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# Freedom of Association for College Fraternities after *Christian Legal Society* and *Citizens United*

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Freedom of Association for College Fraternities  
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By Mark D. Bauer<sup>1</sup>

Freedom of association for college<sup>2</sup> fraternities<sup>3</sup> is dead – or is it? Inconsistent decisions considering the extent of such a right (or even whether the right exists at all) impact all social groups. And while it is not unreasonable to find the tortured jurisprudence of the freedom of association convoluted, it is most evident when reviewing court decisions affecting college fraternities.

Of course there is no specific freedom of association recognized in the Constitution or in the Bill of Rights.<sup>4</sup> Yet without a foundational freedom of association underlying the enumerated rights, a right to free speech, religion, or assembly would have little muscle.<sup>5</sup>

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<sup>2</sup> Except when used in reference to a specific institution’s name, the words “college,” “university,” and “school” will be used interchangeably.

<sup>3</sup> The term “fraternities” will be used throughout to describe men’s and women’s college social fraternities, as well as coeducational fraternities. Most “sororities” are formally “women’s fraternities.” WILLIAM R. BAIRD, JACK L. ANSON & ROBERT F. MARCHESANI, BAIRD’S MANUAL OF AMERICAN COLLEGE FRATERNITIES I-12, I-37, IV-1-74 (20th ed. 1991) [hereinafter BAIRD’S MANUAL]. See also Brief for Amici Curiae North American Interfraternity Conference and National Panhellenic Conference in Support of Plaintiffs-Appellees, and in Support of the District Court’s Decision at 1, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111-cv) (noting that the terms sorority and fraternity “are used interchangeably”). Indeed, a number of the so-called “social fraternities” are formally “literary societies.” See, e.g. *Alpha Delta Phi*, at <http://www.alphadeltaphi.org> (last visited June 5, 2012) (fraternity founded as literary society). See generally *Psi Upsilon History*, Psi Upsilon, at <http://www.psiu.org/about/history.html> (last visited June 5, 2012).

<sup>4</sup> *Griswold v. Conn.*, 381 U.S. 479, 483 (1965).

<sup>5</sup> *Id.*; *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 461 (1958).

A focus on college fraternities may at first glance seem an odd test for the boundaries of free association. After all, philanthropic work and social bonds aside, the press is replete with incidents of unacceptable behavior by specific fraternity chapters.<sup>6</sup> The limits of constitutional rights, however, are best tested by unpopular causes. And fraternities present an excellent example of organizations existing for a noble purpose<sup>7</sup> where Americans are regularly denied some or all rights to congregate, socialize, express themselves, or even petition apparatus of the state.<sup>8</sup>

College fraternities have been forbidden or denied recognition at state universities,<sup>9</sup> prohibited from choosing members as they see fit,<sup>10</sup> prevented from advertising their existence,<sup>11</sup> and even stopped from gathering for meetings on campus.<sup>12</sup> But courts have routinely failed to recognize fraternities' associational rights, despite Supreme Court precedent to the contrary that seems to be on point.<sup>13</sup>

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<sup>6</sup> See *infra* n. 24 (discussing incidents of negative fraternity behavior).

<sup>7</sup> See, e.g., Alpha Epsilon Pi Fraternity, Mission Statement, <http://www.aepi.org/?page=MissionStatement> (last visited Feb. 23, 2012); Alpha Tau Omega, *The Creed of Alpha Tau Omega Fraternity*, <http://www.ato.org/AlphaTauOmega/atohistory/atocreed.aspx> (last visited Feb. 23, 2012); Beta Theta Pi Fraternity, *About Beta*, <http://www.betathetapi.org/about.html> (last visited Feb. 23, 2012); Delta Chi Fraternity, Inc., *Values of Delta Chi*, <http://deltachi.org/values/index.php> (last visited Feb. 23, 2012); Delta Tau Delta, *About Us*, <http://www.delts.org/main/about.html> (last visited Feb. 23, 2012); Pi Kappa Alpha, *About Pike*, <http://www.pikes.org> (follow "About Pike" hyperlink) (last visited Feb. 23, 2012); Psi Upsilon, *The Psi Upsilon Experience*, at <http://psiu.org/about.html> (last visited Feb. 23, 2012); Sigma Phi Epsilon, *About SigEp*, <http://www.sigep.org/about/> (last visited Feb. 23, 2012); Zeta Psi at <http://zetapsi.org> (last visited Feb. 23, 2012). See also *Waugh v. Miss. Univ.*, 237 U.S. 589, 596-597 ("It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied.").

<sup>8</sup> See *infra* pt. I(b) and accompanying notes (explaining common restrictions on fraternity associational rights).

<sup>9</sup> *Infra* pt. I(b)(ii).

<sup>10</sup> *Infra* pt. I(b)(i).

<sup>11</sup> *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 142 (2nd Cir. 2007). See also *infra* n. 54-55 (fraternity members may be required to self-censor speech and attire).

<sup>12</sup> *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 148. See also *infra* n. 250 (fraternities may be denied associational rights granted to unaffiliated organizations).

<sup>13</sup> See generally *Roberts v. U.S. Jaycees*, 468 U.S. 609, 621 (1984) (discussing associational rights of voluntary organizations). See n. 177-227 and accompanying text *infra*.

Recently, however, while considering other issues, the Supreme Court has given new hope for fraternities, and indeed all voluntary social organizations. Two decisions concerning other issues, *Christian Legal Society v. Martinez* (“CLS”)<sup>14</sup> and *Citizens United v. Federal Election Commission*,<sup>15</sup> suggest that the groups may have more associational and expressive rights than have been previously recognized.

In Part I, this article will first trace the roots of fraternities, and delve into the expression of associational rights that create some inherent tensions with host colleges. Short of a complete prohibition of fraternities, the vast majority of schools impose rules on fraternities that restrict associational freedoms to some degree. While many are tied to the school’s educational mission and general need to control order and discipline, some of these policies do not appear to be narrowly tailored to that end. Substantially none of these restrictions have been court-tested, and this section will serve merely to highlight the importance of further research and advocacy in this area. Part II will review critical cases that recognize and set parameters for a freedom of association, as well as early case law that considers the rights of fraternities. Part III will examine the *Jaycees v. Roberts* decision, and other cases that directly review whether a freedom of association extends to fraternities and other voluntary social groups, and under what limitations. Part IV will consider *Christian Legal Society and Citizens United*, and how these cases may impact future court decisions concerning any right to association for fraternity members. Part V will present conclusions and suggestions for additional work.

## Part I – The Development of American College Fraternities and Associational Rights

### a. Origins of Fraternities

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<sup>14</sup> *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971 (2010).

<sup>15</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

The first college fraternity, Phi Beta Kappa, was founded at the College of William and Mary in 1776.<sup>16</sup> While now purely an academic honorary organization, Phi Beta Kappa served as the model and catalyst for fraternity development and expansion.<sup>17</sup> The oldest all-male fraternity emphasizing social intercourse is the Kappa Alpha Society, founded in Union College, in Schenectady, New York, in 1824.<sup>18</sup> The oldest all-female fraternity is Alpha Delta Pi, founded at Wesleyan Female College, in Macon, Georgia, in 1851.<sup>19</sup>

From these modest beginnings, the American college fraternity has expanded to over 8612 individual chapters on at least 800 college campuses.<sup>20</sup> Total undergraduate membership in 2012 exceeds 300,000.<sup>21</sup> Fraternities reflect the college population at large from which they are comprised; the relevant age group is capable of generating much controversy through positive and negative behavior.

Statistics show there is much positive about fraternities. In 2009, fraternities contributed approximately 3.6 million hours of community service, raised \$20.1 million for philanthropic causes, and the men's fraternities achieved a grade point average in excess of the general men's

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<sup>16</sup> BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES 5 (J. Robeson ed. 1977).

<sup>17</sup> From its inception, Phi Beta Kappa possessed many characteristics of modern fraternities, including "secrecy, a ritual, oaths of fidelity, a grip, a motto, a badge for external display, a background of high idealism, a strong tie of friendship and comradeship, an urge for sharing its values through nationwide expansion." BAIRD'S MANUAL, *supra* n. 3, at § I-10 (20th ed. 1991). Phi Beta Kappa transformed itself into a purely honorary society with a public ritual after anti-Masonic (and anti-secret) fervor swept the United States; in 1831, William Morgan, who claimed to be a Mason, threatened to betray the secrets of his organization and publish its ritual. *Id.* Morgan was murdered and an anti-Masonic movement spread throughout the United States, resulting in the formation of a major political party, the "Anti-Masonic Party." *Id.* With all the anti-Masonic sentiment in the country, Phi Beta Kappa became a purely honorary fraternity with a non-secret ritual. *Id.*

<sup>18</sup> *Id.* at 6.

<sup>19</sup> *Id.* at 414.

<sup>20</sup> North-American Interfraternity Conference, *Press Room*, <http://www.nicindy.org/press> (last visited Feb. 17, 2012); National Panhellenic Conference, *NPC Statistical Information June 2009*, [http://www.npcwomen.org/resources/pdf/2009%20Stats\\_Final.pdf](http://www.npcwomen.org/resources/pdf/2009%20Stats_Final.pdf) (last visited Feb. 17, 2012).

<sup>21</sup> North-American Interfraternity Conference, *supra* n. 20.

grade point average.<sup>22</sup> The same year, the University Learning Outcomes Assessment (“UniLOA”), conducted by Indiana State University, found fraternity membership was correlated with some increase in critical thinking, communication, and appreciation of diversity.<sup>23</sup> But also in 2009, specific fraternity chapters were alleged to be complicit in hazing, alcohol poisoning, and sexual assault.<sup>24</sup> It is difficult to reconcile these extremes.

Fraternities have been controversial since they were first founded in the United States.<sup>25</sup>

Colleges in America’s early years tightly constrained students' educational choices and "social

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<sup>22</sup> *Id.*; National Panhellenic Conference, *supra* n. 20. The National Panhellenic Conference website does not contain grade point average information for the women’s organizations. See also Rachel Louise Ensign, Four Ways That Colleges Have Raised Graduation Rates, *Chron. Higher Educ.* (Dec. 5, 2010). But see Social Science Research Council College Learning Assessment Longitudinal Study, [http://higherred.ssrc.org/?page\\_id=28](http://higherred.ssrc.org/?page_id=28) (last visited Feb. 17, 2012) (reporting fraternity grade point averages are lower than general student population). See generally Henry Wechsler, *Alcohol and the American College Campus: A Report from the Harvard School of Public Health*, 28 *Change* 20, 20 (July–Aug. 1996).

<sup>23</sup> Center for Learning Outcomes Assessment, Inc., *The American College Fraternity: Impact of Membership on Student Growth, Learning, and Development*, <http://www.measuringbehaviors.com/ImpactofFraternityMembership.pdf> (July 2009).

<sup>24</sup> See, e.g., Jerome Birdy, *Fraternity Suspended During FAU Inquiry*, *S. Fla. Sun-Sentinel* (Dec. 19, 2009) (available at [http://articles.sun-sentinel.com/2009-12-19/news/0912190152\\_1\\_hazing-incident-hazing-research-rapid-fire-drinking-games](http://articles.sun-sentinel.com/2009-12-19/news/0912190152_1_hazing-incident-hazing-research-rapid-fire-drinking-games)); Jim Bush, *University Suspends 1 Fraternity, Places 2 On Probation For Violations*, *Purdue Univ. News Svc.*, (Dec. 11, 2009) (available at <http://www.purdue.edu/newsroom/students/2009/091210MalavendaFraterniti.html>); *Drake Fraternity Members Still in House*, *Des Moines Register* (Dec. 1, 2009); Jennifer Baker, *911 Call Gives Sex Assault Details*, *Cincinnati Enquirer* (Sept. 19, 2009) (available at <http://news.cincinnati.com/apps/pbcs.dll/article?AID=/AB/20090918/NEWS0107/309170094/>); Joanna Lin & Jia-Rui Chong, *USC Fraternity Suspended after Alleged Sex Assault*, *L.A. Times* (Apr. 17, 2009) (available at <http://articles.latimes.com/2009/apr/17/local/me-usc-sexual-assault17>). This Article makes no attempt to answer or judge the problematic behavior of college students in some fraternities, whether that behavior is disproportionate to the general college student population, and whether such behavior would exist without fraternities. Indeed, while none of this behavior is acceptable or excusable, some of it may be traced, at least chronologically, to the demise of college supervision through *in loco parentis*. See *Dixon v. Alabama*, 294 F. 2d 150 (5th Cir. 1961); ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* 5 (Carolina Academic Press 1999); Eric Hoover, ‘*Animal House*’ at 30: *O Bluto, Where Art Thou*, *Chron. Higher Educ.* (Sept. 5, 2008).

<sup>25</sup> The North American college fraternity has remained unique to the United States and Canada, although one fraternity, Zeta Psi, installed a chapter at Oxford University in the United Kingdom in 2008. See Zeta Psi, *Our Chapters*, <http://www.zetapsi.org/about/chapters> (last visited Feb. 29, 2012). While there are certainly student organizations in other nations, none fully replicate the broad diversity of activities found within a fraternity chapter, including fellowship, philanthropy, housing and dining, academic support, networking, and mentoring by alumni. Indeed, many of these prominent features are found within fraternities because colleges did not offer or promote these activities for decades.

life was extremely limited, if it existed at all.”<sup>26</sup> College faculties exercised “absolute power” and “students were regulated closely from morning vespers through the evening meal.”<sup>27</sup> With a curriculum that was “a combination of medieval learning, [and] devotional studies judged conducive to the preservation of confessional religious piety,”<sup>28</sup> students developed secret literary societies, with related mottos, passwords, and symbols to provide a forum for students to “express themselves freely on the foremost topics of the day as well as the more enduring questions prompted by their studies.”<sup>29</sup>

Eventually, the fraternities convinced college faculties that the societies shared intellectual and moral ambitions with the colleges, and could be useful adjuncts in a general education.<sup>30</sup> Meeting a need to ease the tedium of studying classics and religion with fellowship, lively discussion and debate, fraternities filled a void for students and quickly spread to almost every college.<sup>31</sup>

At a time when England had only four universities, the United States already had opened 250 colleges.<sup>32</sup> Most religious denominations founded at least one college.<sup>33</sup> New England

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<sup>26</sup> WILLIAM A. BRYAN, *THE EIGHTIES: CHALLENGES FOR FRATERNITIES AND SORORITIES* 1 (Robert A. Schwartz ed., Am. Coll. Personnel Ass’n Media 1983).

<sup>27</sup> *Id.* The earliest published rules at Harvard stated,

‘Every one shall consider the main end of his life and studies to know God and Jesus Christ, which is eternal life . . . and therefore to lay Christ in the bottom, as the only foundation of all sound knowledge and learning’; each scholar was to read the scriptures twice daily so that he shall be ready to give such an account of his proficiency therein, both in theoretical observations of the language, and logic, and in practical and spiritual truths, as his tutor shall require, according to his ability.’

CHRISTOPHER J. LUCAS, *AMERICAN HIGHER EDUCATION: A HISTORY* 104 (St. Martin’s Griffin 1994).

<sup>28</sup> Lucas, *supra* n. 27, at 109.

<sup>29</sup> BAIRD’S MANUAL, *supra* n. 3, at § I-1.

<sup>30</sup> HANK NUWER, *WRONGS OF PASSAGE; FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING* 102 (Ind. Univ. Press 1999).

<sup>31</sup> Maureen Sirhal, *Fraternities on the Rocks*, Hoover Inst’n Stanford Univ. Policy Review, Feb. 2000, <http://www.hoover.org/publications/policy-review/article/8032> (last visited Feb. 17, 2012).

<sup>32</sup> Lucas, *supra* n. 27, at 117. The English universities each had multiple colleges.

pioneers pushing west founded Carleton and Oberlin.<sup>34</sup> States established public universities to prevent tuition dollars from being spent in other states.<sup>35</sup> Even small towns found that establishing a college would boost the population by bringing faculty and students, as well as enriching the local community financially.<sup>36</sup>

But most of these new colleges had very little money. Some opened with no money, no resources to build even rudimentary facilities, and very few students.<sup>37</sup> Few American colleges had money to build dormitories.<sup>38</sup> Fraternities not only filled a social void, but also began to supply members with room and board.<sup>39</sup>

Colleges that previously had been opposed to fraternities because of their secrecy, or at least had not wholly approved of the organizations, now enthusiastically welcomed fraternities and encouraged them to provide lodging and board services for their students.<sup>40</sup>

After World War II, many colleges received large sums of money from government grants and increased their size to accommodate returning veterans – who received government-

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<sup>33</sup> OSCAR HANDLIN & MARY F. HENDLIN, *THE AMERICAN COLLEGE AND AMERICAN CULTURE: SOCIALIZATION AS A FUNCTION OF HIGHER EDUCATION* 25 (McGraw-Hill Book Co. 1970). Many of the earliest American universities had religious affiliation. Presbyterians founded Princeton, Congregationalists founded Dartmouth, Baptists founded Brown, and the Dutch Reformed Church founded Rutgers. Lucas, *supra* n. 27, at 105-06.

<sup>34</sup> Lucas, *supra* n. 27, at 118.

<sup>35</sup> *Id.* at 117-18. Many of these colleges were founded before the Morrill Land-Grant Acts of 1862 and 1890, 7 U.S.C. §§ 301, 321, which promoted the creation of agricultural and mechanical colleges.

<sup>36</sup> Handlin & Hendlin, *supra* n. 33, at 25-26 (McGraw-Hill Book Co. 1970).

<sup>37</sup> Lucas, *supra* n. 27, at 117.

<sup>38</sup> *Id.* at 117, 125-28. See generally Handlin & Hendlin, *supra* n. 33, at 27. Influential German universities did not concern themselves with dormitories or supervising student activities, and this encouraged many American colleges to focus only on classroom activities. GREGORY A. BARNES, *THE AMERICAN UNIVERSITY: A WORLD GUIDE* 28, 33 (ISI Press 1984); Lucas, *supra* n. 27, at 142; BAIRD'S MANUAL, *supra* n. 3, at § I-14.

<sup>39</sup> BAIRD'S MANUAL, *supra* n. 3, at § I-14; Guillermo de los Reyes and Paul Rich, Housing Students: Fraternities and Residential Colleges, 585 *Annals of the American Academy of Political and Social Science* at 121 (January 2003).

<sup>40</sup> MARIANNE R. SANUA, "HERE'S TO OUR FRATERNITY": ONE HUNDRED YEARS OF ZETA BETA TAU 1898-1998 3 (Brandeis University Press 1998). "[F]ew presidents failed to perceive the advantages of the fraternities, which took the college out of the lodging business, freed capital for other uses, and spared the faculty the tasks of supervision." Handlin & Hendlin, *supra* n. 33, at 40.

paid tuition under the GI Bill.<sup>41</sup> Colleges built dormitories and improved campus life, and often saw less need for fraternities.<sup>42</sup> While hazing may have existed prior to World War II, the returning veterans brought military-style hazing into fraternities, not only endangering new members, but creating justifiable conflict between fraternities and their host colleges.<sup>43</sup>

#### b. Common Restrictions on Fraternity Associational Rights

Litigation sometimes occurs when a university bans all fraternities, or engages in a contentious disciplinary matter with one or more fraternities.<sup>44</sup> But most associational restrictions on fraternities are neither litigated nor discussed in academic literature, at least with regard to the First Amendment.

