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# Constitutional Law--Racial Discrimination in College Social Fraternities

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# Recent Cases

CONSTITUTIONAL LAW — RACIAL DISCRIMINATION IN COLLEGE SOCIAL FRATERNITIES.—A 1956 resolution of the Board of Regents of the University of Colorado prohibited discrimination in campus fraternities because of race, creed, or color.<sup>1</sup> Ten years later, a member of the Board expressed doubts about the validity of Sigma Chi Fraternity's compliance with the resolution, because of the national organization's suspension of its Stanford University chapter for allegedly pledging a Negro.<sup>2</sup> As a result, the Regents unanimously adopted a resolution that, in effect, required Sigma Chi to prove that there was no discrimination in selection of members by the Colorado chapter. At their next meeting, finding that the proof of non-discriminatory practices was not adequate,<sup>3</sup> the Board further resolved to place the local chapter on probation, with loss of rushing and pledging privileges, until the chapter and the national organization could show full compliance with the 1956 resolution.<sup>4</sup> Sigma Chi seeks injunctive relief against enforcement of the resolutions. *Held*: Relief denied. A resolution of a State Board of Regents prohibiting a fraternity on the campus of a State university from denying membership to anyone be-

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<sup>1</sup> The primary object of the plaintiffs' concern, this March 19, 1965, resolution stated that

After September 1, 1962, the University shall place on probation any fraternity, social organization or other student group that is compelled by its constitution, ritual or government to deny membership to any person because of his race, color or religion. During such probation, no rushing, pledging or initiation of new members shall be permitted.

Brief for Plaintiffs, p.1, *Sigma Chi Fraternity v. Regents of the Univ. of Colorado*, 258 F. Supp. 515 (D. Colo. 1966).

<sup>2</sup> Technically, the suspension was for failure to observe ritual, and it climaxed a longstanding conflict between the Stanford chapter and the national fraternity. The formal suspension occurred on April 2, 1966, and the pledging took place the following day, but Sigma Chi had been informed several days earlier that the student had been approved by the chapter and there was an intention to pledge him. This was consistent with an earlier announcement by the chapter that it would not discriminate in the selection of members. *Sigma Chi Fraternity v. Regents of the Univ. of Colorado*, 258 F. Supp. 515, 520 (D. Colo. 1966).

<sup>3</sup> The findings resulted from correspondence with national officers of Sigma Chi, officers of the Colorado and Stanford chapters, and Stanford University officials. *Ibid.*

<sup>4</sup> In September, 1966, the Colorado chapter requested the lifting of the probation, declaring that they would be autonomous in selection of members. This request was denied because of failure to sever ties with the national organization. *Id.* at 521.

cause of race, color, or religion is within the power of the Board and does not violate the constitutional rights of the national fraternity and local chapter with respect to freedom of association. *Sigma Chi Fraternity v. Regents of the Univ. of Colorado*, 258 F. Supp. 515 (D. Colo. 1966).

The problem in *Sigma Chi* was a novel one. Since there were no cases directly in point, the plaintiffs contended that the 1956 resolution was a violation of their first amendment rights of freedom of association.<sup>5</sup> Citing recent cases involving the National Association for the Advancement of Colored People [hereinafter cited as N.A.A.C.P.] concerning the production of membership lists,<sup>6</sup> *Sigma Chi* argued that it should receive the same rights of freedom of speech and assembly accorded that body. The court distinguished these cases on the grounds that they recognized freedom of association for the advancement of views and ideas, whereas in the case at bar, there was no such overriding purpose.<sup>7</sup> "It is finally, therefore, a matter of viewing the alleged violation in relationship to the authority of the Regents."<sup>8</sup>

It is well settled that a state may impose restrictions on state university students who are members of Greek-letter societies. In *Waugh v. Board of Trustees*,<sup>9</sup> a Mississippi statute prohibited members of fraternities from receiving or competing for class honors, diplomas, or distinctions. The Supreme Court held that such a prohibition was within the power of the legislature, since that body controls the university "and has a right to legislate for

<sup>5</sup> U.S. CONST. amend. I declares that "Congress shall make no law respecting . . . the right of the people peaceably to assemble."

<sup>6</sup> *Gibson v. Florida Legislative Investigation Comm'n*, 372 U.S. 539 (1963); *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293 (1961); *N.A.A.C.P. v. State of Alabama ex rel. Patterson*, 357 U.S. 293 (1961); *Bates v. City of Little Rock*, 361 U.S. 516 (1940).

