

Despite the veterans council's short-term tactic of renaming its parade a protest for the purposes of excluding disfavored groups, a lawsuit asking that gays be included in the parade is still proceeding to the US Supreme Court.

The South Boston Allied War Veterans Council is going to win — and should win — in the US Supreme Court when it argues its right to exclude a gay-and-lesbian organization from marching in its annual St. Patrick's Day Parade. The victory may not please all people of good will, but the results of liberty, free speech, and free association are not always pleasant. From my point of view, as a civil libertarian, there is no alternative.

Many men and women, gay and straight, believe that it is not nice for the veterans council to exclude the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB) from the parade. The veterans say they wish to keep out GLIB not on sexual-orientation grounds but because of the group's message, namely, "We're Irish and gay, we're proud, and we're not going away." Indeed, in the past, the council has never inquired into any marcher's sexual preference, and for years gay individuals have marched in the parade. They have not done so, however, as an identifiable unit seeking to promote a gay group's identity and agenda.

The question here is not what is nice or even preferable as a matter of social policy. The issue is whether the veterans council has the right to promote its own views by holding a private parade in the streets.

Put another way, the question is whether the courts have the power to order the NAACP to allow a Ku Klux Klan contingent to march in white hoods in a civil-rights demonstration. Does the National Organization for Women (NOW) have to allow Operation Rescue to march in a pro-choice parade bearing a visible message very different from NOW's? Can a group of black separatists organize a black-pride parade without having it crashed by white racists carrying slogans demeaning black culture and history, or even by integrationists opposed to separatism?

A lower-court Massachusetts judge provided one answer when he wrote, "Inclusiveness should be the hallmark of [the veterans'] parade," an opinion that was upheld by the state Supreme Judicial Court. If the ideological shoe were on the other foot, I wonder whether the Massachusetts courts would have talked about "inclusiveness." And what, exactly, does that word mean? Does "inclusiveness" connote a society that allows every voluntary group of like-minded people to control its own message and image by selecting who may join in its public manifestations? Or does it mean a society in which the government may insist that



POINT

by Harvey Silverglate

FREEDOM OF SPEECH

people not welcome as members and marchers nonetheless have to be allowed in, even when that distorts the group's intended message and image?

In some situations, of course, the answer depends upon

context. If you run a hotel or a restaurant, the public-accommodations law prohibits exclusion on the basis of race, religion, sex, and, in many places, sexual orientation as well. Staying at a hotel or eating in a restaurant has no ideological content. And if you are holding an event in a public facility, such as a lecture hall, equal access to that event would be reasonable. But, surely, marching under a gay-pride banner in a parade well known for its conservative, family-values theme is not akin to staying at a hotel or eating in a restaurant.

I have maintained since 1992, when the St. Patrick's Day Parade became an issue, that ultimately some court would recognize that the free-speech and freedom-of-association provisions of the First Amendment gave the veterans the right to exclude any group they wished from their privately

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sponsored parade. I also said that the state Supreme Judicial Court was unlikely to side with the veterans ("Freedom Watch," March 11, 1994). Given the highly politicized nature of the controversy, I suggested, it would be hard for the SJC to decide the case according to "the requirements of the law" rather than "according to its emotions [or] the dictates of political correctness."

I've been proven right on both counts.

Why, exactly, is the Supreme Court likely to reverse the SJC's decision? Because GLIB has focused its arguments on the Commonwealth's public-accommodations law while the vets have placed their faith in the First Amendment, which takes precedence constitutionally.

The SJC bought GLIB's argument that the parade, even though paid for with private rather than city funds, was nonetheless a public event and had to be open to all comers. Since, in Boston, St. Patrick's Day coincides with Evacuation Day, a civic and secular holiday, the parade's private funding didn't matter, and the entire public had a right to march with their own chosen banners. (In earlier years, in fact, the vets had accepted some city funds, but when they realized that the price of being subsidized was a requirement that they allow anyone and everyone to march under their own banners, the veterans privatized the parade and gave up the city funds.)

The court also rejected the council's assertion that its parade was a clear expression of "traditional religious and social values" and that those values were incompatible with GLIB's message. The court ruled that because the veterans council had, over the years, allowed a wide variety of organizations and groups to march, this seeming "lack of selectivity" demonstrated that the parade had no expressive theme worthy of free-speech protection.

The SJC's ruling, however, contradicted the findings in a similar case involving the New York St. Patrick's Day Parade. In that case, US District Judge Kevin Thomas Duffy said that New York City could not "re-articulate" the theme of the parade as defined by its sponsor from one of religious, traditional, and family values into one of secular or civic celebration. "By substituting its own version of what the [New York Human Rights] Commission thought the message of the Parade was or should be," he wrote, the city "attempted to dictate what the Parade sponsors would think."

"Such activity," concluded Judge Duffy, "is something one would expect from the 'Thought Police' described by George Orwell."

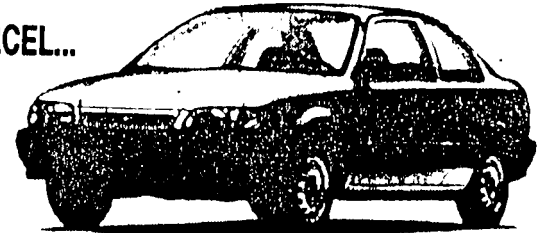
And that's what we must bear in mind. It doesn't matter whether the occasion for sponsoring the parade is a religious holiday, a civic commemoration, a political cause, or any other excuse for marching. The First Amendment gives every group an equal right to promote the image and message it desires. To exercise that right, one group must be able to exclude others whose messages are seen as discordant — since the power to control the marchers is inseparable from the power to control the message. □

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