The most troubling restrictions occur at public universities; as arms of the state "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>45</sup> Still, there may be some limits to the extent private colleges can regulate fraternities that are otherwise permitted to exist, particularly when such regulation creates profoundly disparate treatment between student organizations.<sup>46</sup>

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<sup>41</sup> Lucas, *supra* n. 27, at 203-04

<sup>42</sup> *Id.*

<sup>43</sup> See Michael Locke, *Hazing in Historical Perspective*, Inside Hazing, <http://www.insidehazing.com/headlines.php?headlines2Page=46&idno=1172> (Mar. 31, 2009); Lambda Chi Alpha Fraternity, *Fraternity News: Hazing's Culture*, Cross & Crescent, <http://stage.lambdachi.org/candc/hazings-culture> (Nov. 2006). See generally HANK NUWER, *WRONGS OF PASSAGE; FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING* 128 (Indiana Univ. Press 1999).

<sup>44</sup> See *e.g.*, *Phelps v. Presidents and Trustees of Colby College*, 595 A.2d 403 (Me. 1991) (discipline of students for participation in a fraternity after abolition of all fraternities); *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F.3d 435, 439 (3d Cir. 2000) (suspension of a fraternity); *Psi Upsilon v. University of Pennsylvania*, 591 A.2d 755, 758 (Pa. Super. Ct. 1991) (same).

<sup>45</sup> *Tinker v. Des Moines Indep. Co. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>46</sup> At least two courts would agree that the distinction between private and public colleges is blurred, leaving open the possibility that private colleges could be treated as state actors. Judge Skelly Wright held that the activities of a private university constitute state action: "[c]learly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on

Nonetheless, without the very public battle of abolishing an entire fraternity system, or denying recognition (or existence) to a particular fraternity chapter, a large number of colleges, both public and private, have regularly curtailed, foreclosed, or otherwise disrupted the rights of fraternities to freely associate.<sup>47</sup> These restrictions may be directly related to the success of fraternities, and a response by colleges to assert greater control over campus student life, as well as to create a stronger institutional bond with each undergraduate than that created by fraternity membership. Indeed, even some colleges with consistently well-run and well-behaved fraternities may believe that greater restrictions on the associational freedoms of these organizations will lead to higher national rankings.

These restrictions fall across a wide array of associational activities and may be quite narrowly or extremely broad. Some of the broader restrictions on fraternities by colleges are unique in the way they chill associational rights, and go well beyond settled case law. The academic literature thus far has not attempted to catalogue all the restrictions, let alone determine

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governmental action . . . ?” *Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855, 859 (E.D. La. 1962), *vacated*, 306 F.2d 489 (5th Cir.). On remand no state action was found, 212 F. Supp. 674 (E.D. La. 1962). *See also* *Alpha Tau Omega v. Univ. of Pa.*, 10 Phila. 149, 150 n.1 (Common Pleas Ct. 1983) (the University of Pennsylvania “receives substantial support from the Commonwealth of Pennsylvania . . . many of its students received federal grants . . . [i]t is also subject to regulations as are state institutions of higher education and state affiliated institutions . . . Providing higher education has traditionally been a state function . . . At least since 1862, pursuant to the First Morrill Act, it is a matter of national policy that higher education is a public function”). Other courts, however, have used similar logic in finding state action in a private university. *Ryan v. Hofstra Univ.*, 67 Misc. 2d 651, 663-69, 324 N.Y.S.2d 964, 977-83 (Sup. Ct. 1971), *supplementary judgment*, 68 Misc. 2d 890, 328 N.Y.S.2d 339 (Sup. Ct. 1972) (private universities perform a “governmental function” and the state financed and regulated “private” universities). Other courts have disagreed, *see e.g.*, *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971) (act of college not state action); *Blackburn v. Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971) (same); *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969) (same); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968) (same); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968) (same).

<sup>47</sup> Sometimes these powers are devolved from the college to a student organization, such as a student government or an interfraternity council.

whether a public or even a private<sup>48</sup> college can take substantially any action against its own students and student groups. This section is intended to be a start.

The associational restrictions colleges place on fraternities have many different names, but generally fall into consistent categories: i) structured and deferred recruitment; ii) permission to exist and requirements relating to national affiliation; iii) restrictions on housing options; and iv) regulating membership and even banning all fraternities. This article will review each in turn.

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<sup>48</sup> The essential nature of the relationship between a private college and its students is one of contract, and that infringement of civil rights by a private college is not attributable to the state. See e.g., *Psi Upsilon v. Univ. of Pa.*, 591 A.2d 755, 758 (Pa. Super. Ct. 1991); *Boehm v. Univ. of Pa. Sch. of Veterinary Med.*, 573 A.2d 575, 578 (Pa. Super. 1990) (citing *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir.1961), *cert. den.*, 368 U.S. 930 (1961)); Hoover, *supra* n. 73. See generally *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982); Valier L. Brown, *College Fraternities and Sororities: Tort Liability and the Regulatory Authority of Public Institutions of Higher Education*, 58 Educ. L. Rep. 1, n. 13 (Mar. 5, 1990); Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive In The 1990s?* 18 J.C. & U.L. 419, 428-29 (Spring 1992); Robert E. Manley, *First Amendment Freedoms on Private Campuses*, *Fraternal Law* (March 1992); Terrence E. Milani & William R. Nettles III, *Defining the Relationship Between Fraternities and Sororities and the Host Institution in Fraternities and Sororities on the Contemporary College Campus*, 1987 *New Directions for Student Svcs.* 40, 57-74 (Winter 1987); Ralph S. Rumsey, *Legal Aspects of the Relationship Between Fraternities and Public Institutions of Higher Education: Freedom of Association and Ability to Prohibit Campus Presence of Student Membership*, 11 J.C. & U.L. 467 (1985). Therefore while there may be some issues related to ending a fraternity system for existing students, there is no legal dilemma to forbidding newly matriculating students from joining fraternities. Private colleges that have banned existing fraternities include Williams, Amherst, Colby, and Bowdoin. See Leo Reisberg, *Fraternities in Decline*, *Chron. Higher Educ.* (Jan. 7, 2000); Sirhal, *supra* n. 31. Hamilton and Denison permit only non-residential fraternities. Alan D. Miller, *Denison Braces for Possible Trouble Over Fraternity Vote*, *COLUMBUS DISPATCH*, Apr. 19, 1995, at 1A; *Hamilton Coll.*, 1996 WL 172652 at \*3; *Trustee Resolution Concerning Fraternities*, Apr. 23, 1994, reprinted in *DENISON MAGAZINE*, Spring 1995. Middlebury permits only coeducation fraternities. Timothy Spears, *Blogs Dot Middlebury, One Dean's View, Further (Historical) Observations on Fraternities and Sororities*, <http://blogs.middlebury.edu/onedeanview/2009/04/21/further-historical-observations-on-fraternities-and-sororities> (Apr. 21, 2009). Some schools have never permitted fraternities, including the University of Notre Dame, Brandeis University, Rice University, and Georgetown University. Katie Perry, *Domers Defend Dorm Life at Notre Dame*, *The Observer* (Notre Dame, IN), <http://www.ndsmcobserver.com/2.2754/domers-defend-dorm-life-at-notre-dame-1.265824> (updated Aug. 11, 2009) (last visited Mar. 2, 2012); Brandeis Student Handbook, *University Policy on Fraternities and Sororities*, 36, <http://www.brandeis.edu/studentaffairs/srcs/pdfs/rr2009.pdf> (last visited Mar. 2, 2012); Rice Historical Society, *Timeline*, [http://www.ricehistoricalsociety.org/timeline\\_20.html](http://www.ricehistoricalsociety.org/timeline_20.html) (last visited Mar. 2, 2012); Georgetown Univ., *Speech and Expression Policy*, ¶24, <http://studentaffairs.georgetown.edu/policies.html#SpeechandExpressionPolicy> (last visited Mar. 2, 2012). It is, however, ironic, that at some of the nation's finest liberal arts colleges, inspiring students to confront and embrace knowledge, fraternities must meet in secret to avoid expulsion. See Sirhal, *supra* n. 31. Even if the relationship between a college and its students is one of contract, query whether some of these restrictions on associational rights are so severe as to make the contract unconscionable.

i. Structured and Deferred Recruitment

Fraternalities do not exist in a vacuum, and ideally serve as useful adjuncts to a college's program of education. Thus in order to encourage students to bond first to the college, rather than the fraternity, as well as to allow students time to immerse themselves in classroom activities without distraction, a large number of colleges have required fraternities to postpone recruitment.<sup>49</sup> These deferrals can be as long as weeks, months, semesters, or years.<sup>50</sup> Many colleges bar recruitment unless and until a student has achieved a specific minimum grade point average,<sup>51</sup> or earned a specified number of credit hours.<sup>52</sup>

These rules facially restrict free association, but may be tied to a goal of furthering a college's educational mission; they may, however, prevent entering students from getting to know, and being mentored by, upperclassmen.<sup>53</sup>

Some colleges have rules, however, that go much further, leading to odd restrictions on speech and association. For example, a fraternity member may be required to censor speech with

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<sup>49</sup> In 2007, the University of Miami reported that 156 colleges deferred recruitment from the fall for freshmen. Greg Linch, *U Miami to Defer Fraternity, Sorority Rush for Freshman*, *The Miami Hurricane* (Mar. 9, 2007). See, e.g., Elizabeth F. Farrell, *Fraternity Leaders Oppose Rule That Would Postpone Rush Activities in Bid to Curb Alcohol Abuse*, *Chron. Higher Educ.* (Apr. 1, 2005); BAIRD'S MANUAL, *supra* n. 3, at I-10; Lance Vaillancourt, *CU's Frats Happy to Stay Independent*, *Daily Camera* (Apr. 24, 2009).

<sup>50</sup> See, e.g., Baylor University, *IFC and Local Fraternity Recruitment*, <http://www.baylor.edu/studentactivities/greeklife/index.php?id=74966> (last visited Feb. 23, 2012); Princeton University, *Princeton to Ban Freshman Affiliation with Fraternities, Sororities as of Fall 2012*, <http://www.princeton.edu/main/news/archive/S31/40/49Q43/index.xml?section=topstories> (Aug. 23, 2011); Wake Forest University, *Interfraternity Council*, <http://wakeforest.orgsync.com/org/wfugreek/ifc> (last visited Feb. 23, 2012); BAIRD'S MANUAL, *supra* n. 3, at I-10.

<sup>51</sup> See, e.g., Cornell University, *Greek Life*, [http://dos.cornell.edu/greek/info\\_for\\_students](http://dos.cornell.edu/greek/info_for_students) (last visited Feb. 23, 2012); University of Central Florida, *Fraternity and Sorority Life*, <http://fsl.sdes.ucf.edu/join> (last visited Feb. 23, 2012); BAIRD'S MANUAL, *supra* n. 3, at I-10.

<sup>52</sup> See, e.g., Gettysburg College, *Fraternity Recruitment*, [http://www.gettysburg.edu/about/offices/college\\_life/greek/fraternityrecruitment](http://www.gettysburg.edu/about/offices/college_life/greek/fraternityrecruitment) (last visited Feb. 23, 2012); Texas Tech Greek Life, *Recruitment Information*, <http://ttu.orgsync.com/org/ttuifc/recruitment> (last visited Feb. 23, 2012); BAIRD'S MANUAL, *supra* n. 3, at I-10.

<sup>53</sup> See, e.g., W. Raymond Ollwerther, *Freshman to Be Prohibited from Fraternities, Sororities*, *Princeton Alumni Weekly*, <http://paw.princeton.edu/issues/2011/09/14/pages/3739/index.xml> (Sept. 14, 2011).

students who are not members of fraternities, or to avoid all mention of fraternities.<sup>54</sup> Fraternity members may be barred from wearing apparel with fraternity letters or logos at certain times during the school year.<sup>55</sup> Some colleges have required fraternities to admit any student seeking membership in a fraternity.<sup>56</sup> Such restrictions may begin to impinge on a freedom of association.<sup>57</sup>

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<sup>54</sup> See e.g., Hope College, *Rush Rules*, <http://www.hope.edu/student/life/greek/rushrules.html> (last visited Feb. 23, 2012); Columbia University, *Columbia University Panhellenic Council Formal Recruitment Rules and Ethics*, [http://www.columbia.edu/cu/panhel/Panhellenic/Documents\\_files/Recruitment%20Rules-2011%20Final%20version.doc](http://www.columbia.edu/cu/panhel/Panhellenic/Documents_files/Recruitment%20Rules-2011%20Final%20version.doc) (last visited Feb. 23, 2012); University of Denver, *Membership Recruitment Rules and Procedures*, [http://du.orgsync.com/org/dugreeklife/Sorority\\_Recruitment\\_Rules](http://du.orgsync.com/org/dugreeklife/Sorority_Recruitment_Rules) (last visited Feb. 23, 2012); Furman University, *Constitution of the Inter-Fraternity Council of Furman University*, <http://ifc.furman.edu/storage/IFCConstitutionJan09.pdf> (amended Jan. 17, 2009); Josh White, *Unfair Sorority 'Silence Period' Shrouds Reality*, *Michigan Daily* (Ann Arbor, MI) (Sept. 16, 1997); Inter-Fraternity Council University of Virginia, *Regulations*, [http://www.student.virginia.edu/~ifcouncil/rush\\_regulations.php](http://www.student.virginia.edu/~ifcouncil/rush_regulations.php) (last visited Feb. 23, 2012); Massachusetts Interfraternity Council, *Recruitment Rules 2011*, <http://ifc.mit.edu/docs/2011%20rush%20rules.pdf> (last visited Feb. 23, 2012).

<sup>55</sup> See, e.g., Dax Thomas, *Post-Break Panhellenic Rules Bar Wearing Letters*, *Daily Pennsylvanian* (Philadelphia, PA), (Dec. 2, 2003) (available at [http://thedp.com/index.php/article/2003/12/postbreak\\_panhellenic\\_rules\\_ban\\_wearing\\_letters](http://thedp.com/index.php/article/2003/12/postbreak_panhellenic_rules_ban_wearing_letters)); Penn State University Panhellenic Council, *2009 Recruitment Code of Conduct*, [http://www.greeks.psu.edu/phc/Recruitment\\_Code\\_of\\_Conduct.doc](http://www.greeks.psu.edu/phc/Recruitment_Code_of_Conduct.doc) (last visited Feb. 23, 2012). See also Baylor University, *Pan-Hellenic Recruitment Policies*, <http://www.baylor.edu/studentactivities/greeklife/index.php?id=76214> (last visited Feb. 23, 2012); Cal State Polytechnic University, Pomona, *Greek Life Guidelines*, [http://dsa.csupomona.edu/osl/greeklife/files/CPG\\_Greek\\_Life\\_Policies-Draft\\_1\\_7777.pdf](http://dsa.csupomona.edu/osl/greeklife/files/CPG_Greek_Life_Policies-Draft_1_7777.pdf) (last visited Feb. 23, 2012). In addition, some colleges seek volunteers to counsel students on recruitment, and forbid these counselors from wearing fraternity sportswear or otherwise demonstrating their affiliation with a fraternity. See, e.g., East Central University, *Recruitment Rules*, [http://www.ecok.edu/campus\\_life/greek\\_life/recruit\\_rules.htm](http://www.ecok.edu/campus_life/greek_life/recruit_rules.htm) (last visited Feb. 23, 2012); Interfraternity Council Emory, *Bylaws*, [http://euifc.com/files/library/IFC\\_Bylaws\\_Jan\\_2012.pdf](http://euifc.com/files/library/IFC_Bylaws_Jan_2012.pdf) (last visited Feb. 23, 2012); University of California at Merced, *Recruitment Advisor Application Packet 2011–2012*, <http://fraternitysorority.ucmerced.edu/sites/fraternitysorority/files/public/Rho%20Alpha%20Application%20-%202011-12.doc> (last visited Feb. 23, 2012).

<sup>56</sup> See, e.g., Philip F. Smith, *The Demise of Fraternities at Williams*, *Chron. Higher Educ.* (Apr. 2, 1999); Zachary Rosenfeld, *Esty Raises the Bar for Class Presidents*, *The Amherst Student* (Amherst, MA), Oct. 25, 2005, <http://amherststudent2.amherst.edu/current/arts/view.php?year=2005-2006&issue=07&section=arts&article=02>; *New Dorms Threaten Amherst Fraternities*, *Harvard Crimson* (Cambridge, Mass.), Mar. 26, 1962, <http://www.thecrimson.com/article/1962/3/26/new-dorms-threaten-amherst-fraternities-pa> (last visited Feb. 23, 2012); WILLIAM R. BAIRD & JOHN ROBSON, *BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES* 31 (17TH ed. 1963). See generally *Frank v. Ivy Club*, Nos. PL 05-1678, 05-1679, 05-1680, at 5 (N.J. Dep't of Law & Public Safety, Div. on Civil Rights, Finding of Probable Cause, Feb. 6, 1986) (noting that most eating clubs at Princeton University used a lottery system to choose new members).

<sup>57</sup> *Healy v. James*, 408 U.S. 169, 181 (1972) (“If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students.”).

Fraternity recruitment, when permitted, may be extensively regulated by a college. A common requirement is to allow for recruitment only during a specific period of time.<sup>58</sup> The likely reason for this is that it imposes fewer burdens on both the fraternity members and the new recruits when their primary attention should be on school work. Still, it is possible that a shortened recruitment season may have the unintended consequence of forcing students to focus too heavily on recruitment during a shortened period. Shorter recruitment periods favor larger fraternity chapters, which can spread the work between more members than a smaller chapter.<sup>59</sup>

Restrictions on recruitment are often created to protect academically challenged students. A college may require students to maintain a grade point average above a certain level before becoming eligible for membership, or at least be a student in good standing academically.<sup>60</sup> A college may require that fraternities limit membership to students attending the host institution, barring association with others.<sup>61</sup>

Recruitment activities may be carefully regulated by a college. Restrictions often include a ban on alcohol,<sup>62</sup> perhaps uncontroversial since the vast majority of students entering school

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<sup>58</sup> See, e.g., Lehigh University, *Strengthening Greek Life*, <http://www.lehigh.edu/ofsa/strengtheningqa.shtml> (last visited Feb. 23, 2012) (four weeks); Northern Arizona University, *Fraternity Recruitment*, <http://home.nau.edu/greeklife/fraternityrecruitment.asp> (last visited Feb. 23, 2012) (seven days); San Diego State University, *Joining a Fraternity or Sorority*, <http://greeklife.sdsu.edu/join.html> (last visited Feb. 23, 2012) (five days).

<sup>59</sup> See generally *Winning Formal Recruitment (aka Rush) at Sigma Phi Epsilon*, <http://www.sigep.org/documents/winning-formal-recruitment.pdf>; Tiffany Webber, *Rush Ends, Reactions of Frats Vary*, *The Chronicle* (Durham, NC), Feb. 1, 2006, <http://dukechronicle.com/article/rush-ends-reactions-frats-vary>.

<sup>60</sup> See, e.g., Miami University of Ohio, *Fraternity Eligibility Requirements*, <http://www.units.muohio.edu/saf/gra/IFCRecruitment.htm> (last visited Feb. 21, 2012) (minimum GPA of 2.5). Ironically, studies show that fraternity members are far more likely to graduate than non-fraternity members, and some studies suggested that fraternity members achieve a higher grade point average than non-fraternity members.

<sup>61</sup> See, e.g., Johns Hopkins University, *Office of Greek Life Policies*, [http://web.jhu.edu/studentlife/greek\\_life/greeklifepolicies.html](http://web.jhu.edu/studentlife/greek_life/greeklifepolicies.html) (last visited Mar. 1, 2012) (“membership must be exclusive to students of Johns Hopkins University.”).