<sup>7</sup> 258 F. Supp. at 524. The court stated that the right of association asserted in *N.A.A.C.P. v. State of Alabama ex rel. Patterson* was couched in the following words of the Supreme Court:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. [Citations omitted.] It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' aroused by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech.

357 U.S. 449, 460-61.

<sup>8</sup> 258 F. Supp. at 526.

<sup>9</sup> 237 U.S. 589 (1915).

their welfare, and to enact measures for their discipline."<sup>10</sup> Modern statutes generally vest authority to govern state universities in boards of regents or trustees, which act as agents of the legislature and make all appropriate regulations.<sup>11</sup> Rules laid down by these bodies are given the same force as legislative enactments.<sup>12</sup> Thus, it follows that bans on fraternities by a state university's governing board would be upheld, and in the only case on this issue that was the result.<sup>13</sup> In *Webb v. State Univ. of New York*,<sup>14</sup> the Board of Trustees banned all social organizations affiliated with national groups. After recognizing the authority of the board to act, the court, in upholding the ban, said: "A state may adopt such measures, including the outlawing of certain social organizations, as it deems necessary to its duty of supervision and control of its educational institutions."<sup>15</sup> In another case, the court held that the Board of Trustees (of Purdue University) could not make membership in a fraternity a disqualification for admission as a student, but then went on to say, as dictum, that "It is clearly within the power of the trustees . . . to absolutely prohibit any connection between the Greek fraternities and the University."<sup>16</sup>

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<sup>10</sup> *Id.* at 596.

<sup>11</sup> COLO. REV. STAT. § 124-2-10 (1963) [hereinafter cited as CRS] provides that "The Board of Regents shall have the general supervision of the University." CRS § 124-2-11 states that "The Board of Regents shall enact laws for the government of the University."

<sup>12</sup> *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805 (1932). See also *State ex rel. Weaver v. Board of Trustees of Ohio State*, 126 Ohio 290, 185 N.E. 196 (1933).

<sup>13</sup> A distinction may be made between the authority of boards of trustees of state universities and boards of private institutions. The former draws its authority from statute; the latter has no such legislative mandate upon which to rest its regulations. In *Guillory v. Administrators of Tulane Univ. of La.*, 203 F. Supp. 855 (E.D. La. 1962), rev'd on rehearing, 212 F. Supp. 674 (E.D. La. 1962), two students were denied admission to the university solely because they were Negroes. The court held that Tulane was a private institution (rather than public) and that actions of the board could not be considered as actions of the state, to bring them within the confines of the fourteenth amendment. Moreover, the fourteenth amendment limits its application to states and courts may not interfere in instances of private discrimination.

Apparently, then, it may reasonably be concluded that a legislative enactment conferring power on a board of trustees applies only to a board of a public institution. Boards of private schools do not act as agents of the state, and thus are free to prohibit or permit discrimination in fraternities as they deem appropriate.

<sup>14</sup> 125 F. Supp. 910 (N.D.N.Y. 1954).

<sup>15</sup> *Id.* at 912.

<sup>16</sup> *State ex rel. Stallard v. White*, 82 Ind. 278, 285 (1882). For another early decision supporting the power of the trustees to forbid membership in secret societies, see *People v. Wheaton College*, 40 Ill. 186 (1866).

In similar cases in the future, it is unlikely that other courts and litigants will be satisfied with the rationale of this decision. With some 7500 fraternity and sorority chapters on the nation's campuses,<sup>17</sup> this is certain to be the first in a series of cases treating the problem of discrimination, and courts will not be able to evade so simply the underlying issues of freedom of association.

An alternative line of reasoning for the purpose of preventing discrimination in fraternities, at least in those instances where the university has leased housing to the organization,<sup>18</sup> is state action,<sup>19</sup> violative of the fourteenth amendment.<sup>20</sup> By supplying the housing, the school administration retains control over the conduct of the group, not only in relation to social activities and scholastic achievement, but in selection of members as well.<sup>21</sup> Therefore, under this concept of state action, "fraternities which are provided housing from a state educational institution are subject to the commands of the fourteenth amendment."<sup>22</sup> A possible solution would be for the universities and the fraternities to sever all relations.<sup>23</sup> By so doing, the fraternity could free itself from regulation and probably achieve the status of a private, voluntary, social organization.<sup>24</sup>

In a truly private organization, the method of selection of members should not be subject to judicial review, and a rejected

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<sup>17</sup> BAIRD, MANUAL OF AMERICAN COLLEGE FRATERNITIES X (17th ed. 1963).

