Wisdom aside, is the Boy Scout ban constitutional?
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"I am not now, nor ever have been, a member of the Boy Scouts of America." - Tom Lehrer, "Be Prepared" (1953)

A pending proposal to eliminate a "youth group exception" to Canon 2C of the Code of Judicial Ethics has stirred debate. The proposal is designed to bar judges from membership in the Boy Scouts of America, and bar Scouts members from the bench. Many have addressed the wisdom of the proposal, but few have addressed its constitutionality.

Canon 2C bars membership in organizations practicing "invidious discrimination." Its commentary acknowledges that discrimination might not be "invidious" where a group is "dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest," or where membership "could not be constitutionally prohibited." Since the 1996 adoption of this language, the U.S. Supreme Court has held that membership in the Scouts does enjoy First Amendment protection, suggesting any "exception" might now be superfluous. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). But if it is not constitutionally superfluous, the exception might be constitutionally necessary.

Dale followed a decision that rejected the forced inclusion of speakers who publicly contradicted the position of St. Patrick's Day parade organizers. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston Inc.*, 515 U.S. 557 (1995). The divided *Dale* court upheld the exclusion of a gay scoutmaster to protect a right of "expressive association," while the dissent questioned whether the "mere act of joining the Boy Scouts" would send any "message" contradicting the group's, as did *Hurley*'s forced inclusion of speakers.

New Scouts policies may alter the analysis. A recent account of a gay scoutmaster who had served for nearly a year - until he gave a television interview - suggests the Scouts no longer exclude anyone based on private orientation, but exclude only those whose public speech contradicts the Scouts' message. If so, it means not only that the unanimous *Hurley* rather than *Dale* governs, but that the Scouts' policy might not violate Canon 2C at all.

The Unconstitutional Conditions Doctrine

Could there be a constitutional right to belong to the Boy Scouts, but not a corollary right to be a judge? The high court long ago rejected the notion that individuals could be forced to forego constitutional rights as a condition of office. *Torcaso v. Watkins*, 367 U.S. 488 (1961). *Torcaso* reversed the state court decision, which had held that Maryland could compel a political candidate to profess a belief in God because anyone could avoid the oath by not seeking office.

The unconstitutional conditions rule applies evenhandedly, protecting both nonbelief and belief, so a state may not bar clergy members from public office. *McDaniel v. Paty*, 435 U.S. 618 (1978). Notwithstanding the right to be a minister, and the right to hold office, the *McDaniel* appellant had been unable to "exercise both rights simultaneously because the State ha[d] conditioned the exercise of one on the surrender of the other." The high court held it was unconstitutional to force the minister to choose between two protected rights. As Justice William Brennan's concurrence explained, "Because the challenged provision establishes as a condition of office the willingness to eschew certain protected religious practices, Torcaso v. Watkins ... compels the conclusion that it violates the Free Exercise Clause." (Emphasis added.) If a state may not condition office on eschewing a protected First Amendment right, judges may not be required to quit the Boy Scouts as a condition for service.

McDaniel further addressed the rationale of the proposed revision to Canon 2C. Tennessee had disqualified clergy to ensure neutral and disinterested officeholders, lest their personal affiliations influence their public conduct. It is this noble goal that animates the proposed revisions. But *McDaniel* rejected a presumption of public bias based on private affiliations. The canons thus do not bar judges from belonging even to "discriminatory" religious congregations.

Recent Cases

Still, two post-*Dale* cases offer support for the revisions. In *Evans v. City of Berkeley,* 38 Cal.4th 1 (2006), the court upheld Berkeley's conditioning free marina berths on a promise to eschew discrimination against atheists or homosexuals. Evans relied on U.S. Supreme Court cases allowing a state to attach conditions to the use of its own resources: "A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."

The state thus could decline the carrot of subsidy, but could not impose the stick of penalty. It would violate the constitution to impose "a condition on the recipient of the subsidy rather than on the particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the [publicly] funded program." *Evans* might allow the state to bar judges from letting Scouts meet in their courtroom, but would forbid any penalty (i.e., removal) on judges themselves.

Even restricting the use of state facilities is uncertain. *Evans* recalled how California applies the unconstitutional conditions doctrine more vigorously than federal courts. The court in *Danskin v. Unified Sch. Dist.*, 28 Cal.2d 536 (1946), held the state could not require a group to disavow its First Amendment right - to advocate the violent overthrow of the government - as a condition for meeting on state property. "Since the state cannot compel 'subversive elements' directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly." At a minimum, *Danskin* means that if the state may not compel resignation from the Scouts, it may not make resignation a condition for the privilege of judicial service.

The decision in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), also offers only limited support. The Supreme Court there upheld UC Hastings College of the Law's conditioning official recognition of a student group, and the attendant use of school funds and facilities, on the organization's agreement to open eligibility for membership and leadership to all students.

Like Berkeley, Hastings was "dangling the carrot of subsidy, not wielding the stick of prohibition." It restricted the "particular program or service," not the recipient, and did not "effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the [state] funded program."

Furthermore, Hastings' policy required all groups to accept all members; it required not only the Christian Legal Society to accept non-Christians, but also, inter alia, the Hastings Democratic Caucus to admit Republicans. The policy was "textbook viewpoint neutral" because it did not indicate governmental disapproval of any particular form of expressive association. By contrast, the proposed revision to Canon 2C permits membership in other selective organizations, and thus is not viewpoint neutral.

Martinez further cited "the special characteristics of the school environment" in deferring to Hastings' policy. In sum, *Martinez* needed to balance an organization's "speech and expressive-association rights" against "Hastings' interests as a property owner and education institution," but only the former interest appears here.
A recent federal case thus described the limited reach of *Evans* and *Martinez*. *Cradle of*

Liberty Council Inc. v. City of Philadelphia, 851 F.Supp.2d 936 (E.D. Pa. 2012). Philadelphia, which had allowed a Boy Scouts chapter to use a building rent-free, conditioned continued free use on the chapter's changing its membership policy. The Scouts could abandon the policy, pay $200,000 a year in rent, or vacate the building. *Cradle of Liberty* invalidated these conditions. The court rejected reliance on *Evans* and *Martinez* because neither authorized (1) a penalty for (2) the exercise of a constitutional right.

First, whereas *Evans* concerned only the marina, and *Martinez* concerned only school programs, Philadelphia's condition applied "even in contexts unrelated to the subsidized building." The proposed revision goes even further as it involves no subsidy or use of government resources, and addresses only activities outside that context. It is all stick and no carrot.

Second, *Cradle of Liberty* observed that the *Martinez* policy forbade all selective membership, and the *Evans* plaintiff (the local chapter) disavowed any intent to exclude atheists or gays. Neither case, therefore, authorized adverse treatment based on an organization's specific expressive association.

It is telling that the current commentary to Canon 2C indicates the law must "accommodate individual rights of intimate association and free expression," but the current proposal deletes that imperative. Deleting that language, and those rights themselves, may be the only way to exclude Boy Scouts members from the judiciary. But those are deletions no judicial canon can make. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). However well-intentioned, the proposed revisions probably cannot survive a constitutional challenge.

Mitchell Keiter is an attorney with Keiter Appellate Law in Beverly Hills. He is an appellate law specialist certified by the California Board of Legal Specialization.