<sup>62</sup> See, e.g., Elizabeth F. Farrell, *Berkeley Bans Booze in the Greek System*, *Chron. Higher Educ.* (May 20, 2005); Inter-Fraternity Council University of Virginia, *Regulations*,

are under twenty one years of age. But schools may also dictate specifically what types of activities are permitted or prohibited.<sup>63</sup>

It is uncontroverted that colleges may regulate student activities.<sup>64</sup> Some of these restrictions, however, particularly regarding speech and character of activity, may go beyond even the most expansive reading of court decisions on school regulations.<sup>65</sup>

## ii. Permission to Exist and Requirements Relating to National Affiliation

Many schools tightly regulate the number of fraternities permitted to be affiliated with a college.<sup>66</sup> Even schools that otherwise deny student organization recognition to fraternities may

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[http://www.student.virginia.edu/~ifcouncil/rush\\_regulations.php](http://www.student.virginia.edu/~ifcouncil/rush_regulations.php) (last visited Feb. 23, 2012) (no alcohol permitted during recruitment); MIT Division of Student Life, *Policies and Procedures*, <http://studentlife.mit.edu/mindandhandbook/policiesandprocedures/risk> (last visited Feb. 23, 2012) (same); University of California Irvine, *Dry Rush Enforcement Board Policies and Procedures*, <http://www.dos.uci.edu/greeklife/documents/IFC%20-%20DREB%20PROCEDURE.pdf> (last visited Feb. 23, 2012) (same). See *supra* n. 22.

<sup>63</sup> See, e.g., Cornell University, *Interfraternity Council*, <http://www.cornellifc.org/Recruitment/Formal%20Recruitment.html> (last visited Feb. 23, 2012) (schedule includes list of permitted activities); Furman University, *Constitution of the Inter-Fraternity Council at Furman University*, <http://ifc.furman.edu/storage/IFCConstitutionJan09.pdf> (amended Jan. 17, 2009) (recruitment activities, dates, and hours established by Interfraternity Council); University of Colorado at Boulder, *Greek Life Membership Recruitment Guidelines*, <http://www.colorado.edu/greeks/recruitment/guidelines.html> (last visited Feb. 23, 2012) (permitted activities specified). Historically white women's fraternities and sororities, regulated by the National Panhellenic Conference, tend to have a more highly structured recruitment period than other fraternities. National Panhellenic Council, *Putting it All Together*, at <https://www.npcwomen.org/resources/pdf/MRABAIntroduction-ThoseAssistingWithSigningofMRABAs.pdf> (last visited June 4, 2012) (restrictions on speech); *Frequently Asked Questions about Sorority Recruitment*, National Panhellenic Conference, at <https://www.npcwomen.org/resources/pdf/FAQ-AboutRecruitment.pdf> (last visited June 4, 2012) (restrictions on activities).

<sup>64</sup> Healy v. James, 408 U.S. 169, 180, 192 (1972).

<sup>65</sup> See *infra* n. 255.

<sup>66</sup> See, e.g., Dartmouth College, *Interfraternity Council Rules for Expansion*, <http://www.dartmouth.edu/~ifc/expansion.html> (last visited Feb. 23, 2012) (Interfraternity Council and college must approve expansion); Lehigh University, *Expansion Policy for NIC Affiliated Chapters*, [http://mylehigh.lehigh.edu/s/1127/images/editor\\_documents/expansionpolicytimeline.pdf](http://mylehigh.lehigh.edu/s/1127/images/editor_documents/expansionpolicytimeline.pdf) (last visited Feb. 23, 2012) (university must approve expansion); University at Albany, State University of New York, *Expansion Guidelines*, <http://www.albany.edu/involvement/expansion.shtml> (last visited Feb. 23, 2012) (same); University of Florida, *Policy on Expansion for Social Sororities and Fraternities*, <https://www.studentinvolvement.ufl.edu/Portals/1/Documents/Greeks/Docs/OSFA%20-%20Expansion.pdf> (last visited Feb. 23, 2012) (same); University of South Florida, *Fraternity and Sorority Life*, [http://usfgreeklife.com/page.php?page\\_id=15387](http://usfgreeklife.com/page.php?page_id=15387) (last visited Feb. 23, 2012) (same); Virginia Tech, *OFSL*

still regulate the existence of fraternities on that campus.<sup>67</sup> Schools or student organizations may forbid new fraternity expansion, regardless of the enthusiasm of students for that endeavor.

While these decisions likely fall within generally accepted college powers to regulate campus life, other schools have requirements regarding outside affiliation. Some schools require a fraternity to be nationally<sup>68</sup> affiliated.<sup>69</sup> Presumably national affiliation, which comes with a broad set of rules and regulations, professional oversight from headquarters, and engaged alumni supervision, lessens the managerial role for the college and results in better run fraternity chapters. Ironically though, some schools have chosen the opposite, and ban any national affiliation of local fraternities.<sup>70</sup> A decision to forbid national affiliation may be rooted in concerns of the single-gender requirements of most fraternities, or merely an effort by the

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*Administrative Expansion Policy for Fraternities and Sororities,*

[http://www.greeklife.vt.edu/assets/doc/ExpansionPolicy\\_8162010.pdf](http://www.greeklife.vt.edu/assets/doc/ExpansionPolicy_8162010.pdf) (last visited Feb. 23, 2012) (university and student umbrella group must approve expansion). Some schools have devolved the authority to authorize new fraternities to an interfraternity council, or work in partnership with a student organization to make the decision.

<sup>67</sup> See e.g., Benjamin Pokross, *Two Fraternities Under Fire After Bias Claims*, *Chicago Maroon*, May 25, 2012, at <http://chicagomaroon.com/2012/05/25/two-fraternities-under-fire-after-bias-claims> (last visited June 4, 2012) (fraternities not recognized by University of Chicago); *Greek Life on Campus*, The University of Chicago, at <https://studentactivities.uchicago.edu/involved/greek.shtml> (last visited June 4, 2012) (Information about University of Chicago office regulating fraternities).

<sup>68</sup> The term “national” is inappropriate, since a large number of North American fraternities have chapters in both the United States and Canada. Inaccurate though it may be, the common term used to refer to the headquarters, central office, or umbrella organization is “national.”

<sup>69</sup> See, e.g., Johns Hopkins University, *Constitution of the John Hopkins University Inter-Fraternity Council*, [http://web.jhu.edu/studentlife/greek\\_life/InterfraternityCouncil/ifcconstitution.html](http://web.jhu.edu/studentlife/greek_life/InterfraternityCouncil/ifcconstitution.html) (last visited Feb. 23, 2012); University of South Florida, *Fraternity and Sorority Life*, [http://usfgreeklife.com/page.php?page\\_id=15387](http://usfgreeklife.com/page.php?page_id=15387) (last visited Feb. 23, 2012); Virginia Tech, *OFSL Administrative Expansion Policy for Fraternities and Sororities*, [http://www.greeklife.vt.edu/assets/doc/ExpansionPolicy\\_8162010.pdf](http://www.greeklife.vt.edu/assets/doc/ExpansionPolicy_8162010.pdf) (last visited Feb. 23, 2012) (national affiliation required for recognition).

<sup>70</sup> See, e.g., Stephanie Bluemle, *Augustana College, It Started with Tennis and Ended with Greeks: Despite Doubters, Fraternities and Sororities Were Here to Stay*, <http://www.augustana.edu/x19619.xml> (last visited Feb. 23, 2012). Colleges that previously permitted only local fraternities include Otterbein University, Albright University, Trinity University, Clemson University, Pepperdine University, and Baylor University. See generally Krista Langlois, *Dartmouth Task Force Eyes Hazing*, *Valley News* (Hanover, NH), Feb. 8, 2012, <http://www.vnews.com/02082012/8342574.htm> (requiring sororities to disaffiliate from national organizations would allow more organizations to serve alcohol).

college to avoid ceding any control over students to an outside organization. This may deny students the associational benefits of networking and mentoring within a national organization.<sup>71</sup>

Schools that require national affiliation are requiring students to associate and pay fees to an organization for which they may have no bond, affinity for, or connection. Indeed, there may be fraternity chapters that receive little for the fees they pay. Alternatively at other colleges, despite the wish to associate with like-minded students at other schools, students may be prohibited from doing so. These restrictions on association have not been court-tested under the current Supreme Court case law on associational rights of student groups.

### iii. Restrictions on Housing Options

The issue of student housing has always been complicated and controversial. Colleges have debated whether to have student housing,<sup>72</sup> whether students should be required to live in college-owned housing,<sup>73</sup> and what conditions and opportunities student housing should offer.<sup>74</sup> Those issues have frequently been tied to the existence of fraternity housing.<sup>75</sup>

Offering students housing and dining options with co-curricular (or even curricular) activities has been common in the United States, particularly since World War II. Many colleges

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<sup>71</sup> See Br. for Amici Curiae N. Am. Interfraternity Conference and Nat'l Panhellenic Conference in Support of Plaintiffs-Appellees, and in Support of the District Court's Decision at 1, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111-cv) ("Throughout the past 200 plus years, countless members of Greek organizations have gone on to lead the country in various professions. For example, approximately 48% of all United States presidents, 42% of all Senators, 30% of all members of Congress, 40% of Supreme Court Justices, \*2 and 30% of Fortune 500 Executives have been members of Greek organizations.").

<sup>72</sup> BAIRD'S MANUAL, *supra* n. 3, at § I-14.

<sup>73</sup> See, e.g., Eric Hoover, *Campuses See Rising Demand for Housing*, Chron. of Higher Educ. (Aug. 1, 2008).

<sup>74</sup> See, e.g., Ben Gose, *Colleges Invest Millions on Improvements to Keep Upperclassmen in Campus Housing*, Chron. Higher Educ. (February 13, 1998); Lawrence White, *What Legal Issues Will Keep Colleges Busy in the Year 2012?* Chron. Higher Educ. (May 27, 2005).

<sup>75</sup> See, e.g., MARIANNE R. SANUA, "HERE'S TO OUR FRATERNITY": ONE HUNDRED YEARS OF ZETA BETA TAU 1898-1998 3 (Brandeis Univ. Press 1998); OSCAR HANDLIN & MARY F. HENDLIN, *THE AMERICAN COLLEGE AND AMERICAN CULTURE: SOCIALIZATION AS A FUNCTION OF HIGHER EDUCATION* 40 (McGraw-Hill Book Co. 1970); BAIRD'S MANUAL, *supra* n. 3, at § I-3.

consider the ability to offer students these options critical to their competition for students with other schools, as well as to achieve a high ranking in U.S. News & World Report.<sup>76</sup> College admissions is more of an art than a science, in that it is difficult to predict with certainty the exact number of students who will matriculate in a given year. At the same time, colleges attempting to house some or all of their students depend on some certainty with regard to the student population in order to avoid losing money, or crowding their facilities with too many students.

The existence of fraternities can complicate the issue. While the television and movie image of a fraternity house conjures a proud Georgian structure owned in fee simple on valuable land adjacent to an idyllic quadrangle, the truth has always been more complicated than that. While the majority of fraternities (65%) own their house and land, making them the nation's largest non-profit student landlords other than universities, other arrangements exist.<sup>77</sup> Some fraternities own their land or their house, but not both, with the college often owning the other.<sup>78</sup> Some colleges own fraternity houses,<sup>79</sup> or house fraternities in sections of college residence

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<sup>76</sup> See, e.g., Quinn Bernier, *New College Ranking System Rekindles Criticism*, The Chicago Maroon, Oct. 17, 2003, <http://chicagomaroon.com/2003/10/17/new-college-ranking-system-rekindles-criticism>; Letter from Gerhard Casper, President, Stanford University, to James Fallows, Editor, *U.S. News & World Report* (Sept. 23, 1996), <http://www.stanford.edu/dept/pres-provost/president/speeches/961206gcfallow.html>; National Opinion Research Center, *A Review of the Methodology for the U.S. News & World Report's Rankings of Undergraduates Colleges and Universities*, <http://www.washingtonmonthly.com/features/2000/norc.html> (last visited Feb. 27, 2012); Michael Crissey, *Changes in Annual College Guides Fail to Quell Criticisms on Their Quality*, Chron. Higher Educ. (Sept. 5, 1997); Nicholas Thompson, *Playing With Numbers*, Washington Monthly, Sept. 2000, available at <http://www.washingtonmonthly.com/features/2000/0009.thompson.html>.

<sup>77</sup> Capital Fraternal Caucus, *Collegiate Housing and Infrastructure Act*, [http://www.fraternalcaucus.org/index.php?option=com\\_content&task=view&id=39&Itemid=45](http://www.fraternalcaucus.org/index.php?option=com_content&task=view&id=39&Itemid=45) (last visited Feb. 27, 2012). Fraternities supply housing for more than 250,000 students at no cost to the host schools or the taxpayers. *Id.* Most public universities and many private colleges rely on fraternities to house a large percentage of their students. See, e.g., Gene Warner, *Housing, Inexperience Tied to MIT Death*, Buffalo News (Buffalo, NY), Oct. 2, 1997.

<sup>78</sup> See *id.* (different ownership arrangements exist for fraternity houses).

<sup>79</sup> See, e.g., Ben Gose, *One-Stop Shopping for Campus Housing*, Chron. Higher Educ. (Jan. 28, 2005).

halls, sometimes with extensive modifications made to create a resemblance to an old fraternity house,<sup>80</sup> and sometimes not.<sup>81</sup> Some schools forbid any form of residential fraternity.<sup>82</sup>

The schools forbidding residential fraternities are the most interesting for freedom of association issues. For example, a school may permit or encourage themed housing, centered on some affinity such as lifestyle, language, or political belief, while at the same time the school may prohibit fraternities.<sup>83</sup>

In order to enforce a non-residential fraternity rule, some schools may go further. A school may require membership rolls of fraternities, and prohibit more than a small number of members from living together as roommates or hall mates, so as to prevent the existence of de facto fraternity housing.<sup>84</sup> In situations like this, it is possible that schools are restricting

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<sup>80</sup> See, e.g., *Pace Accelerates for House System*, Union College Mag. (Fall 2002), [http://www.union.edu/N/DS/edition\\_display.php?e=748&s=3196](http://www.union.edu/N/DS/edition_display.php?e=748&s=3196) (Union College required fraternities to move from historic houses into renovated dormitories).

<sup>81</sup> See, e.g., Julianne Basinger, *How Nan Keohane Is Changing Duke*, Chron. Higher Educ. (Nov. 3, 2000) (fraternity housing at Duke).

<sup>82</sup> Ben Gose, *Do Bans on Fraternities Violate the First Amendment?* Chron. Higher Educ. (Nov. 27, 1998). See, e.g., *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College*, 128 F.3d 59, 60 (2nd Cir. 1997) (College banned residential fraternities); *Convocation 2010*, Reed Magazine, at [http://web.reed.edu/reed\\_magazine/december2010/columns/eliot\\_circular/1.html](http://web.reed.edu/reed_magazine/december2010/columns/eliot_circular/1.html) (last visited June 5, 2012) (Reed does not permit fraternities); *Fraternities, Policies, Procedures, and Regulations*, Williams College, at <http://web.williams.edu/registrar/hahttp://web.williams.edu/registrar/handbook/policies.htmlndbook/policies.html> (last visited June 5, 2012) (Williams does not permit fraternities).

<sup>83</sup> See, e.g., Alex P. Kellogg, *Lawrence U. Ends Fraternities' Right to Housing Privileges*, Chron. Higher Educ. (Nov. 2, 2001). Alfred, Amherst, Colby, and Williams all prohibit fraternities while providing for and encouraging themed housing. See Alfred University, *Residence Life: Overview*, [http://www.alfred.edu/students/living\\_at\\_au/residence\\_life.cfm](http://www.alfred.edu/students/living_at_au/residence_life.cfm) (last visited Feb. 27, 2012) (Hillel, Environmental Studies, Honors, Language, and International. Alfred also offers Joel's House, "which provides housing for 22 students in a family-like setting." Alfred University, *Joel's House*, <http://www.alfred.edu/map/joel.cfm> (last visited Feb. 27, 2012)); Amherst College, *Theme Houses*, <https://www.amherst.edu/campuslife/reslife/housing/theme> (last visited Feb. 27, 2012) (French, German, Russian, Spanish, Black, Arts, Asian, Healthy & Wellness, Latino, and Co-op); Colby College, *Residential Experience*, [http://www.colby.edu/alumni\\_parents\\_cs/parents/handbook/life\\_at\\_colby/residence.cfm](http://www.colby.edu/alumni_parents_cs/parents/handbook/life_at_colby/residence.cfm) (last visited Feb. 27, 2012) (Green and Music & Arts); and Williams College, *Co-op Housing*, <http://student-life.williams.edu/student-housing/upperclass-housing/co-op-housing> (last visited Feb. 27, 2012) ("Co-ops are small houses where seniors live in small groups, providing students with a more independent living experience.").

<sup>84</sup> See, e.g., Hamilton College, *Housing Lottery Guidebook*, <http://www.hamilton.edu/residentiallife/lottery/housing-lottery-guide/blocking-lottery> (last visited Mar. 2, 2012);

association for a disfavored group while encouraging it for others. Some schools have been very aggressive in enforcing fraternity bans.<sup>85</sup>

Schools may restrict whether students live off-campus; this is often done to ensure that the college-owned housing maintains full occupancy. But a school may allow some students to live off-campus, while forbidding fraternity members from doing so, in concern that they will essentially create a banned off-campus fraternity house.<sup>86</sup>

A recent trend is for colleges to require “adult supervision” of fraternity houses.<sup>87</sup> In many respects, this harkens back to the system of house mothers that were often found in fraternity housing in the past.<sup>88</sup> Certainly there are many benefits that can be created by such a system, including restraints on bad behavior, and positive mentoring.<sup>89</sup> But some applications of the system may require fraternities to have older persons living in a house, but not impose the same requirement on other college housing. Being part of a disfavored group that is then forced

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Williams College, *Anchor Housing*, [http://wso.williams.edu/wiki/index.php/Anchor\\_housing](http://wso.williams.edu/wiki/index.php/Anchor_housing) (last visited Mar. 2, 2012); Amherst College, *Room Draw*, <https://www3.amherst.edu/~dos/roomdraw> (last visited Mar. 2, 2012). Even some town may attempt to prohibit de facto fraternity houses, although this is likely related to land use and noise issues, rather than free association. See generally, e.g., Holly Kurtz, *Deland’s Housing Change Delayed*, Orlando Sentinel, Aug. 18, 1998, available at

<http://www.lawhelp.org/documents/264491Digs%20Dwellings%20and%20Domiciles.pdf?stateabbrev=NC/>.

<sup>85</sup> Jim Terhune, *A Letter to the Colby Community Regarding Secret Fraternities*, The Colby Echo, Nov. 9, 2011, available at [http://www.thecolbyecho.com/opinion/a-letter-to-the-colby-community-regarding-secret-](http://www.thecolbyecho.com/opinion/a-letter-to-the-colby-community-regarding-secret-fraternities)

<http://web.williams.edu/registrar/handbook/policies.html#fraternities> (last visited Mar. 21, 2012); Amherst

College, *Trustees’ Resolution on Fraternities and College Council Statement on the Fraternity Policy*, <https://www.amherst.edu/campuslife/deanstudents/handbook/studentrights#Fraternities> (last visited Mar. 2, 2012).

<sup>86</sup> See, e.g., Claire Michalewicz, *New Wesleyan Policy Bans Student Use of Unapproved Houses*, Middletown Press (Middletown, CT), Feb. 24, 2011, available at

<http://www.middletownpress.com/articles/2011/02/24/news/doc4d65c0e187679065802866.txt> (students may not live in fraternity houses if unrecognized by school).

<sup>87</sup> See, e.g., Elizabeth F. Farrell, *Fraternity Leaders Oppose Rule That Would Postpone Rush Activities in Bid to Curb Alcohol Abuse*, Chron. Higher Educ. (Apr. 1, 2005); *MIT Moves on Plan to Put Resident Advisers in Fraternity Houses*, Chron. Higher Educ. (July 24, 1998).

<sup>88</sup> See, e.g., Michelle Hillenbrand, *Frats Getting Live-In Dad*, Daily Iowan (Iowa City, IA), Feb. 17, 2010, available at <http://www.dailyiowan.com/2010/02/17/Metro/15662.html>; WILLIAM R. BAIRD & JOHN ROBSON, *BAIRD’S MANUAL OF AMERICAN COLLEGE FRATERNITIES* 18 (17TH ed. 1963).