<sup>18</sup> It is quite common for a state university to build a house on state property which is then leased to the fraternity or sorority (or to a house corporation, composed of alumni) on a long term basis.

<sup>19</sup> Because of the Board of Regents acting as agent for the Colorado legislature, the decision in *Sigma Chi* actually is based on one aspect of state action. But the court did not develop the concept now pursued.

<sup>20</sup> "No state shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. CONST. amend. XIV, § 1.

<sup>21</sup> Regulations over selection of members include the imposing of time limits on rushing and pledging, minimum grade averages, and removal of racial and religious restrictions. Note, 1964 ILL. L. FORUM 631, 643-44.

<sup>22</sup> *Id.* at 645.

<sup>23</sup> Apparently, this is the trend among campus organizations; political organizations, such as Students for a Democratic Society, which are not controlled by the administration, are numerous.

<sup>24</sup> At this point, the problem becomes one between the local chapter and the national headquarters of the fraternity, which is not here under discussion. Here, also, a paradox arises. Is it possible that a board of trustees could not regulate the fraternity in any manner except to absolutely prohibit them (for which there is precedent—*Waugh* and *Webb*)? But if the fraternities completely sever relations, can the board exert even that power? As to the former question, the only case that touches upon even a similar issue indicates that the answer might be yes. See *State ex rel. Stallard v. White*, 82 Ind. 278 (1882).

applicant should not be entitled to relief.<sup>25</sup> Admission into labor unions is virtually the only area where courts have uniformly forbidden discrimination in membership.<sup>26</sup> In most other situations, particularly social and fraternal societies, there has been absolute discretion in choice of members.<sup>27</sup> A distinction has been made between voluntary and involuntary associations,<sup>28</sup> and in some cases involving the latter, courts have compelled admission and full membership.<sup>29</sup> But a social fraternity must be categorized as a voluntary organization, and thus it escapes the prohibitions on free selection of members.<sup>30</sup>

For all practical purposes, *Sigma Chi* is of no value except as a forerunner of future similar cases. The court, by skirting the major issues, established no authoritative precedent. Until the questions raised by the freedom of association claims are satisfied, the problem of fraternity discrimination remains.

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<sup>25</sup> See Note, 14 W. RES. L. REV. 346, 357 (1963).

<sup>26</sup> *Railway Mail Ass'n. v. Corsi*, 326 U.S. 88 (1944); *Thorman v. International Alliance of Theatrical Stage Employees*, 49 Cal. 2d 629, 320 P.2d 494 (1958); *International Bhd. of Elec. Workers v. Commission on Civil Rights*, 140 Conn. 537, 102 A.2d 366 (1953).

<sup>27</sup> Note, 14 W. RES. L. REV. 346, 360 (1963).

<sup>28</sup> An example of an involuntary society is one which is necessary for economic survival, such as a medical association.

<sup>29</sup> Typical of these cases is *Falcone v. Middlesex County Medical Soc'y*, 62 N.J. Super. 184, 162 A.2d 324 (1960) where the court said that if the exclusion resulted in substantial injury to the plaintiff, "the court will grant relief." 62 N.J. Super. 184, 197, 162 A.2d 324, 331.

<sup>30</sup> In a discussion of the right of association, Associate Justice William O. Douglas said: "In my view, government can neither legislate with respect to nor probe the intimacies of political, spiritual, or intellectual relationships in the myriad of lawful societies and groups, whether popular or unpopular, that exist in this country." Douglas, *The Right of Association*, 63 COLUM. L. REV. 1361, 1375 (1963). In the same article, Justice Douglas quoted the noted historian, Alexis de Toqueville:

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. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

63 COLUM. L. REV. 1361, 1363.

TORTS-NEGLIGENCE-VIOLATION OF AN ADMINISTRATIVE REGULATION AS NEGLIGENCE PER SE.—After removing tile from the floor of a room in his service station, Calvin Stipes, the manager, and three employees proceeded, in direct violation of the Standards