reach petitioner's claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment. Petitioner argues that in view of the facts and circumstances shown in the record, **the effect of compelled disclosure of the membership lists will be to abridge***

the rights of its rank-and-file members to engage in lawful association in support of their common beliefs.

The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, **has taken no direct action**, cf. *De Jonge v. Oregon*, *supra*; *Near v. Minnesota*, [283 U.S. 697](#), **to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order**. See *American Communications Assn. v. Douds*, [339 U.S. 382, 402](#). In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. (*NAACP v. Alabama*, *Findlaw.com*)

The court further recognizes potential "chilling effects" (defined below in "terms") of allowing states to make laws that intimidate groups from performing entirely legal activities that are disfavored by the state:

Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. United States v. Rumely, 345 U.S. 41, 46 -47; United States v. Harriss, 347 U.S. 612, 625 -626. The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment...

The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold. (NAACP v. Alabama, Findlaw.com)

The state's argument fails the compelling interest test: Alabama has no compelling interest in possessing the group's membership list, and therefore, freedom of association takes priority over the state's non-compelling interest.

Important Terms

- Chilling effect: government actions that dissuade or discourage certain actions that citizens have a right to engage in
- Compelling state interest test: if a state violates a right afforded by the Constitution, it may survive constitutional scrutiny if it can assert a compelling interest that justifies the violation of rights, provided the state is not doing more than necessary to protect that interest.

Discussion of Roberts vs. United States Jaycees, 1984

Background:

Jaycees is a national non-profit corporation whose purpose is to pursue "educational and charitable purposes" and to "foster the growth and development of young men's civic organizations" (*Roberts v. United States Jaycees*, [www.findlaw.com](#)). Two local chapters of the Jaycees begin allowing women to be full voting members, in violation of the organization's national membership policy. Before the local chapters have a chance to sue for their right to admit women without having their charter revoked, the Jaycees national organization files suit to prevent enforcement of the Minnesota human rights act, which prohibits gender-based discrimination in public accommodations.

Constitutional Claim:

Jaycees claim that the act forbidding them from discriminating in their membership rules violates their right to free speech and association.

Decision:

Minnesota's compelling interest in eradicating discrimination against its female citizens, an interest unrelated to the suppression of expression, justifies the impact that application of the Act to appellee may have on its male members' freedom of expressive association. *By prohibiting gender discrimination in places of public accommodation, the Act protects the State's citizenry from a number of serious social and personal harms. Assuring women equal access to the goods, privileges, and advantages of a place of public accommodation clearly furthers compelling state interests. In applying the Act to appellee, the State has advanced those interests through the least restrictive means of achieving its ends. There is no basis in the record for concluding that admission of women as full voting members will impede appellee's ability to engage in its constitutionally protected civic, charitable, lobbying, fundraising, and other activities or to disseminate its preferred views. In any event, even if enforcement of the Act causes some incidental abridgment of appellee's protected speech, that effect is not greater than necessary to accomplish the State's legitimate purposes. (Roberts v. United States Jaycees, Findlaw.com)*

Key points in the reasoning of the Supreme Court:

In each step, there is a question the court must answer affirmatively to be able to continue considering the petitioner's claim:

- Does the petitioner have standing? (Is it the petitioner's rights that are at stake?)
- Have the rights of the petitioner been violated, either directly or through the effect of the law?
- Should the rights be protected? (Functionally this means, does the state have a legitimate interest unrelated to the violation of rights? If so, the court will apply one of the prescribed interest tests)
 - Rational Basis Test: requires only a rational basis to sustain a law; typically for economic legislation
 - Strict Scrutiny or the Compelling Interest test, used in cases where rights of specific 'suspect' groups are at stake (racial or ethnic minorities, groups historically discriminated against)
- Can the court provide a remedy? Often in rights cases, this means nullifying a state law, or application of the state law in a specific circumstance. If there is no remedy, the court may not render a decision.

Discussion of Boy Scouts of America v. Dale, 2000

Dale sues the Boy Scouts for his right to participate in the organization, which has a policy of excluding homosexuals. Court of New Jersey rules that allowing Dale membership does not "significantly affect members' ability to carry out their purposes". The Boy Scouts appeal the ruling on grounds that their right to free association entails the right to determine the sexual orientation of their members.

The Court rules that the traditional values of the Boy Scouts and their focus on inculcating youth with such values are inconsistent with allowing a homosexual scout leader. Therefore, the Boy Scouts' rights to free association and exercise of free expression are undermined by forcing them to admit Dale.

The majority opinion cites a number of instances where the scouts' official position on homosexuality might be interpreted to be restrictive of homosexuals. It also cites evidence of internal memos proving the Boy Scouts are opposed to homosexuality. The dissenting opinion, however, challenges each of the interpretations cited in the majority opinion and cites other evidence that sexual orientation is not a part of the value system the Boy Scouts attempt to bestow upon their members.

There is a serious conflict between the rulings in *Roberts v. Jaycees* and *Boy Scouts v. Dale*:

- In *Roberts*, the Supreme Court says that the state can protect women from being excluded from the Jaycees' organization because it is a public accommodation. In *Boy Scouts v. Dale*, the court says that the Boy Scouts may exclude homosexuals because the message of the boy scouts is in conflict with the admission of homosexuals. These two cases seem to have very similar circumstances and issues, yet opposite outcomes.

Additional notes on *NAACP v. Alabama*: the decision frequently cites the case *Bryan v. Zimmerman*, a very similar free association case.

Bryant v. Zimmerman, 1928

A New York statute said that organizations requiring an oath of membership must submit membership lists to the state, with exceptions for a few well-known secret societies (such as the Free Masons). Bryant, a KKK leader, refused to hand over KKK membership lists and was arrested. Bryant sues for his group's freedom of association. His claim was that since they exempted some groups (which the court calls "benevolent orders"), they are being denied equal protection. The Supreme Court affirms the lower court decision that there are two classifications of groups: those "benevolent orders" who intend to do good, and other groups supporting lawlessness or illegal action. The court affirms the state's compelling interest in monitoring groups promoting lawlessness though obtaining lists of their members.

In *NAACP v. Alabama*, the Court says Bryant does not apply because there is an inherent difference between the KKK and the NAACP.