<sup>89</sup> See, e.g., *MIT Moves on Plan to Put Resident Advisers in Fraternity Houses*, Chron. Higher Educ. (July 24, 1998).

to live with a person who is not a member of the group may be a test of the limits of college mandated supervision of student activities.

#### iv. Regulating Membership and Banning Fraternity Systems

Universities may also place affirmative requirements on fraternity membership, not required of other students. For example, a school may specifically require fraternities to engage in philanthropy or perform community service, but not require unaffiliated students to do the same.<sup>90</sup> Certainly most fraternities are encouraged by their schools to perform community service, but it is not clear that non-members receive the same encouragement.

Fraternities are frequently required to accept collective responsibility for the actions of individual members.<sup>91</sup> While this typically means that a fraternity chapter may be sanctioned for

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<sup>90</sup> See generally, e.g., Florida Institute of Technology, *Fraternity and Sorority Life: New Member Education Program Requirements*, <http://www.fit.edu/greeklife/documents/NewMemberProgramRequirements.pdf> (last visited Feb. 27, 2012) (community service required of fraternity members); Penn State University, *2011 Chapter Accreditation Program*, <http://studentaffairs.psu.edu/hub/greeks/pdf/ChapterAccreditationProgram.pdf> (last visited Mar. 1, 2012) (community service required of fraternity members); University of Georgia, the Interfraternity Council, *FAQs*, <http://ifc.uga.edu/faqs.html> (last visited Feb. 27, 2012) (community service required of fraternity members); UCLA, *Fraternity & Sorority Chapter Standards of Excellence 2011*, <http://www.greeklife.ucla.edu/documents/Document12011.pdf> (last visited Mar. 1, 2012) (community service required of fraternity members); Worcester Polytechnic Institute, *Fraternities and Sororities*, <http://www.wpi.edu/offices/sao/fratsandsors.html> (last visited Feb. 27, 2012) (community service required of fraternity members).

<sup>91</sup> See, e.g., Stanford University, *Greek Guide*, <http://osa.stanford.edu/greek/greekguide/principles.htm> (last visited March 1, 2012); University of Pennsylvania, *Fraternity/Sorority Advisory Board Disciplinary Charter*, The Pennbook, [http://www.upenn.edu/provost/PennBook/fraternity\\_sorority\\_advisory\\_board\\_disciplinary\\_charter](http://www.upenn.edu/provost/PennBook/fraternity_sorority_advisory_board_disciplinary_charter) (last visited Mar. 1, 2012); University of Connecticut, *Fraternity and Sorority Life, Anti Hazing*, [http://www.greeklife.uconn.edu/hazing\\_rights.html](http://www.greeklife.uconn.edu/hazing_rights.html) (last visited March 1, 2012); Drexel University, *Individual Housing Agreement for 34th Street Housing 2011–2012*, <http://www.drexel.edu/dbs/universityHousing/34thStreet/howtoApply/> (follow “2012–2013 34th Street Housing Agreement [PDF]” hyperlink) (last visited Mar. 1, 2012); University of Vermont, *Fraternity and Sorority Standards for Recognition & Awards (FSR)*, <http://uvmgreeklife.celect.org/fsr> (last visited Mar. 1, 2012); San Diego State University, *SDSU Policies for Social Fraternities and Sororities*, [http://greeklife.sdsu.edu/documents/SDSUPoliciesforSocialFraternitiesandSororitiesExpanded\\_000.doc](http://greeklife.sdsu.edu/documents/SDSUPoliciesforSocialFraternitiesandSororitiesExpanded_000.doc) (last visited Mar. 1, 2012). Cf. 6 Am. Jur. 2d Associations and Clubs § 47 (“mere membership in a voluntary association does not make all the members liable for acts of their associates done without their knowledge or approval”). See generally *Shaheen v. Burgess Harrison Yonts*, 2008 U.S. Dist. LEXIS 16020, 11-12 (W.D. Ky. 2008); *Nicole Sitrin vs. James Meneghini*, 1996 Mass. App. Div. 148 (Mass. App. Div. 1996).

the acts of individuals, it also may mean that individuals are sanctioned for the actions of others.<sup>92</sup> There are likely few, if any, other student organizations treated similarly.

The issue of coeducation is often at the heart of friction between a college and its fraternities.<sup>93</sup> While some colleges see benefits to single gender organizations and housing, other schools believe it inappropriate in the current era.<sup>94</sup> Regardless of a college's discomfort, fraternities are privileged organizations under federal law and exempt from any federal requirements to admit opposite sex members under the 1974 Bayh Amendment to Title IX of the Education Amendments of 1972.<sup>95</sup> Private universities, however, while generally the recipients of some federal funding, have been held to have authority to ban single sex organizations.<sup>96</sup>

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<sup>92</sup> See, e.g., *Psi Upsilon v. Univ. of Pa.*, 591 A.2d 755, 759 (Pa. Super. Ct. 1991) (Upholding collective responsibility).

<sup>93</sup> See, e.g., Billie Wright Dziech, *Forcing Greek Organizations to Go Coeducational Won't Lead to Greater Diversity*, Chron. Higher Educ. (Apr. 2, 1999); Ben Gose, *Dartmouth Plan Would Let Fraternities Continue*, Chron. Higher Educ. (Jan. 21, 2000); Carol Innerst, *Coed or Out*, Wash. Times (Washington, D.C.), Mar. 7, 1992; Adam Rashkoff, *Fraternities No Longer Required To Be Co-Ed*, Wesleyan Argus (Middletown, CT), Feb. 2, 20120, <http://wesleyanargus.com/2010/02/02/fraternities-no-longer-required-to-be-co-ed>; Fran Silverman, *Trinity Orders Greek Groups To Become Coed by 1995*, Hartford Courant (Hartford, CT), Sept. 20, 1992; Maureen Sirhal, *Fraternities on the Rocks*, Hoover Inst'n Stanford Univ. Policy Review, Feb. 2000, <http://www.hoover.org/publications/policy-review/article/8032> (last visited Feb. 17, 2012); *The Idea of Coeducational Fraternities Is Catching On in the Northeast*, N.Y. Times, Apr. 8, 1990.

<sup>94</sup> See *supra*, n. 93.

<sup>95</sup> Title IX otherwise prohibits discrimination on the basis of gender in educational institutions. Title IX states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that: . . . (6) this section shall not apply to memberships practice-(A) of a social fraternity or social sorority which is exempt from taxation under s§ 501(a) of Title 26 [of the Internal Revenue Code], the active membership of which consists primarily of students in attendance at an institution of higher education.

20 U.S.C. § 1681(a) (1988). Also excluded are the Boy Scouts, Campfire Girls, Girl Scouts, YMCA, and YWCA. *Id.* at § (a)(6)(B). In offering this amendment, Senator Birch Bayh of Indiana, the sponsor of Title IX, stated that “[f]raternities and sororities have been a tradition in the country for over 200 years. Greek organizations . . . must not be destroyed in a misdirected effort to apply Title IX.” 120 Cong. Rec. 39992 (1972). Prior to the Bayh Amendment, Congress amended the 1957 Civil Rights Act to prevent scrutiny of the single-gender status of most fraternities. 42 U.S.C. § 1975c(b). In 1964 Congress accepted and passed an amendment to the Civil Rights Act of 1964 that prohibited the federal government from regulating single-sex fraternities. 20 U.S.C. § 1144(b). In 1998, fraternities received some modicum of additional protection. The Higher Education Act of 1965 was amended to read:

While a few fraternities have embraced (or at least accepted) coeducation in some or all of their chapters, most fraternities remain single sex.<sup>97</sup> Forced coeducation of fraternities by colleges has resulted in at least one lawsuit, but the college prevailed.<sup>98</sup>

The greatest restriction on freedom of association occurs when colleges abolish entire fraternity systems,<sup>99</sup> or forbid them from ever taking root.<sup>100</sup> This extreme restriction is the focus of Part II of this Article.

Students may be subject to a code or affirmation that prohibits them from joining fraternities.<sup>101</sup> While the power of private colleges to take such action is very broad,<sup>102</sup> the lawfulness of such action by public universities is questionable.<sup>103</sup>

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“It is the sense of Congress that no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under an education program, activity, or division of the institution directly or indirectly receiving financial assistance under the Higher Education Act of 1965, whether or not such program, activity, or division is sponsored or officially sanctioned by the institution.”

20 U.S.C. §§ 1011; 1011a(c)(2). The Amendment received broad support; the House voted 414-4, and the Senate 96-1, in favor of adoption. Explicitly linking the Amendment to the protection of fraternities was the sponsor, Representative Robert Livingston of Idaho. On the House floor, Congressman Livingston said “[a] number of colleges throughout this country are vigorously attacking their students’ constitutionally protected right of free speech and association. The controversy centers on a decision by some private schools to ban all single-sex organizations like fraternities and sororities and restrict any involvement with them, even if it is off-campus and on their own time.” Steven Menashi, *Editorial: Talk to My Lawyer*, Dartmouth Review (Hanover, NH), Feb. 7, 2000, <http://s14929.gridserver.com/issues/2.7.00/editorial.html>.

<sup>96</sup> See generally, e.g., Phelps v. Presidents and Trustees of Colby College, 595 A.2d 403 (Me. 1991); Timothy Spears, Blogs Dot Middlebury, One Dean’s View, *Further (Historical) Observations on Fraternities and Sororities*, <http://blogs.middlebury.edu/onedeanview/2009/04/21/further-historical-observations-on-fraternities-and-sororities> (Apr. 21, 2009);

<sup>97</sup> See *Chi Iota*, 443 F. Supp. 2d at 388 (fraternity choosing to remain single sex).

<sup>98</sup> See Wilson Ring, *Despite Bans at 5 Eastern Colleges, Fraternities Survive*, Los Angeles Times (Los Angeles, CA), Nov. 20, 1994; Sirhal, *supra* n. 31; Spears, *supra* n. 96. See generally Innerst, *supra* n. 93; Phelps v. Presidents and Trustees of Colby College, 595 A.2d 403 (Me. 1991). See also Brzica v. Trs. of Dartmouth College, 147 N.H. 443 (N.H. 2002).

<sup>99</sup> See, e.g., *Santa Clara U. to Shut Down All Fraternities and Sororities*, Chron. Higher Educ. (Apr. 6, 2001).

<sup>100</sup> See, e.g., Susanna Ashton, *Making Peace with the Greeks*, Chron. Higher Educ. (Nov. 17, 2006).

<sup>101</sup> See, e.g., Colby College, *Fraternity Activity*, [http://www.colby.edu/administration\\_cs/student-affairs/deanofstudents/studentconduct/policies\\_procedures/other\\_policies/fraternity-activity.cfm](http://www.colby.edu/administration_cs/student-affairs/deanofstudents/studentconduct/policies_procedures/other_policies/fraternity-activity.cfm) (last visited Mar. 2, 2012); Waynesburg University, *Student Code of Conduct*, <http://tps.waynesburg.edu/web/about/student->

According to the College Board, 143 public four-year colleges have no fraternity systems.<sup>104</sup> While it is difficult to determine why none of these schools have fraternities, at some there is likely no interest, and at others there may be gentle dissuasion by the school administration.<sup>105</sup> Several public universities<sup>106</sup> actively deny recognition to fraternities, including: Alfred University,<sup>107</sup> Framingham State University,<sup>108</sup> University of Mary

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code-of-conduct (last visited Feb. 22, 2012); Williams College, *Fraternities*, <http://web.williams.edu/registrar/handbook/policies.html> (last visited Mar. 2, 2012).

<sup>102</sup> *Supra* n. 48.

<sup>103</sup> *See infra* pt. II(c) (discussing the issue of whether public universities may ban specific student groups).

<sup>104</sup> This was determined utilizing “College Board College Search” at

<http://collegesearch.collegeboard.com/search/index.jsp> (last visited Feb. 22, 2012). The search requested all public four-year colleges in the United States without fraternities or sororities. Among other programs, the College Board is responsible for authoring the SAT and Advanced Placement exams. College Board, *What We Do*, <http://about.collegeboard.org/what> (last visited Feb. 22, 2012). The actual number of traditional public colleges banning fraternities is likely less than 143; some of these schools appear to be restricted to graduate students (e.g. SUNY Upstate Medical University, Texas Tech University Health Sciences Center, University of Arkansas for Medical Sciences), adult education (e.g. SUNY Empire State College), or military academies (e.g. U.S. Air Force Academy, U.S. Naval Academy). Some public schools have banned fraternities in the past; for example, Texas A&M University banned fraternities until 1973; they were not officially recognized until after the university was forced to recognize a gay student’s organization. *See infra* n. 112.

<sup>105</sup> *See, e.g.*, Chelsea Krotzer, *CWU Students Eye Greek System*, Daily Record (Ellensburg, WA), Feb. 12, 2010; Eastern Connecticut State University, *You Asked The President!*, [http://nutmeg.easternct.edu/housing/pdf/pres-visits/Spring\\_2009.pdf](http://nutmeg.easternct.edu/housing/pdf/pres-visits/Spring_2009.pdf) (last visited Feb. 12, 2012); St. Mary’s College of Maryland, *Residence Life Frequently Asked Questions*, <http://www.smcm.edu/residencelife/faqs/index.html> (last visited Feb. 23, 2012); University of Hawaii at Hilo, *Listening Tour 2010: Meeting with the UH Hilo Student Association and Chartered Student Organization Officers* (Oct. 25, 2010), *available at* [http://hilo.hawaii.edu/strategicplan/documents/FINALLTSummarynote\\_UHSA\\_CSOs.pdf](http://hilo.hawaii.edu/strategicplan/documents/FINALLTSummarynote_UHSA_CSOs.pdf). “Gentle dissuasion” against fraternities is harder to identify, but the State University of New York at Purchase’s admissions website may be an example. Purchase College State University of New York, *School of Liberal Arts & Sciences*, <http://www.purchase.edu/Departments/Admissions/AreasofStudy/liberalartsandscience.aspx> (last visited Feb. 22, 2012) (Stating with approval that college has no fraternities).

<sup>106</sup> There are likely others. For example, The Citadel bans fraternities and sororities, but can likely make a strong argument that such organizations might disrupt unity in a military academy. *See* The Citadel, *College Regulations*, (Aug. 4, 2011), [http://www.citadel.edu/root/images/Faculty/college\\_regulations\\_after\\_august\\_2011\\_meeting.08-04-11.pdf](http://www.citadel.edu/root/images/Faculty/college_regulations_after_august_2011_meeting.08-04-11.pdf).

<sup>107</sup> Alfred University, *Alfred University Trustees Vote to Eliminate Fraternities and Sororities* (May 20, 2002), <http://www.alfred.edu/pressreleases/viewrelease.cfm?ID=1701>. Alfred University is difficult to categorize; it is a private university that contracts with the state of New York to host and administer several collegiate programs that would otherwise be resident at a state university. Alfred University, *About AU*, <http://www.alfred.edu/glance> (last visited Feb. 22, 2012) (Alfred is a “private, non-sectarian, with state-sponsored programs in engineering and art and design.”). *See also* *State v. White*, 82 Ind. 278 (Ind. 1882) (as a condition of admission, university required students to pledge not to join fraternities).

<sup>108</sup> Framingham State University, *RAM Student Handbook 2011–2012*, <http://www.framingham.edu/student-affairs/documents/1112ramhandbook.pdf#nameddest=80> (last visited Feb. 23, 2012).

Washington<sup>109</sup> College of Staten Island of the City University of New York,<sup>110</sup> all Vermont State Colleges,<sup>111</sup> and Western Washington University.<sup>112</sup>

## Part II – The Development of a Freedom of Association

### a. Origins

It is difficult to point to the earliest recognition of the importance of a freedom of association. Certainly the Founders were influenced by the Enlightenment and contemporary discussion of natural or innate rights of man, particularly the philosophy of John Locke and Thomas Paine<sup>113</sup> It is also possible that both the Founders of the United States and fraternities were at least partially informed by the free association embodied in the Freemason movement.<sup>114</sup>

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<sup>109</sup> See James Sennett, Letter to the Editor, *LETTER: New Kappa Sigma Fraternitiy Looking for School Recognition and Members*, THE BULLET (Fredericksburg, VA), Feb. 9, 2011, <http://umwbullet.com/2011/02/09/letter-new-kappa-sigma-fraternity-looking-for-school-recognition-and-members/>; Kat Saunders, *Frat OK'd on Campus*, THE BULLET (Fredericksburg, VA), Feb. 28, 2008, [http://umwbullet.com/2009/02/12/meet-the-underground-fraternity](http://umwbullet.com/2009/02/12/meet-the-underground-fraternity;); <http://umwbullet.com/2008/02/28/frat-okd-on-campus/>.

<sup>110</sup> *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2<sup>nd</sup> Cir. 2007).

<sup>111</sup> The four-year Vermont State Colleges are Castleton State College, Johnson State College, Lyndon State College and Vermont Technical College. Vermont State College, <http://www.vsc.edu> (last visited Feb. 23, 2012). See Castleton State College, *2011–2012 College Handbook*, <http://www.castleton.edu/campus/CollegeHandbook/handbook.pdf> (last visited Feb. 23, 2012).

<sup>112</sup> Samantha Wohlfeil, *Western's Potential Big, Fat Greek Row?*, THE WESTERN FRONT 5 (Bellingham, WA), Apr. 5, 2011, <http://westernfrontonline.net/pdf/Spring2011/4.5.11.pdf>; Admin, *So Where Do I Pledge*, THE AS REVIEW, Oct. 1, 2007, <http://as.wvu.edu/asreview/so-where-do-i-pledge>. In the past, South Carolina, Arkansas, and Michigan have banned fraternities at all state universities. WILLIAM R. BAIRD & JOHN ROBSON, *BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES* 28 (17TH ed. 1963). Virginia Tech, Virginia Military Institute, and Texas A&M University have all previously banned fraternities. *Id.*; Kara Bounds Socol, *The Evolution of Aggie Greeks* (Aug. 3, 2010), <http://tamunews.tamu.edu/2010/08/03/the-evolution-of-aggie-greeks>. The State University of New York at Buffalo, at one time a private institution, required its fraternities to sever contact with national and international organizations when it became part of the state university. See also *Webb v. State Univ. of N.Y.*, 125 F.Supp. 910 (N.D.N.Y. 1954) (university prevails when local fraternity challenges policy forbidding affiliation with national or international organization); *Beta Sigma Rho, Inc. v. Moore*, 46 Misc. 2d 1030, 261 N.Y.S.2d 658 (Sup. Ct. Erie County 1965), *aff'd* 25 A.D.2d 719, 269 N.Y.S.2d 1012 (N.Y. App. Div. 1966) (no social organization with national affiliation permitted). Fraternities at Buffalo are now permitted outside affiliation. See University at Buffalo, State University of New York, *Greek Affairs*, <http://www.greeklife.buffalo.edu> (last visited Feb. 29, 2012).

<sup>113</sup> See generally Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have - the Case of Associational Freedom*, 10 Harv. J.L. & Pub. Pol'y 101, 102-104 (1987); H. Wayne House, *A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State?* 13 BYU J. Pub. L. 203, 219-20, 227-28, 231,

A freedom of association was recognized in several early state constitutions, and its absence from the proposed federal constitution may have been germane to the reluctance of several states to ratify it. Virginia and North Carolina each proposed an amendment to the Constitution stating that “there are several natural rights of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.”<sup>115</sup> Virginia and North Carolina also proposed an amendment “that the people have a right peaceably to assemble together to consult for the common good or to instruct their representatives; and that every freeman has a right to petition or apply to the Legislature for redress of grievances.”<sup>116</sup> New York and Rhode Island offered similar amendments.<sup>117</sup>

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233 (1999); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 Harv. L. Rev. 4, 18, 47 (2001); Barbara Stark, *Deconstructing the Framers’ Right to Property: Liberty’s Daughters and Economic Rights*, 28 Hofstra L. Rev. 963, 973-74, 996-97, 1000, 1012-13 (2000). Interestingly, the Supreme Court once seemed to attribute the Freedom of Association to Alexis de Tocqueville. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 n. 80 (1982). Cf. Frank H. Easterbrook, *Implicit and Explicit Rights of Association*, 10 Harv. J. L. & Pub. Pol’y 91, 98-99 (1987).

<sup>114</sup> Many college fraternities were patterned on Freemasonry. HANK NUWER, *WRONGS OF PASSAGE; FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING* 102 (Indiana Univ. Press 1999); ALAN AXELROD, *INTERNATIONAL ENCYCLOPAEDIA OF SECRET SOCIETIES & FRATERNAL ORDERS* 52 (Facts on File, Inc. 1997). The modern Masonic movement, established in 1717, was an early organization to take advantage of association unrelated to religion, business, or royalty. See JASPER RIDLEY, *THE FREEMASONS* 33 (Arcade Publishing 1999); MARGARET C. JACOB, *THE ORIGINS OF FREEMASONRY* 11, 21, 18-20, 22, 24, 47, 48, 55 (Univ. of Pa. Press 2006). Among the many Masons prominent in the founding of the United States were Ben Franklin, George Washington, John Hancock, James Madison, James Monroe, Paul Revere, and John Paul Jones. RIDLEY, *supra* at 108-9. Nine of the fifty five signers of the Declaration of Independence were masons, as were thirteen of the thirty nine signers of the Constitution. *Id.* at 96. The masons championed such ideas as self-government and free speech, and the use of a voluntary associations as a school for government. JACOB, *supra* at 24, 47-48, 55.

<sup>115</sup> 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 657 (Jonathan Elliot, ed., 1937) (amendments proposed by the Virginia Convention on June 27, 1788); 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 240, 243 (amendments proposed by the North Carolina Convention on Aug. 1, 1788).

<sup>116</sup> *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 140 (Neil H. Cogan ed. 1997).

<sup>117</sup> *Id.* at 141.

James Madison proposed that “[t]he people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the legislature by petitions, or remonstrances for redress of their grievances.”<sup>118</sup> On August 19, 1789, the House approved “[t]he freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances shall not be infringed.”<sup>119</sup> But the Senate deleted the reference to “common good.”<sup>120</sup> This left an ambiguity that exists today, as to whether the First Amendment recognizes a right to assembly for petitioning the government, or whether the right to assembly was separate and apart from the right of petition.<sup>121</sup>

*The Federalist* noted the necessity of freedom of association, when reviewing the role of factions in a republic.<sup>122</sup> Strongly suggested in this discussion was the need for the people to freely associate in order for the republic to function.<sup>123</sup>

Madison noted in *The Federalist* that while democracy could not survive with factions, a tyranny of the majority would occur without them.<sup>124</sup> He suggested that a republic might resolve that dilemma, because voluntary private associations would be put to work to maximize the opportunities for self-realization, and to minimize the dangers attendant to a government with centralized power.<sup>125</sup> If the citizens were allowed to be secure in their freedom to freely

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<sup>118</sup> *Id.* at 129.

<sup>119</sup> *Id.* at 143.

<sup>120</sup> *Id.* at 70-71, 77.

<sup>121</sup> John D. Inazu, *The Forgotten Freedom of Assembly*, 84. Tul. L. Rev. 565, 573 (2010).

<sup>122</sup> THE FEDERALIST NOS. 10, 54 (James Madison).

<sup>123</sup> DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 67 (1984).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 58-59.

associate, a wide variety of dynamic groups would develop, insuring the vitality and strength of the republic.<sup>126</sup>

Although the exact reasons for its absence are lost to history, no express endorsement of a freedom of association was added to the Constitution or Bill of Rights.<sup>127</sup>

#### b. *NAACP* and the Recognition of the Right

The Supreme Court first formally acknowledged a freedom of association in *NAACP v. State of Alabama ex. Rel. Patterson*,<sup>128</sup> where the Court held that a state law requiring the NAACP to release a membership list violated the constitutional rights of the group's members to associate freely.<sup>129</sup> Noting that curtailing the freedom to association is subject to the closest scrutiny, and that Alabama's law violated both the First and Fourteenth Amendments, Justice Harlan wrote for the Court:

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic,

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<sup>126</sup> *Id.* at 59-60.

<sup>127</sup> The lack of specific endorsement of a freedom of association may best be explained by Alexander Hamilton who stated, writing about freedom of the press, "why, for instance should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed? I will not content that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible preference for claiming that power." THE FEDERALIST NO. 84 (Alexander Hamilton). See also Erwin Chermersinsky and Catherine Fisk, *The Expressive Interest of Associations*, 9:3 Wm. & Mary Bill of Rights Jnl 595, 597-98.

<sup>128</sup> 357 U.S. 449 (1958). See also *Healy v. James*, 408 U.S. 169, 181 (1972) ("While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.").

<sup>129</sup> Specifically, the question presented before the Supreme Court was "whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association." *Id.* at 451.

religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.<sup>130</sup>

While *NAACP* stated that the Constitution protected “political, economic, religious or cultural matters,” it remained unclear whether purely social organizations were protected.<sup>131</sup>

A few years later, commenting on its *NAACP* decision, the Court noted that the Constitution protected associations that were “not political,” but that existed for the social, legal, or economic benefit of its members.<sup>132</sup>

The right of ‘association,’ like the right of belief, is more than the right to attend a meeting; it included the right to express one’s attitudes or philosophies by membership in a group or by affiliation with it by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.<sup>133</sup>

With this, the Supreme Court gave recognition to relationships forged through associations that had no direct political impact and that could be structured outside an immediate family setting.<sup>134</sup>

c. Banning specific students groups at public universities<sup>135</sup>

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<sup>130</sup> *NAACP*, 357 U.S. at 461.

<sup>131</sup> Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74 Yale L.J. 1, 20 (1964).

<sup>132</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>133</sup> *Id.* at 483.

<sup>134</sup> The Court eventually recognized the dual character of expressive and intimate association in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

<sup>135</sup> This essay generally considers fraternities’ associational rights at public universities. Fraternities at private colleges have had less success in asserting associational rights. For example, after Colby College in Maine banned all fraternities in 1984, twenty nine members of Lambda Chi Alpha were suspended, placed on probation, and required to reapply for admission to Colby for continuing their active membership. Mark Blandschun, *Party’s Over*

The issue of whether a public college may control students' associational rights through its program of education has been examined in detail only in a relatively old line of cases, and largely in the setting of secondary schools.<sup>136</sup> In 1915, the U.S. Supreme Court considered *Waugh v. Board of Trustees of the University of Mississippi*,<sup>137</sup> which tested a Mississippi statute that abolished all secret orders, fraternities, and sororities at all educational institutions supported by state funds, including the University of Mississippi.<sup>138</sup>

To meet the requirements of the statute, the University of Mississippi required each student desiring admission to the university to sign a pledge stating they were not a member, and would not become members, of any fraternity – essentially creating a prior restraint.<sup>139</sup> The plaintiff, an applicant to the University of Mississippi, refused to sign the pledge and was denied admission to the university, though otherwise qualified.<sup>140</sup> Appealing from a decision of the

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for *Colby Fraternity*, Boston Globe, Sept. 20, 1990 at 89. Thirty other Lambda Chi members received less severe sanctions. *Id.* The students sued Colby under the Maine Civil Rights Act. *Phelps v. President and Trustees of Colby College*, 595 A.2d 403 (Me. 1991). The trial court denied relief to the students, and the Maine Supreme Court affirmed, holding that the Act did not authorize “Maine courts to mediate disputes between private parties exercising their respective rights of free expression and association.” *Id.* at 407. See also *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186 (Ill. 1866) (a private college may forbid students from joining a secret society). There are, however, other ramifications to colleges banning fraternities. The year after Colby abolished its fraternity system, alumni contributions declined by 33%. *Colby College Echo*, May 7, 1985. While private colleges are likely free to ban fraternities as a contractual term for admission and matriculation, it is not as clear that colleges can ban fraternities for existing students. In addition, if a private college choosing to permit fraternities, query whether there are some particularly odious regulations that exceed that permitted by the First Amendment and Equal Protection Clause. See generally *infra* n. 49-103 and accompanying text.

<sup>136</sup> Ralph Rumsey, *Legal Aspects of the Relationship Between Fraternities and Public Institutions of Higher Education: Freedom of Association and Ability to Prohibit Campus Presence of Student Membership*, 11 J. College & U. L. 465, 468 (1985).

<sup>137</sup> 237 U.S. 589 (1915).

<sup>138</sup> *Id.* at 591. Cf. *State ex. Rel. Stallard v. White*, 82 Ind. 278 (Ind. 1882), which states that while a college has authority to regulate a fraternity system, it could not ask incoming students to pledge not to join a fraternity. N.B. It is not clear whether the Indiana Supreme Court was interpreting the U.S. or Indiana Constitution, the Morris Land Grant Act, or generalized common law.

<sup>139</sup> *Waugh*, 237 U.S. at 593.

<sup>140</sup> *Waugh*, 237 U.S. at 593

Mississippi Supreme Court, the plaintiff urged the U.S. Supreme Court to find that Mississippi denied his rights under the 14th Amendment.<sup>141</sup>

Without considering the plaintiff's argument that the University of Mississippi denied the plaintiff his right to association, the *Waugh* Court held that colleges maintain full discretion to interpret their educational mission and ways to carry out that goal as a means of enforcing discipline.<sup>142</sup> Accordingly, the right of the state to create and enforce educational policy outweighed the unique circumstances of individual prospective students.<sup>143</sup> As to the rights of students to associate in fraternities generally, the Court only noted that while "the right to pursue happiness and exercise rights and liberty are subject in some degree to" regulation, there are limits to the extent of those regulations under the 14th Amendment.<sup>144</sup>

*Waugh* may also represent a cul-de-sac in Constitutional jurisprudence.<sup>145</sup> Although never expressly overruled, *Waugh* relies on a rights versus privileges theory of higher education, no longer followed by courts;<sup>146</sup> in fact, at least two Supreme Court cases directly conflict with *Waugh*'s analysis and conclusion.<sup>147</sup> Specifically, *Waugh* suggests that higher education at a public institution is a privilege, rather than a right, and thus a candidate for admission could be forced to abandon a Constitutional right in order to receive the privilege of education. Since that

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<sup>141</sup> Specifically, the plaintiff alleged the University of Mississippi denied his "property right, liberty and his harmless pursuant of happiness." *Id.* at 593. The plaintiff also alleged violation of Mississippi law. *Id.*

<sup>142</sup> *Id.* at 596.

<sup>143</sup> *Id.* at 596.

<sup>144</sup> *Id.* at 596.

<sup>145</sup> James C. Harvey, *Rights, Privileges and Fraternities: Requiem for Waugh*, 35 Fraternal Law 3, 4 (January 1991).

<sup>146</sup> See Van Alstyne, *The Demise of the Rights-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968); Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive In The 1990s?* 18 J.C. & U.L. 419, 429-30 (Spring 1992). See also *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5<sup>th</sup> Cir. 1961) (university cannot expel student without due process).

<sup>147</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (students' freedom of expression may not be restricted without proof that its exercise would materially and substantially interfere with school activities or other students' rights); *Healy v. James*, 408 U.S. 169 (1972) (students' freedom of association may not be supported as a prior restraint based on unsupported fear of disruption).

time, the Supreme Court and lower courts have held citizens cannot be compelled to give up Constitutional rights in exchange for a state-offered privilege.

A case that does appear to be much more relevant, however, is *Healy v. James*,<sup>148</sup> a 1972 case in which the U.S. Supreme Court had another occasion to consider a prior restraint to undergraduates' right to association in a student group.<sup>149</sup>

In *Healy* a state university in Connecticut denied official recognition to a student activism group based on the potential for disruption and violence.<sup>150</sup> The college argued that the denial of recognition abridged no associational rights because the student group could meet as a group off-campus, distribute written material off-campus, and informally meet together on-campus as individuals.<sup>151</sup> Additionally, the university claimed broad authority to limit students' expressive activity to further its overall educational goals.<sup>152</sup>

The Supreme Court, however, rejected the college's arguments and held that non-recognition stifled the exercise of the student group's associational rights; meeting off-campus

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<sup>148</sup> 408 U.S. 169 (1972). Between *Waugh* and *Healy*, federal courts considered some aspects of the issue of fraternities and associational rights, but did not face the issue squarely. See e.g. *Sigma Chi Fraternity v. Regents of the Univ. of Colo.*, 258 F. Supp. 515 (D. Colo. 1966) (university denied recognition after finding fraternity restricted membership on the basis of race); *Webb v. State University of New York*, 125 F.Supp. 910 (N.D.N.Y. 1964) (affirming college's authority to control discipline and distinguished by *Healy*); *Beta Sigma Rho, Inc. v. Moore*, 46 Misc. 2d 1030, 261 N.Y.S.2d 658 (N.Y. Sup. Ct. 1965), *aff'd* 25 A.D.2d 719, 269 N.Y.S.2d 1012 (N.Y. App. Div. 4th Dept. 1966) (decided on the basis of contract and equal protection). The Supreme Court distinguished these cases from *Healy* because they did not involve a political organization and because the *Healy* case involved procedural issues. *Healy* at 1279-80.

<sup>149</sup> A few years earlier, the Supreme Court had recognized a student right to freedom of speech in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969) (students do not lose their rights to freedom of speech and expression "at the schoolhouse gate"). *Tinker* played an important role in *Healy*, decided three years later, which recognized a corresponding right of association for students. 408 U.S. 169, 180-2 (1972).

<sup>150</sup> *Id.* at 172-4, 176 n. 4.

<sup>151</sup> *Id.* at 182-83. Interestingly, the college in *Healy* confronted an organization that was known for violence and disruption, but still preserved the right of students to meet and distribute literature off-campus, and to gather informally on campus. Several colleges, however, have even prohibited those activities on the part of fraternity members. See *infra* n. 249.

<sup>152</sup> *Healy*, 408 U.S. at 187-88.

did not mitigate the impact of non-recognition.<sup>153</sup> The Court stated “the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities.”<sup>154</sup>

Where the lower court placed the burden of proof on the student group to show that it was entitled to recognition, the Court held that the burden rested on the college to justify its rejection of the student group's application for recognition.<sup>155</sup> Since rejection of recognition was a form of prior restraint, the burden of proof lay with the college to prove such restraint was appropriate.<sup>156</sup> Furthermore, the denial of recognition needed to be based on the organization's activities rather than its philosophy.<sup>157</sup>

### Part III - Associational Rights of Voluntary Organizations

#### a. The *Roberts* Case

The watershed for considering freedom of association in the context of voluntary and private social organizations was in *Roberts v. United States Jaycees*.<sup>158</sup> The United States Jaycees – or Junior Chamber of Commerce – “gives young people between the ages of 18 and 40 the tools they need to build the bridges of success for themselves in the areas of business

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<sup>153</sup> *Id.* at 183.

<sup>154</sup> *Id.* at 183.

<sup>155</sup> *Id.* at 184, 190, 193-4. The *Healy* court anchored students' associational rights in the First Amendment, rather than the Equal Protection Clause. *See generally id.* at 171-3.

<sup>156</sup> *Id.* at 186

<sup>157</sup> *Id.* at 188–189. Despite this guidance from *Healy*, in 1976 Texas A & M University tried unsuccessfully to ban a student homosexual organization because of its philosophy, despite the fact that the organization did not seek formal recognition and only desired to meet on campus and use student bulletin boards. *Gay Student Services v. Texas A&M University*, 737 F.2d 1317, 1319-1320 (5<sup>th</sup> Cir. 1984), *cert. denied* 471 U.S. 1001 (1985), *reh'g denied* 471 U.S. 1120 (1985) (Texas A&M argued that “the stated purposes and goals of the ‘Gay Student Services’ are not ‘consistent with the philosophy and goals that have been developed for the creation and existence of Texas A & M University.’”). After the gay student organization prevailed, Texas A&M for the first time gave official recognition to fraternities. Kara Bounds Socol, *The Evolution of Aggie Greeks* (Aug. 3, 2010), <http://tamunews.tamu.edu/2010/08/03/the-evolution-of-aggie-greeks> (last visited Feb. 23, 2012).

<sup>158</sup> 468 U.S. 609 (1984).

development, management skills, individual training, community service, and international connections.”<sup>159</sup> At the time of the case, membership was restricted to men, with non-voting associate membership available to women.

Two local chapters in Minnesota decided to admit women as full members and were sanctioned by the national organization.<sup>160</sup> The Minnesota chapters responded by suing the national organization under the Minnesota public accommodations statute;<sup>161</sup> the national organization countered that allowing chapters to admit women violated male members’ freedom of association.<sup>162</sup>

At the Supreme Court, the Minnesota chapters prevailed and their right to admit women was affirmed in contravention of the national rules. The Court held that the right to associate for expressive purposes was not absolute. Infringements on that right could be justified by state regulations adopted to serve compelling interests that could not be achieved through means significantly less restrictive of associational freedoms, provided that the restrictions were unrelated to the suppression of ideas.<sup>163</sup> Writing for the majority, Justice Brennan found that the state of Minnesota had a compelling interest in providing women the economic benefits that came with membership in the Jaycees.

The Court grouped associations into three categories: expressive, intimate,<sup>164</sup> and economic; the decision focused, however, on expressive and intimate associations.<sup>165</sup> Intimate

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<sup>159</sup> Jaycees, *Learn More about the Jaycees*, <http://www.usjaycees.org> (last visited September 23, 2011).

<sup>160</sup> *Roberts*, 468 U.S. at 614.

<sup>161</sup> MINN. STAT. § 363.03(3) (1982).

<sup>162</sup> *See generally Roberts* 468 U.S. at 617.

<sup>163</sup> *Id.* at 623.

<sup>164</sup> *Id.* at 618.

<sup>165</sup> *Id.* *See also id.* at 632–34 (O’Connor, J., concurring). The Court used the term “commercial association” in *Roberts*, but the academic literature has referred to it as an economic association. *See, e.g., id.* at 626, 629; *id.* at

associations are an element of personal liberty; human relationships that “must be secured against undue intrusion by the State because of the role of such relationships in safeguarding . . . individual freedom[s].”<sup>166</sup> Expressive associations are protected by the First Amendment to allow groups to engage in speech, assembly, petitioning for the redress of grievances, and the exercise of religion.<sup>167</sup>

The Court provided little guidance on the strictures or boundaries of expressive association, suggesting it was a characteristic of groups advancing “a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>168</sup>

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632–34 (O’Connor, J., concurring); Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2010 Cato Sup. St. Rev. 105, 117-18 (2009–2010). Justice Brennan’s majority opinion suggested there were four types of associations: 1) intimate expressive; 2) intimate non-expressive; 3) non-intimate expressive; and 4) non-intimate non-expressive. John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 Conn. L. Rev. 149, 155-56 (2010). Since *Jaycees*, it has become clear that intimate associations receive the highest level of Constitutional protection, regardless of whether they are expressive. *Id.* at 156. Indeed, all associations likely have expressive potential. The very act of gathering may be expressive. The categories of speech and standard of review is notoriously complicated, indeed somewhat confused. See e.g. Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1963 (2006) (“Strict scrutiny doctrine is notoriously hard to transport from one field to another. In equal protection and free speech cases it has with few exceptions been ‘strict in theory, fatal in fact.’”).

<sup>166</sup> *Id.* at 618. The Court added that the government may impermissibly burden the freedom to associate in a variety of ways, including “impos[ing] penalties or withhold[ing] benefits from individuals because of their membership in a disfavored group” and “interfer[ing] with the internal organization or affairs of the group.” *Id.* at 622–623. Freedom to associate “plainly presupposes a freedom not to associate.” *Id.* at 623. See also *Bd. Of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 544-45 (1983).

<sup>167</sup> *Roberts*, 468 U.S. at 618. See also John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 Conn. L. Rev. 149, 153-54 (2010) (“Expressive association fails to account for the expressive potential inherent in all groups.”). Expressive association requires strict scrutiny. *Christian Legal Soc’y*, 130 S. Ct. at 2985-86 (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

<sup>168</sup> *Roberts*, 468 U.S. at 622. The Court added that expressive association was “especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” *Id.* Three years later the Court considered similar circumstances in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1983). In *Rotary* the Court examined the purpose of the organization, which encouraged chapters to create in membership a cross-section of the business and professional life of a community. *Id.* at 546. The organization’s broad purpose, high turnover rate, vigorous recruitment, and policy of encouraging guests to attend meetings failed to meet the Court’s standard for an intimate association. *Id.* at 547. *Boy Scouts of America v. Dale* refined the Court’s explanation of expressive association. 530 U.S. 640 (2000). “It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity. See *Roberts, supra*, at 636, 104 S.Ct. 3244 (O’CONNOR, J., concurring) (‘Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence,

But the Court made it clear that the right to expressive association could be limited or abridged when “justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>169</sup> Essentially, an “individual’s statutory freedom from discrimination trumps a group’s constitutional freedom of expressive association unless that group can establish a nexus between its exclusionary policy and its expressive association.”<sup>170</sup>

Focusing on intimate association, the Court emphasized that such groups are characterized by their size, selectivity, and intimacy.<sup>171</sup> The Court then determined that the Jaycees were not small, selective, or intimate, and thus were not a protected intimate association.<sup>172</sup>

Specifically, the Jaycees existed as an association to engage in civic activities. The average Jaycees chapter was not small, having over four hundred members, with some chapters as large as nine hundred members.<sup>173</sup> Selectivity played no role in enrolling new Jaycees members.<sup>174</sup> And since Jaycees involved outsiders in most of its activities, and sought extensive

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patriotism, and a desire for self-improvement’).” *Dale*, 530 U.S. at 650 (internal citations included). But *Dale* is less relevant to this discussion because it focuses on the forced inclusion to a group of an unwanted person. *Id.* at 648.<sup>169</sup> *Id.* at 623.

<sup>170</sup> Bryson J. Hunter, *Introduction to Perspectives on Constitutional Exemptions to Civil Rights Laws: Boy Scouts of America v. Dale*, 9 Wm. & Mary Bill Rts. J. 591, 593 (2001). The Court’s analysis of expressive association was explained in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). See also *Bd. of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) (“In many cases, government interference with one form of protected association will also burden the other form of association.”). “Although a group may have some right as a group, all of the Supreme Court’s decisions concerning freedom of association have emphasized its protection based on the rights of the individuals involved.” Erwin Chemerinsky and Catherine Fisk, *The Expressive Interest of Associations*, 9 Wm. & Mary Bill Rts. J. 595, 605-06 (internal citations omitted).

<sup>171</sup> *Roberts*, 468 U.S. at 621. The Court also noted that purpose, policies, congeniality, and other characteristics might be pertinent in other cases. *Id.* at 620.

<sup>172</sup> *Id.* at 618-19. See also *Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987).

<sup>173</sup> *Id.* at 621.

<sup>174</sup> *Id.* at 620.

media coverage of its civic and philanthropic events, the Jaycees did not operate in intimate seclusion.<sup>175</sup>

Because individual fraternity chapters invariably have fewer than four hundred members, are selective in membership decisions, and conduct many (if not most) activities in seclusion,<sup>176</sup> the *Jaycees* decision suggested that fraternities were entitled to some associational rights. Two court decisions that followed seemed to extinguish that hope.

b. Aftermath of *Roberts* decision

In 1996, Pittsburgh police raided the Pi Lambda Phi fraternity house at the University of Pittsburgh, arresting several members and confiscating illegal drugs and drug paraphernalia.<sup>177</sup> The university subsequently determined that the membership at large either tacitly approved of the drug activity, or failed to take responsibility for other members' actions. Based on that finding, the university suspended the fraternity for one year and imposed sanctions on its members.<sup>178</sup> Ultimately, the university withdrew recognition of the fraternity.<sup>179</sup> Members of the fraternity sued the university and alleged, *inter alia*, that the university had violated the fraternity members' rights to free association under the First and Fourteenth Amendments.<sup>180</sup>

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<sup>175</sup> *Id.* at 620. See also *Bd. of Directors of Rotary Int'l*, 481 U.S. 537.

<sup>176</sup> "During [] weekly chapter meetings, Greek organizations meet with the members of their chapter to discuss the critical aspects of their organization. Such topics generally include the private business of the chapter, along with discussions of potential members. These meetings are often held using the respective organization's ritual and require seclusion from all but members of that particular organization." Br. for Amici Curiae N. Am. Interfraternity Conference and National Panhellenic Conference in Support of Plaintiffs-Appellees, and in Support of the District Court's Decision at 7, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111-cv).

<sup>177</sup> *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F.3d 435, 439 (3d Cir. 2000).

<sup>178</sup> *Pi Lambda Phi, Inc. v. University of Pittsburgh*, 58 F. Supp. 2d 619, 622 (W.D. Pa. 1999).

<sup>179</sup> *Pi Lambda Phi Fraternity, Inc.*, 229 F.3d at 439-40.

<sup>180</sup> *Pi Lambda Phi, Inc.*, 58 F. Supp. 2d at 622. The fraternity also alleged the university violated its rights to equal protection, and substantive and procedural due process. *Id.*

Perhaps because tied to the serious criminal allegations against the fraternity, the trial court reviewed the intimate association claim cursorily, stating, “[t]he personal relationships protected by the right to intimate association are ‘those that attend the creation and sustenance of a family--marriage, . . . the raising and education of children, . . . and cohabitation with one's relatives’ . . . . [c]learly, plaintiffs are not engaged in the sort of intimate human relationships that give rise to First Amendment protection.”<sup>181</sup> And finding that the purpose of a fraternity was “social,” the court found no right to expressive association.<sup>182</sup> In fact, according to the court, “[e]ven assuming that the fraternity is an expressive association . . . . [t]he university defendants were entitled to regulate the [fraternity’s] conduct with respect to drug use . . . .”<sup>183</sup>

The Third Circuit affirmed the trial court noting the *Roberts* standard for intimate association based on smallness, selectivity, and seclusion, and holding that Pi Lambda Phi failed to meet that standard.<sup>184</sup>

Specifically, the Third Circuit confused two separate concepts related to size and selectivity. Citing *Roberts* and *Rotary*, the court noted that chapters in the Jaycees and Rotary had membership in a range of fewer than twenty to as many as nine hundred members.<sup>185</sup> While that put the Pi Lambda Phi chapter, with eighty members, roughly in the same rubric, the Third

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<sup>181</sup> *Id.* at 623 (quoting *Roberts*, 468 U.S. at 619-20).

<sup>182</sup> *Id.* at 624. Interestingly, while there may be strong arguments that Pi Lambda Phi was not an expressive association under the *Roberts* criteria, the trial court relied on three odd cases as support for the proposition that the only purpose of a fraternity is social. The court cited *Cornelius v. Benevolent Protective Order of the Elks*, 382 F. Supp. 1182, 1195 (D. Conn. 1974) (“the associational activities of the Elks and Moose are purely social and not political and therefore do not come within the core protection of the right to associate”); *Sigma Chi Fraternity v. Regents of the Univ. of Colo.*, 258 F. Supp. 515, 526 (D. Colo. 1966) (court notes lack of Supreme Court precedent concerning freedom of association as it relates to a social organization in 1966; the Supreme Court did consider relevant cases after 1966 and before Pi Lambda Phi was decided. Further, it is not clear from the case that either the University of Colorado or Sigma Chi termed the fraternity a social organization); and *Phinney v. Dougherty*, 307 F.2d 357, 361 (5th Cir. 1962) (for purposes of the internal revenue code college fraternities are social organizations).

<sup>183</sup> *Pi Lambda Phi, Inc.*, 58 F. Supp. 2d at 624.

<sup>184</sup> *Pi Lambda Phi Fraternity, Inc.*, 229 F.3d at 438.

<sup>185</sup> *Id.* at 442.

Circuit intertwined that number with an analysis of both Jaycees' and Rotary's inclusiveness. Rotary Clubs were instructed by its central organization to include all qualified members within its geographic territory, and to avoid arbitrary limits on growth.<sup>186</sup> Jaycees chapters were "large and basically unselective," and the only reason anyone could recall a prospective member being rejected was for their gender.<sup>187</sup>

Essentially the Third Circuit conflated the fact that Pi Lambda Phi overlapped in size with smaller Jaycees chapters and Rotary Clubs, and then presumed that resulted from a lack of selectivity. But there is nothing in the decision to support that analysis, other than the court's conclusory statement that Pi Lambda Phi was "not particularly selective in whom it admits."<sup>188</sup> In fact, fraternities are typically very selective in choosing new members, and often criticized for their exclusivity.<sup>189</sup>

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<sup>186</sup> *Bd. of Directors of Rotary Int'l*, 481 U.S. at 546.

<sup>187</sup> *Roberts*, 468 U.S. at 621.

<sup>188</sup> *Pi Lambda Phi Fraternity, Inc.*, 229 F.3d at 442. The court also pointed out that the fraternity recruited from the general student body, held parties open to non-members, and participated in university events, although it is not clear why those attributes would make an organization unselective in choosing new members. *Id.* at 442. The court also held that the fraternity was not an expressive association. *Id.* at 438. See *Roberts*, 468 U.S. at 622-23; *Bd. of Directors of Rotary Int'l*, 481 U.S. at 548-49. See also *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). See also *Chi Iota*, 443 F. Supp. 2d at 385.

<sup>189</sup> See generally *Hamilton Chapter of Alpha Delta Phi v. Hamilton College*, 128 F.3d 59, 61 (2<sup>nd</sup> Cir. 1997); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 443 F. Supp 2d 374, 387 (E.D.N.Y. 2006) (overruled) ("Plaintiffs noted at oral argument that fraternities and sororities are generally portrayed as and criticized for being exclusive and selective . . . in the case at bar, plaintiffs have provided several details regarding the Fraternity's selectivity in membership."); *Phelps v. President & Trustees of Colby College*, 1990 Me. Super. LEXIS 176, 2 (Me. Super. Ct. Aug. 23, 1990); *Reardon v. Wroan*, 811 F.2d 1025, 1028 n. 2 (7th Cir. 1987); BAIRD'S MANUAL 17th at 3-4; HANK NUWER, WRONGS OF PASSAGE; FRATERNITIES, SORORITIES, HAZING, AND BINGE DRINKING 45 (Indiana Univ. Press 1999); Susanna Ashton, *Making Peace with the Greeks*, *Chron. Higher Educ.* (Nov. 17, 2006); Julianne Bassinger, *How Nan Keohane Is Changing Duke*, *Chron. Higher Educ.*, Nov. 3, 2000; Nicholas Syrett, *Schools Are Culpable*, *New York Times*, May 6, 2011, <http://www.nytimes.com/roomfordebate/2011/05/05/frat-guys-gone-wild-whats-the-solution/colleges-condone-fraternities-sexist-behavior> (last visited Feb. 28, 2012).

While the court’s analysis is inexplicable with respect to the standards the Supreme Court set forth in *Roberts*,<sup>190</sup> fraternity members had violated the law and, rather than accept what was likely a just punishment, the fraternity litigated to avoid group responsibility.<sup>191</sup> Indeed, if this decision is viewed as regulating conduct rather than expressive or intimate speech, then it is possible that this was a strong decision and outlier intended to punish unacceptable behavior.<sup>192</sup> But in 2007, the Court of Appeals for the Second Circuit applied *Roberts* similarly, and in a case where the fraternity may have been a much more sympathetic plaintiff.

In 2005, the College of Staten Island, a branch of the public City University of New York (“CUNY”), denied recognition to Chi Iota Colony, an all-male Alpha Epsilon Pi (“AEPi”) expansion group, because it discriminated on the basis of gender.<sup>193</sup> AEPi was a men’s fraternity founded in 1913 “to provide opportunities for the Jewish college man seeking the best possible college and fraternity experience,”<sup>194</sup> and the Chi Iota Colony was the national fraternity’s effort

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<sup>190</sup> Several commentators have suggested that this is the inherent flaw in *Roberts* categories of intimate and expressive association. See, e.g., John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 Conn. L. Rev. 149, 150–153 (2010).

<sup>191</sup> At least one commentator has suggested that in application to groups with unpopular compositions and messages, the *Jaycees* standards are unworkable. Inazu, *supra* n. 190, at 149. Professor Inazu suggests instead that the categories of intimate and expressive association be merged into a general right of assembly. *Id.* at 200. See also John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tul. L. Rev. 565 (Feb. 2010).

<sup>192</sup> Many universities attach some form of “collective responsibility” to acts carried out by members of fraternities. See, e.g., Jim Puzanghera, *Stanford Burglary Gets More Serious*, San Jose Mercury News (San Jose, CA), Apr. 11, 1995. And some have taken umbrage at the application of collective responsibility. See, e.g., *Psi Upsilon v. Univ. of Pa.*, 591 A.2d 755, 759, 761 (Pa. Super. Ct. 1991). But fraternities do choose their members and by the nature of fraternal bonds accept some responsibility for the actions of their brothers and sisters, particularly when the act was carried out in the name of the fraternity. And certainly some good comes from collective responsibility as well. See, e.g., Shaun R. Harper, *The Effects of Sorority and Fraternity Membership on Class Participation and African American Student Engagement in Predominantly White Classroom Environments* (Jan. 2008), available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1019&context=sharper>.

<sup>193</sup> *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007).

<sup>194</sup> *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 443 F. Supp 2d 374, 376 (E.D.N.Y. 2006), *overruled by* *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d 136 (2nd Cir. 2007) (quoting AEPi Mission Statement). See also Alpha Epsilon Pi, *Mission Statement of AEPi*, <http://www.aepi.org/?page=MissionStatement> (last visited Feb. 21, 2012). “As a secular Jewish organization with Brothers from all denominations, Alpha Epsilon Pi is non-discriminatory and open to all who are willing to espouse its purpose and values.” AEPi, *Jewish Life*, <http://www.aepi.org/?page=JewishLife> (last visited Feb. 21, 2012). AEPi was associated with Jewish organizations such as the AIPAC, B’nai B’rith, and Taglit Birthright Israel Trips. *AEPi Jewish Identity Enrichment Programming*,

to install a chapter at the College of Staten Island. As all fraternities, the goals of the organization were noble, seeking “to promote and encourage among its members: Personal perfection, a reverence for God and an honorable life devoted to the ideal of service to all mankind; lasting friendship and the attainment of nobility of action and better understanding among all faiths . . . .”<sup>195</sup>

The fraternity appeared deeply important to AEPi’s members. According to its past president, the fraternity was a “lifelong interpersonal bond termed brotherhood,” which “results in deep attachments and commitments to the other members of the Fraternity among whom is shared a community of thoughts, experiences, beliefs and distinctly personal aspects of their lives.”<sup>196</sup> As to the single-sex composition of the organization, the fraternity explained

[t]he single-sex, all-male nature of the Fraternity is essential to achieving and maintaining the congeniality, cohesion and stability that enable it to function as a surrogate family and to meet social, emotional and cultural needs of its members. Furthermore, non-platonic, *i.e.*, romantic relationships between members and the inevitable jealousies and other

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<http://www.aepi.org/?page=JewishLife> (last visited Feb. 21, 2012). AEPi has also partnered with the organization "Taglit-birthright israel" to send members on cost-free trips to Israel. *Id.*

<sup>195</sup> *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp 2d at 377 (quoting AEPi by-laws).

“Plaintiffs further describe the Fraternity’s purpose as achieving a ‘lifelong interpersonal bond termed brotherhood,’ which “results in deep attachments and commitments to the other members of the Fraternity among whom is shared a community of thoughts, experiences, beliefs and distinctly personal aspects of their lives.’ Plaintiffs explain that ‘[t]he single-sex, all-male nature of the Fraternity is essential to achieving and maintaining the congeniality, cohesion and stability that enable it to function as a surrogate family and to meet social, emotional and cultural needs of its members. Furthermore, non-platonic, *i.e.*, romantic relationships between members and the inevitable jealousies and other conflicts would pose a grave threat to the group’s brotherhood, thus, maintaining the Fraternity’s brotherhood is best achieved by maintaining an all-male membership.”

*Id.* (internal citations omitted).

<sup>196</sup> *Id.*

conflicts would pose a grave threat to the group's brotherhood, thus, maintaining the Fraternity's brotherhood is best achieved by maintaining an all-male membership.<sup>197</sup>

The colony was established in 2002, and from that time until the lawsuit was filed in 2005, it never had more than twenty members. In 2004 it applied to the college for recognition, which was rejected. The college's response was that : “[m]embership in a chartered club must be open to all students. Because your constitution appears to exclude females, it contravenes the College's non-discrimination policy. . . . In addition . . . your proposed constitution provides for the practices of rushing and pledging. College policy . . . prohibits rushing and pledging.”<sup>198</sup>

The denial of recognition prohibited AEPi from using college facilities, bulletin boards, mailboxes, workspace in the campus center, or meeting space on campus.<sup>199</sup> AEPi was also precluded from using the college's name in association with the group or applying for funding from the student government.<sup>200</sup> Perhaps most importantly, AEPi was specifically prohibited from handing out flyers to students on campus, hanging banners advertising events, or using chalkboards to make announcements.<sup>201</sup> AEPi further explained that holding “meetings off-campus has caused difficulty for students who depend on public transportation.”<sup>202</sup>

In 2005 AEPi sued in the United States District Court for the Eastern District of New York alleging the group's rights to intimate and expressive<sup>203</sup> association had been violated.<sup>204</sup>

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 380. Other branches of the City University of New York permit single-sex fraternities (and rushing and pledging). See, e.g., Brooklyn College, *Student Clubs*, <http://www.brooklyn.cuny.edu/web/campuslife/clubs.php> (last visited Mar. 1, 2012); The City College of New York, *Fraternities and Sororities, Overview of Greek Life at CCNY*, <http://www1.ccnyc.cuny.edu/current/student/activities/greek/index.cfm> (last visited Mar. 1, 2012);

<sup>199</sup> *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp 2d at 380.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Neither the trial court nor the appellate court analyzed the expressive association issue in depth. The Second Circuit, while acknowledging that AEPi was primarily a fraternity for Jewish men, seemed to suggest that the

The district court granted a preliminary injunction against the college on AEPi's intimate association claim, but the U.S. Court of Appeals for the Second Circuit reversed on appeal from the college.<sup>205</sup>

The Second Circuit balanced the fraternity's associational rights against CUNY's interest in preventing discrimination, and found the balance in favor of CUNY.<sup>206</sup> The court's analysis, focusing on intimate association, was puzzling.<sup>207</sup>

The Second Circuit noted that in *Roberts*, an average Jaycees chapter had four hundred members and as many as nine hundred members. While the Second Circuit recognized that the

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fraternity was not quite Jewish enough. See generally 502 F.3d at 140-142. Chi Iota, in testimony, seemed to suggest otherwise, e.g. AEPi is "predominantly Jewish male fraternity," "we're a Jewish fraternity," "extending bids to non-Jewish potential members has been 'an issue with some brothers.'" *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F.Supp 2d at 378. The national organization of AEPi, describes itself as "the Global Jewish Fraternity" and it "was founded to provide opportunities for a Jewish man seeking the best possible college and fraternity experience. We have maintained the integrity of our purpose by strengthening our ties to the Jewish community and serving as a link between high school and career. Alpha Epsilon Pi develops leadership for the Global Jewish community at a critical time in a young man's life." Alpha Epsilon Pi, <http://www.aepi.org> (last visited Mar. 1, 2012). AEPi associates itself with Jewish organizations including B'nai B'rith, and "Taglit Birthright Israel," which sends members on cost-free trips to Israel. See Alpha Epsilon Pi, *Jewish Life*, <http://www.aepi.org/?page=JewishLife> (last visited Mar. 1, 2012).

<sup>204</sup> *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp 2d at 376. AEPi also claimed a violation of equal protection. *Id.*

<sup>205</sup> *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d 136. The District Court also rejected AEPi's claim based on expressive association. 443 F. Supp 2d at 445. The Second Circuit remanded the case for a full trial, noting that AEPi's "interests in expressive association are relatively weak." 502 F.3d at 149. Sometime during the pendency of the appeal, AEPi at the College of Staten Island disbanded. John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 Conn. L. Rev. 149, 191 (2010).

<sup>206</sup> 502 F. 3d at 139.

<sup>207</sup> The court did not consider AEPi's expressive association as a matter of procedure. *Id.* at 149 n.2.

Alpha Epsilon Pi had only eighteen members, it held that its size<sup>208</sup> was low by circumstance rather than a desire to maintain intimacy.<sup>209</sup>

Although precise data is hard to find for fraternity chapters across North America, in 1999-2000 the average chapter size for women was 54; in 2011 the average chapter size for men was 63.<sup>210</sup>

With regard to selectivity, the court found that the fraternity's aggressive recruitment practices suggested it was not selective, as did its affiliation with the national Alpha Epsilon Pi organization.<sup>211</sup> Finally, as to seclusion, the court found that while some fraternity activities

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<sup>208</sup> Beyond the general rubric of the *Roberts* Court instructing that size is to be a factor considered for intimate association, there is nothing in that decision that suggests that size alone prevents intimate association. Indeed, some families, related by blood or marriage, are quite large, and certainly larger than an eighteen member fraternity such as AEPi. There are no bright lines separating the types of relationships that receive heightened protection; instead, courts must carefully assess "where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Roberts*, 468 U.S. at 620.

<sup>209</sup> 502 F. 3d at 145. It is important to point out the procedural posture: this was an appeal from a preliminary injunction and extensive testimony had not yet occurred. It is also worth noting that the College of Staten Island had, at the time, over 11,000 students, and Alpha Epsilon Pi included only .2% of the total student population (and 1.1% of its male population). 443 F. Supp. 2d at 386; 502 F.3d at 145. Additionally, as Justice O'Connor wrote in another matter concerning associational rights, "[i]n a city as large and diverse as New York City, there surely will be organizations that . . . are deserving of constitutional protection. For example, in such a large city, a club with over 400 members may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence." *New York State Club Association, Inc. v. City of N.Y.*, 487 U.S. 1 (1988) (O'Connor, J., concurring). See also *Louisiana Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1487, n.28 (5th Cir. 1995). Staten Island is one of the five boroughs of New York City. See generally *Staten Island USA*, <http://statenislandusa.com> (last visited Feb. 20, 2012). The Alpha Epsilon Pi trial court also noted that the Supreme Court in *Rotary Club* found that while the association had no upper limit for membership, the Court's focus was more on a lack of selectivity than on the need for a numerical cutoff. 443 F. Supp. 2d at 386.

<sup>210</sup> Encyclopedia of American Education, *Fraternity* (June 25, 2011, 2:47 PM), <http://american-education.org/875-fraternity.html>; North American Interfraternity Conference, *2011 NIC/NPC Congressional Visit Packet*, available at [http://www.nicindy.org/uploads/files/2011\\_Visit\\_Materials-FINAL.pdf](http://www.nicindy.org/uploads/files/2011_Visit_Materials-FINAL.pdf) (last visited Mar. 1, 2012).

<sup>211</sup> According to the court, "[f]raternity members invite approximately one out of ten men they meet on campus – and about a third of the men they know through Jewish groups—to rush events. Most of those who attend a first rush event are invited back for later events, and the majority of those who attend multiple events are asked to pledge." 502 F.3d at 145. Keeping in mind that this effort resulted in eighteen members out of four thousand five hundred men attending the college, query whether most intimate associations, including marriage, are significantly more selective.

were restricted to members, the fraternity also invited non-members to some parties, recruitment activities, and participated in some CUNY activities.<sup>212</sup>

Critics have questioned the courts' logic in *Pi Lambda Phi* and *Alpha Epsilon Pi*.<sup>213</sup>

While there may have been no regulated upper limit to the fraternity's membership, no fraternity chapter has four hundred members, which was the size of the Minnesota Jaycees chapters.<sup>214</sup> In fact, the overwhelming majority of fraternity chapters have fewer than one hundred members.<sup>215</sup> Indeed, on a large number of college campuses, fraternity members live in dedicated restricted housing (whether privately- or college-owned) and share meals together, allowing an even greater degree of intimacy than most organizations.<sup>216</sup>

Over the years, fraternities have frequently been accused of being too selective, not unselective.<sup>217</sup> Individual chapters are seeking members generally called "brothers" or "sisters," suggesting a close relationship. Fraternities are focused on individual growth and mentoring within the confines of a closely-bound membership, rather than the primary purpose of the Jaycees, which is to contribute to the community.<sup>218</sup>

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<sup>212</sup> *Id.* at 146-47.

<sup>213</sup> See, e.g., John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 Conn. L. Rev. 149 (2010).

<sup>214</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984).

<sup>215</sup> See *infra*, n. 210 (stating average chapter size).

<sup>216</sup> See BAIRD'S MANUAL I-10.

<sup>217</sup> See *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp. 2d at 386. Indeed, some of the greatest criticisms of fraternities is that membership selection is too selective. Most fraternities previously had rules restricting membership to Caucasian men. BAIRD'S MANUAL I-22-23. See *supra* n. 189, 211 (also notes – currently 202 -207 on exclusivity and voting for members)

<sup>218</sup> *Roberts*, 468 U.S. at 612-13.

Fraternity membership is not only restricted to students attending a specific college, but generally students of the same gender.<sup>219</sup> Because these students will often live and dine together, fraternities require a vote on new members, with some fraternities or chapters requiring a supermajority or unanimous vote.<sup>220</sup> In some respects membership is restricted to the chapter that initiated a student; fraternities often have restrictive rules governing whether an initiated member can participate in another chapter of the same fraternity upon transferring schools, or attending another school as a graduate student where there may be another chapter of the fraternity.<sup>221</sup>

The membership structure of fraternities presumes students will graduate at some point, and thus the organizations must recruit new members. Accepting for argument's sake that fraternity recruitment is selective in a single year, it is not clear why repeating the process annually to replace graduating members makes an organization unselective. Indeed that alumni often stay involved in local chapters and the national organization for life suggests that there was some degree of intimacy in the organization and its selection process. It is also not clear why the court believed the existence of an umbrella organization comprised of similarly organized locally managed chapters reduces the selectivity of local chapters.

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<sup>219</sup> See, e.g., North-American Interfraternity Conference, *Statement of Position Regarding Single-Gender Membership*, [http://www.nicindy.org/about/resolutions/#Single Gender Membership](http://www.nicindy.org/about/resolutions/#Single%20Gender%20Membership) (last visited Mar. 2, 2012) (emphasizing the NIC's strong support in single-gender membership).

<sup>220</sup> See *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp. 2d at 386. See also e.g., FarmHouse International Fraternity, *The Bylaws 2010–2012*, <http://farmhouse.org/guides/bylaws.pdf> (last visited Mar. 2, 2012); Alpha Epsilon Pi Fraternity Supreme Const. art. II (amended Aug. 1997), available at [http://www.aepi.org/resource/resmgr/files/supreme\\_constitution.pdf](http://www.aepi.org/resource/resmgr/files/supreme_constitution.pdf); Delta Tau Delta Fraternity, Constitution and Bylaws art. IV (amended Feb. 24, 2012), available at <http://www.delts.org/media/Constitution%20and%20Bylaws-Current.pdf>.

<sup>221</sup> See, e.g., Theta Chi Fraternity Const. and By-Laws art. VI (Mar. 2012), available at <http://www.thetachi.org> (follow "Resources" hyperlink; then follow "Constitution and Bylaws" hyperlink); Psi Upsilon Constitution art. IX, § C (Oct. 2004), available at <http://www.psiu.org/ug/handbooks/Constitution%2009.pdf>; Delta Sigma Phi Fraternity, Constitution and Bylaws art. II, available at <http://www.deltasig.org> (follow "Chapter Resources" hyperlink; follow "Constitution and Bylaws" hyperlink under "Manuals"). See also Sigma Alpha Epsilon Fraternity, *The Fraternity Laws* § 47(D)(3) (2011), available at <http://www.saerecord.net/files/docs/FraternityLaws.pdf>.

Although the *Pi Lambda Phi* and *AEPi* courts focused on the fact that some fraternity activities were non-private, the courts did not attempt to measure the importance or significance of the non-private events to members, versus the importance or significance of fraternity activities that were conducted privately. The mere fact that any organization has a public face does not necessarily mean that its private activities are unimportant or irrelevant. There is also some irony that the fraternities were essentially punished by the courts for good citizenship through participation in campus and community activities, where they might have received greater protection were their activities restricted to members alone.

The most critical fraternity activities, such as meetings, ritual ceremonies, and initiations or bonding ceremonies, are universally private, and almost all are secret; most fraternity pledges and oaths include a promise to keep all such activities confidential.<sup>222</sup>

The Second Circuit did not consider *AEPi*'s rights to expressive association.<sup>223</sup> The Amici, however, raised several intriguing arguments that fraternities were in fact protected expressive associations, noting the Supreme Court's statement that "[a]s we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."<sup>224</sup>

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<sup>222</sup> Const. of Chi Psi Fraternity, art. 1 § 3.2 (Aug. 7, 2010), available at [http://www.chipsi.org/resource/collection/2C613DFE-F5BE-4DBC-BF18-89EB6083E589/Constitution\\_-\\_as\\_of\\_7\\_August\\_2010.pdf](http://www.chipsi.org/resource/collection/2C613DFE-F5BE-4DBC-BF18-89EB6083E589/Constitution_-_as_of_7_August_2010.pdf); Delta Sigma Phi Fraternity Const. and Bylaws art. III § K (Aug. 2011), available at <http://www.deltasig.org/files/2011%20Revision%20Constitution%20&%20Bylaws.pdf>. Delta Upsilon Fraternity is an exception. BAIRD'S MANUAL 17th at 8. See also *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 443 F. Supp. 2d at 386.

<sup>223</sup> 502 F.3d at 149, n. 2.

<sup>224</sup> Brief for Amici Curiae North American Interfraternity Conference and National Panhellenic Conference in Support of Plaintiffs-Appellees Chi Iota Colony of Alpha Epsilon Pi Fraternity at 10, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111-cv) (citing *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000)).

The Amici pointed out that fraternities have existed on college campuses in the United States for over 200 years as single-sex organizations; the forced inclusion of all students could destroy the organizations' success.<sup>225</sup> If coeducation were forced upon fraternities nationwide, significant changes would have to be made in thousands of houses, and the development of brotherhood and sisterhood might be "destroyed."<sup>226</sup> Furthermore, if forced coeducation were not universal, it might prevent individual chapters from affiliating with single gender national fraternities.

One of the College of Staten Island's primary arguments against finding a right of expressive association for AEPi was that "[t]he mere fact that the Fraternity holds itself out as an all-male organization valuing 'brotherhood' does not mean that the inclusion of women would significantly burden its expressive rights . . . an expressive association cannot 'erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.'"<sup>227</sup> That, however, ignores the fact that fraternities are exempt from the gender requirements of the antidiscrimination laws.<sup>228</sup>

#### **Part IV – *Christian Legal Society and Citizens United***

##### ***a. Christian Legal Society***

A nationally-organized Christian Legal Society ("CLS") sought university recognition for a local chapter at the state-supported University of California Hastings College of Law.<sup>229</sup> In order to achieve official university recognition, Hastings required groups to take "all comers," in

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> Brief for State Defendants-Appellees at 48, *Chi Iota Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (No. 06-4111cv), 2006 WL 5013104 (citing *Dale*, 530 U.S. at 653).

<sup>228</sup> *See supra* n. 95 (discussing Title IX).

<sup>229</sup> *Christian Legal Soc'y Chapter of the Univ. of Ca. Hastings College of Law v. Martinez*, 130 S. Ct. 2971 (2010).

other words, to have membership open to all students attending the law school.<sup>230</sup> Because CLS required prospective members to attest to a statement of faith that banned “unrepentant homosexual conduct,” and thus effectively banned gay students, Hastings denied recognition to the group.<sup>231</sup>

Recognition by the law school allowed student groups certain benefits, including the ability to seek financial assistance from the law school (from a shared pool of four to five thousand dollars allotted for all recognized student organizations generated by a mandatory student activities fee),<sup>232</sup> place announcements in a school newsletter, advertise events on designated bulletin boards, send emails using a Hastings address, participate in a student activities recruitment fair, receive priority to use law school facilities for meetings, and to use the Hastings name and logo.<sup>233</sup> In return, Hastings required student groups to allow any student to join, and follow Hastings non-discrimination policy.<sup>234</sup>

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<sup>230</sup> *Id.* at 2973-74. *Cf.* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 825 (1995) (government has power to reserve forums for specific groups). *See also* *Widmar v. Vermont*, 454 U.S. 263 (1981) (college not required to open facilities to all non-students). Another type of “take all-comers” policy is found with common carriers, which have long been prohibited from engaging in discrimination with their customers. Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2010 *Cato Sup. St. Rev.* 105, 116 (2009–2010). Professor Epstein notes that the common law rule allowed firms without monopoly power to choose their trading partners, and to refuse to deal with one another for any reason at all. *Id.* *See, e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Professor Epstein further suggests that modern anti-discrimination laws are patterned on rules that applied to common carriers but applied to “all sorts of public accommodations that exercise no hint or whisper of monopoly power. . . . truncat[ing] the right *not* to associate” Epstein, *supra* at 116-117 (emphasis in original). *See generally* *Roberts v. U.S. Jaycees*, 458 U.S. 609, 623 (1984).

<sup>231</sup> *Christian Legal Soc’y*, 130 S. Ct. at 2980. CLS’ statement of faith also required members to attest to several tenets of Christian faith, thus barring non-Christians from membership. *Id.* Similar organizations have had difficulties at other campuses. *See, e.g.,* Thomas Bartlett, *Judge Dismisses Lawsuit Brought by Christian Fraternity Against U. of North Carolina at Chapel Hill*, *Chron. Higher Educ.*, May 19, 2006.

<sup>232</sup> 130 S. Ct. at 2979; *Id.* at 3002 (Alito, J., dissenting).

<sup>233</sup> *Id.* at 2979.

<sup>234</sup> *Id.* The non-discrimination policy stated that “[Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.” *Id.* The parties agreed to a joint stipulation that the law school required recognized student groups to “allow any student to participate, become a member, or seek leadership positions in the organizations, regardless of [the student’s] religious

CLS submitted an application for recognition and was rejected because the society barred students based on religion and sexual orientation.<sup>235</sup> Hastings rejected CLS' request for an exemption to Hastings' non-discrimination policy, and instead offered CLS the use of Hastings facilities for meetings, and access to chalkboards and generally available bulletin boards to announce events.<sup>236</sup> In other words, according to the Court, Hastings would not support CLS, but would do nothing to suppress its endeavors.<sup>237</sup>

CLS operated independently of Hastings for an academic year, and then filed suit alleging that the law school had violated the society's First and Fourteenth Amendment rights to free speech and expressive association.<sup>238</sup> Affirming the U.S. Court of Appeals for the Ninth Circuit, the Court held that Hastings' "take all-comers" policy, required for recognition as a student organization, was sufficiently viewpoint neutral to withstand scrutiny within the limited public forum of the law school.<sup>239</sup> Moreover, Hastings' restrictions served a compelling state

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beliefs." *Id.* at 2982. This policy, however, was not specifically expressed in Hastings' non-discrimination policy as written. See generally *Id.* at 2979. The Court did not consider the non-discrimination policy as written because of the parties' joint stipulation. *Id.* at 2982. Additionally, the Court did not consider whether the "take all-comers" policy was pretext because that had not been considered below. *Id.* at 2979. The majority did, however, permit the Ninth Circuit on remand to consider whether the issue was justiciable. *Id.* at 2995. The dissenting opinion, written by Justice Alito, argued that the governing issue in the case was not the "take all-comers" policy, but instead was the non-discrimination policy itself as it related to sexual orientation. *Id.* at 3000-05, 3016-19 (Alito, J., dissenting).

<sup>235</sup> *Id.* at 2980.

<sup>236</sup> *Id.* at 2981.

<sup>237</sup> *Id.* at 2981. "In essence, Hastings preferred a policy of discrimination to one of total exclusion." Richard A. Epstein, *Church and State at the Crossroads: Christian Legal Society v. Martinez*, 2010 *Cato Sup. St. Rev.* 105, 108 (2009–2010).

<sup>238</sup> 130 S. Ct. at 2981. CLS sued under 42 U.S.C. § 1983. *Id.* The suit also alleged that Hastings violated CLS' free exercise of religion. *Id.*

<sup>239</sup> *Id.* at 2984. The Court contrasted this level of scrutiny to the strict scrutiny applied in *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, a university closed its facilities to a student group seeking space for worship and discussion. *Id.* At 265. The use of the limited public forum doctrine is somewhat at odds with *Healy*, which considered only whether the student group would be disruptive. *Healy v. James*, 408 U.S. 169, 192 (1972).

interest unrelated to the suppression of ideas, and impossible to advance through less restrictive means.<sup>240</sup>

Beyond these conclusions, the Court offered substantial explanation for its decision. Specifically, the majority termed recognition for CLS as a form of state subsidy.<sup>241</sup> To that end, the Court drew a distinction between policies that require university action, and those that withhold university benefits.<sup>242</sup> Here, where CLS participated within the limited public forum of students in a law school, the society faced no pressure to act (or conform its views), but only was denied certain benefits based on the group's conduct.<sup>243</sup> In other words, CLS could do "whatever it will," but it would receive no school subsidy if it failed to take all-comers.<sup>244</sup>

The Court found no constitutional shortcomings in Hastings' policies because the barriers to recognized status were viewpoint neutral, and because substantial alternative channels remained open for communication with students.<sup>245</sup> And most important for fraternities, the Court found Hastings' policies to withstand scrutiny, in part, because Hastings offered CLS access to school facilities for meetings, and the use of chalkboards and generally available

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<sup>240</sup> *Christian Legal Soc'y*, 130 S. Ct. at 2985.

<sup>241</sup> *Id.* at 2986.

<sup>242</sup> 130 S. Ct. at 2986. See Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan L. Rev. 1919 (2006) (government generally need not subsidize the exercise of constitutional rights). Professor Volokh has argued that the government is generally free not to fund the exercise of a constitutional right. Although he is undoubtedly correct regarding the funding of student activities, fraternities rarely seek funding from a university. See n. 258 *infra*. Rather than lobbying for money, fraternities generally seek to use campus bulletin boards and email for publicity; newer and unhoused groups may ask for meeting space and tables in student lounges.

<sup>243</sup> 130 S. Ct. at 2986. See Volokh, *supra* n. 242, at 1931.

<sup>244</sup> 130 S. Ct. at 2989. One of the most pervasive forms of associational discrimination is found in most colleges, where programs are open only to students. See Volokh, *supra* n. 242, at 1940 ("discrimination against certain associational decisions is present in the quintessential, and largely uncontroversial, example of a permissible designation for a public forum: university programs that are open to student groups"). As Professor Volokh notes, students are constitutionally entitled to associate with non-students, yet, for example, a student group aimed at fighting homelessness may not have any non-student homeless individuals serve on its board. *Id.*

<sup>245</sup> 130 S. Ct. at 2991.

bulletin boards to advertise events.<sup>246</sup> This is noteworthy because fraternities rarely ask for or receive the same status as other student organizations because of their choice to maintain selective membership and their ability to raise significant funds internally through membership dues.<sup>247</sup> In fact, the Court noted "[p]rivate groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation."<sup>248</sup>

This is, in fact, the most critical issue for fraternities: whether a fraternity may exist at all in some relationship, no matter how informal, with a host university. Tied to college recognition is the ability to meet, recruit, and affiliate with students. Indeed, the ability to advertise events and use school facilities for meetings may be advantageous for some fraternity chapters, but surely secondary to being permitted to exist. Students at some schools may be expelled for membership in any fraternity.<sup>249</sup> Other schools simply refuse to allow any fraternity the benefits the Supreme Court has embraced for even unrecognized organizations.<sup>250</sup> And even many schools that permit fraternities may regulate and restrict new fraternity expansion.<sup>251</sup>

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<sup>246</sup> *Id.* at 2991.

<sup>247</sup> See generally *id.* at 2991-92; *supra* n. 279 (discussing AEPI's request to forgo any school-distributed money and instead collect dues from its own members).

<sup>248</sup> 130 S. Ct. at 2991-92.

<sup>249</sup> See, e.g., Williams College Student Handbook at 7, <http://web.williams.edu/Registrar/handbook/policies.html#fraternities> (last visited Feb. 28, 2012); Colby College Student Handbook, [http://www.colby.edu/administration\\_cs/student-affairs/deanofstudents/studentconduct/policies\\_procedures/other\\_policies/fraternity-activity.cfm](http://www.colby.edu/administration_cs/student-affairs/deanofstudents/studentconduct/policies_procedures/other_policies/fraternity-activity.cfm) (last visited Feb. 28, 2012); University of Mary Washington, *Student Clubs and Organizations Handbook*, <http://students.umw.edu/studentactivities/student-organization-handbook/> (follow "Welcome" hyperlink) (last visited Feb. 28, 2012) ("The University will not recognize or condone student, faculty, or staff organizations that discriminate in selecting members.").

<sup>250</sup> *Infra* n. 261. See also *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 858 (7th Cir. 2005) (student group was no longer able to reserve rooms for private meetings but could use classrooms to meet as long as other students and faculty were free to come and go from the room).

<sup>251</sup> See *supra* n. 66 (discussing the policies of several schools regarding expansion of new fraternities).

The majority may have been glib in asserting the unrestricted right CLS enjoyed to association on the Hastings campus, even without recognition. According to the dissent,<sup>252</sup> the Court “distorts the record with respect to the effect on CLS of Hastings’ decision to deny registration.”<sup>253</sup> Writing for the dissent, Justice Alito noted that while Hastings offered CLS access to school facilities, the offer was subject to important qualifications. It is possible that CLS may have been required to pay for the use of school facilities for meeting space, or for a table in a public area used at many schools to publicize the group or an event.<sup>254</sup>

Regardless, while public universities can certainly ban specific fraternity chapters for specific reasons (e.g. disciplinary problems), *CLS* suggests that a broad-based ban on fraternities from using college facilities, even on a paid fee-basis, may be an unconstitutional violation of free speech and association.<sup>255</sup>

In some respects, the court’s decision in *Alpha Epsilon Pi*<sup>256</sup> was similar to that in *CLS*. A narrow view would suggest that the College of Staten Island was not trying to ban single-sex groups, but only that the College chose not to subsidize such activities.<sup>257</sup>

But similar to the dispute between the Court’s majority and Justice Alito’s dissent in *CLS*, the real issue was not that Alpha Epsilon Pi was denied a subsidy. Instead, the fraternity’s

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<sup>252</sup> Justice Samuel Alito, joined by Chief Justice Roberts, and Justices Scalia and Thomas.

<sup>253</sup> 130 S. Ct. at 3006 (Alito, J., dissenting). In fact, Justice Alito accused the majority of ignoring strong evidence that the “take all-comers” policy was merely pretext to justify Hastings’ discrimination against CLS. *Id.* at 3000-05, 3016-19. Justice Alito also wrote that the “take all-comers” policy was unconstitutional under the limited public forum doctrine, arguing that it was biased against minority viewpoints, and that it was less viewpoint neutral than had been suggested by the majority. *Id.* at 3013-16, 3016 n. 10.

<sup>254</sup> *Id.* at 3006.

<sup>255</sup> 2985. There has been some criticism of the Court’s conflation of speech and associational rights. See, e.g., Jack Willems, RECENT DEVELOPMENT: THE LOSS OF FREEDOM OF ASSOCIATION IN *Christian Legal Society v. Martinez*, 34 Harv. J.L. & Pub. Pol’y 805, 806 (2011).

<sup>256</sup> *Supra* n. 193.

<sup>257</sup> Eugene Volokh, *Intimate Association, Fraternities, and Government Subsidies*, THE VOLOKH CONSPIRACY (Sept. 13, 2007, 2:26 PM), <http://volokh.com/posts/1158696685.shtml>.

complaint centered on the fact that it was forbidden to reach out to any students on campus through reasonable and generally available fora. The College forbade Alpha Epsilon Pi from setting up recruitment tables on campus, advertising on campus bulletin boards or handing out fliers, appearing in a list of student organizations, or holding any activities – including meetings – on campus.<sup>258</sup> While such activities on school property might be narrowly defined as a form of subsidy, it is not at all clear the *CLS* Court would agree. One reason the majority in *CLS* found that Hastings’ policies withstood scrutiny was because Hastings offered to allow *CLS* to use school facilities for meetings, as well as to use chalkboards and generally available bulletin boards to advertise events.<sup>259</sup>

The College of Staten Island’s chief objection to AEPi was that it maintained discriminatory practices in membership and therefore could not be a registered student organization.<sup>260</sup> But freedom from viewpoint discrimination means that organizations can convey viewpoints, even disfavored viewpoints, on an equal footing with other organizations.<sup>261</sup>

#### ***b. Citizens United***

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<sup>258</sup> *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 142 (2nd Cir. 2007). Alpha Epsilon Pi also wished to receive monies collected from the student activities fee. It is, however, very unusual for a fraternity to receive any funding from a college. Further, the Supreme Court’s subsidy framework is not particularly helpful with regard to fraternities because what is at stake is not access to a benefit, but the ability to exercise citizenship in the fora of a university. See Chapin Cimino, *Campus Citizenship and Associational Freedom: An Aristotelian Take on the Nondiscrimination Puzzle*, 20 *Wm. & Mary Bill Rts. J.* 533, 566-69 (2011).

<sup>259</sup> 130 S. Ct. at 2981. Justice Alito also noted in his strongly worded dissent that the Hastings in reality repeatedly ignored any requests by CLS to host a table on campus or use a classroom. *Id.* at 3006 (Alito, J., dissenting). *But cf.* *Healy v. James*, 408 U.S. 169, 182-83 (the college argued that the denial of recognition abridged no associational rights because the student group could meet as a group off-campus, distribute written material off-campus, and informally meet together informally on-campus as individuals).

<sup>260</sup> *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 139.

<sup>261</sup> Jack Willems, *Recent Development: The Loss of Freedom of Association in Christian Legal Society v. Martinez*, 34 *Harv. J.L. & Pub. Pol’y* 805, 817 (2011). See, e.g., *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (state university may not regulate speech based on the content of message); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (government may not regulate speech showing preference for a particular viewpoint). The College of Staten Island allowed student organizations with favored viewpoints to use campus communication and facilities, while the single gender fraternity could not. *Chi Iota Colony of Alpha Epsilon Pi Fraternity*, 502 F.3d at 148.

*Citizens United v. Federal Election Commission*<sup>262</sup> raises the question of whether universities may regulate or abridge the speech and association rights of fraternities, while allowing similar or identical conduct by individuals. It also suggests another issue; whether an association becomes protected under the First Amendment by asserting its right to exist by petitioning the state and courts.

In *Citizens United*, the United States Supreme Court considered whether a corporation could expressly advocate for or against a candidate in an election, or make contributions in support of a candidate.<sup>263</sup> Under the Bipartisan Campaign Reform Act,<sup>264</sup> even non-profit advocacy groups faced criminal sanctions for certain forms of political speech in the days prior to an election.<sup>265</sup>

Citizens United was a non-profit corporation that produced a movie very critical of Secretary of State Hillary Clinton, then the junior Senator from New York.<sup>266</sup> The issue before the Court was the constitutionality of a federal law prohibiting corporations “from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections” within 30 days of a primary election.”<sup>267</sup> In order to make the movie available, Citizens United sought declaratory and injunctive relief

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<sup>262</sup> 130 S. Ct. 876 (2010).

<sup>263</sup> *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 887-88 (2010). See also *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. \_\_\_\_ (2012) (per curiam).

<sup>264</sup> 2 U.S.C. § 441b (2000 ed.)

<sup>265</sup> *Citizens United*, 130 S. Ct. at 897.

<sup>266</sup> *Id.* at 887. This controversy occurred during Senator Clinton’s campaign for the presidential nomination of the Democratic Party in the 2008 election. The movie was entitled “Hillary: The Movie,” and it was a 90-minute documentary. *Id.* It features interviews with political commentators and other person, most quite critical of Senator Clinton. *Id.* The movie was originally produced with the intention of a theatrical release, but Citizens United sought to increase distribution by making it available through video-on-demand. *Id.*

<sup>267</sup> *Id.* Or 60 days of a general election. *Id.*

against the Federal Elections Commission.<sup>268</sup> The Court held that corporate political speech may be regulated through disclaimer and disclosure requirements, but corporate political speech may not be fully suppressed.<sup>269</sup>

The Court held that the right to free speech, particularly in political debate, was largely immutable, regardless of whether the speaker was an individual or a corporation.<sup>270</sup> Specifically, according to the Court, the government cannot identify certain preferred speakers, and may not determine what speakers are worthy of free speech.<sup>271</sup> “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”<sup>272</sup> Government may not “ban political speech simply because the speaker is an association that has taken on the corporate form.”<sup>273</sup>

Citizens United may be applicable to speech and conduct of fraternities. Specifically, there is often some dichotomy at colleges, where individuals may generally speak and associate freely, but fraternities – the corporations<sup>274</sup> – may not.

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<sup>268</sup> *Id.* at 886.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 904.

<sup>271</sup> *Id.* at 899.

<sup>272</sup> *Id.* at 904.

<sup>273</sup> *Id.* The Court noted that the Constitution offered no basis for distinctions between types of corporations. Specifically, “media corporations” have no “constitutional privilege beyond that of other speakers.” *Id.* at 905. Labor unions were identified as a corporate form for which there were particular concerns about electioneering. *Id.* at 966.

<sup>274</sup> For liability and streamlined governance, it appears that both the national organizations and universities typically require fraternities to be incorporated associations. *See, e.g.,* Tau Kappa Epsilon, What is a Corporation? [http://www.tke.org/member\\_resources/chapter\\_operations/colony\\_resources/how\\_to\\_incorporate](http://www.tke.org/member_resources/chapter_operations/colony_resources/how_to_incorporate) (last visited Mar. 1, 2012) (requiring all Tau Kappa Epsilon chapters “to be an active, registered corporation in the state where they are located”); George Washington University Center for Student Engagement, *Student Organization Registration Provisions for Fraternities and Sororities*, [http://gwired.gwu.edu/sac/index.gw/Site\\_ID/7/Page\\_ID/1308](http://gwired.gwu.edu/sac/index.gw/Site_ID/7/Page_ID/1308) (last visited Mar. 1, 2012) (requiring all fraternities to be incorporated); Stony Brook University, *Relationship Statement between Stony Brook University and its Affiliated Fraternities and Sororities*, <http://studentaffairs.stonybrook.edu/sac/docs/Relationship%20Statement%208.12.pdf> (last visited Mar. 1, 2012) (“it is expected that chapter will have a sponsoring body which is a legal corporation”); University of Florida,

While colleges may regulate speech with potential to cause disruption or violence, or otherwise impede a college's non-discrimination statement and policies, fraternities may not be permitted to contact students, publicize events, or recruit new members freely.<sup>275</sup> Fraternities may be restricted from wearing insignia or letters, interacting with non-members, or hosting activities in a manner consistent with other organizations, or individuals.<sup>276</sup>

When colleges ban fraternities, the organizations are prevented from expressing support for single-sex brotherhood or sisterhood, which is also espoused merely by the existence of such single-sex societies. In *Roberts*, the Supreme Court acknowledged that maintaining single-gender status could be the association's message. If "the Jaycees is organized to promote the views of young men whatever those views happen to be, admission of women as voting members will change the message communicated by the group's speech because of the gender-based assumptions of the audience."<sup>277</sup> On some campuses, supporting single gender associations is a highly contentious political message; banning fraternities prohibits the message and healthy debate.

But a particularly intriguing issue is whether colleges have prohibited fraternities from assembling and petitioning the government, particularly when denied a right to exist or be recognized. Indeed, in *AEPi*, after being banned by the College of Staten Island, the sole

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Chapter Facility Policy for Social Fraternities and Sororities, <http://www.greeks.ufl.edu/resources/docs/OSFAFacilityPolicy.pdf> (Mar.1, 2012) (requiring fraternity chapter houses to be "owned and operated by a House Corporation incorporated within the State of Florida"); Delta Tau Delta Fraternity, *IRS Tax Filing Requirements*, <http://www.delts.org/media/IRS%20Tax%20Filing%20Requirements.doc> (last visited Mar. 1, 2012) (explaining federal tax filing requirements for college fraternities). The national organizations of fraternities are generally incorporated in states as organizations falling under 501(c)(7) of the Internal Revenue Code, 26 § 501(c). The chapters are subsidiary organizations generally separately incorporated, and required to file an IRS 990 subsidiary form each year.

<sup>275</sup> *Supra* pt. I(b).

<sup>276</sup> *Supra* n. 261.

<sup>277</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 627 (1984). The Court found that the record supported no such supposition. *Id.* at 628.

remaining purpose of the group was to petition the government through the courts to plead for its existence. And during that time, the group was not extended the courtesies given to recognized student organizations, including using campus bulletin boards, email, and classrooms.

One important part of the dispute between the College of Staten Island and AEPi concerned membership dues. Specifically, the College prohibited recognized student organizations from collecting dues from its members; it was presumed that an organization would then receive money collected through the general student activities fee.<sup>278</sup>

But AEPi asked to be relieved of this rule; the fraternity wanted to collect money from its own members and was willing to forgo any school-distributed money.<sup>279</sup> Under *Citizens United*, the payment of money to a voluntary association that engages in political activity is protected speech.<sup>280</sup> Payments to a voluntary association engaged in political activity is "[s]peech on public issues [which] occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."<sup>281</sup> Indeed, association activities that merit First Amendment protection include taking positions on issues, and engaging in "civic, charitable, lobbying, [and] fundraising" activities.<sup>282</sup>

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<sup>278</sup> See First Amended Complaint at ¶ 8, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 05-cv-02919), 2005 WL 2547536; Complaint, 2003 WL 24127805 (Demand at 8); Reply Brief for State Defendants-Appellants at 6 n.2, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111cv), 2007 WL 4049097; Brief for State Defendants-Appellees, 2006 WL 5013104 at 48, *Chi Iota*, 502 F.3d 136

<sup>279</sup> Reply Brief for State Defendants-Appellants at 6 n.2, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111cv), 2007 WL 4049097.

<sup>280</sup> 130 S. Ct. at 905 ("All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech."); See also *id.* at 898 ("As a 'restriction on the amount of money a person or group can spend on political communication . . .' that statute 'necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (*per curiam*));

<sup>281</sup> *Snyder v. Phelps*, 131 S.Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

<sup>282</sup> *Roberts*, 468 U.S. at 626-27.

Interestingly, while the *AEPi* case was largely about a right to intimate association, it is possible that at least during the pendency of the litigation (if not before), AEPi was also an expressive association, in the end existing solely to petition the government.<sup>283</sup> Whatever else one can say about the organization, the members cared about it enough to rush, pledge, participate in the fraternity's activities, fight their college for recognition, and file a federal lawsuit.

It is an interesting chicken-egg argument that *Citizens United* does not answer. Does an organization, with disputed associational rights, become a protected organization when it fights for its survival by petitioning the state? This is worthy of additional study and debate.

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<sup>283</sup> 443 F. Supp. 2d at 374, 375. See generally John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 Conn. L. Rev. 149, 178 (2010). Certainly that was an interest of the North-American Interfraternity Conference and the National Panhellenic Conference, both of which were amici. Brief for Amici Curiae North American Interfraternity Conference and National Panhellenic Conference in Support of Plaintiffs-Appellees, and in Support of the District Court's Decision, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136 (2nd Cir. 2007) (No. 06-4111-cv)

## Part V – Conclusion

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. I am therefore led to conclude that the right of association is almost as inalienable as the right of personal liberty. No legislator can attack it without impairing the very foundations of society.<sup>284</sup>

Fraternalities are not the most sympathetic candidate for free speech arguments. But constitutional rights are rarely tested on popular causes. Free speech protects not only the speaker, but protects society as a whole, including protagonists of the questionable speech. As Justice Holmes wrote:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>285</sup>

Justice Holmes' expression of a "free trade in ideas"<sup>286</sup> analogizes freedom of expression to an economic free market, where the best policies will arise from competition of ideas.<sup>287</sup>

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<sup>284</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 196 (P. Bradley, ed. 1945).

<sup>285</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>286</sup> Sometimes referred to as a "free marketplace in ideas."

<sup>287</sup> There are many different theories as to the origins of "free trade in ideas." Elements of it can be found in the work of John Stuart Mill and John Milton. See generally John Stuart Mill, *On Liberty*, *On Liberty and Other Essays* 5 (John Gray ed., Oxford Univ. Press 1991) (1859); John Milton, *Areopagitica and Other Prose Works*. (E.P. Dutton & Company 1927) (1644).

Universities, in particular, may have a responsibility to promote the free trade in ideas. As Thomas Jefferson wrote about the University of Virginia, “[t]his institution will be based upon the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it.”<sup>288</sup>

Most fraternities were founded in an era when colleges rigidly taught a classical curriculum and allowed students few outlets for fellowship and contemporary literary exercises. Some, particularly those justifiably angered by specific acts of delinquency, may argue that fraternities’ time has long passed.

But the marketplace should determine fraternities’ success or failure, not a utopian vision by a school administrator as to how, when, and in what form students will engage one another in a social context. “The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”<sup>289</sup> Even widely unpopular views may benefit society as a whole in their debate.<sup>290</sup>

If fraternities are to die, then let it be through failure in the free trade of ideas. Indeed, the lasting success of fraternities, purely North American organizations with humble roots founded over two hundred years ago, suggests that there is continuing value in the organizations. Although some fraternity chapters are disbanded after a failure to compete, this Article has provided many examples where college administrations have simply restrained or banned a popular, but disapproved, form of association and expression.

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<sup>288</sup> Letter, Jefferson to William Roscoe (1820) available at U.S. Library of Congress, <http://www.loc.gov/exhibits/jefferson/75.html> (last visited Feb. 15, 2012).

<sup>289</sup> Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 898 (2010)

<sup>290</sup>Mills at 59.

There is little doubt that fraternities benefit from some college regulation; students are in school to learn, and school policies governing fraternity activities can be a form of mentoring and leadership instruction, as well as providing a sound framework in business management skills. Regulations stifling or prohibiting fraternities in favor of a school-approved social structure unnecessarily chills freedom of association. The burden to show that such suppression is necessary to effectuate academic goals should be far greater than that found in current case law.