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Freedom of Association in the Public University Setting: How Broad Is the Right to Freely Participate in Greek Life?

Scott Patrick McBride
University of Dayton

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Cover Page Footnote

I wish to thank Professor Maria P. Crist for her guidance on this Comment. I wish to thank the men of 132 North Breese Terrace, Madison, WI, with special thanks to Mark D. Hudson and Jeffrey D. Schmidt, for giving me the inspiration to write this Comment. This Comment is dedicated to my family for all their love and support.

FREEDOM OF ASSOCIATION IN THE PUBLIC UNIVERSITY SETTING: HOW BROAD IS THE RIGHT TO FREELY PARTICIPATE IN GREEK LIFE?

Scott Patrick McBride[*]

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[*] Articles Editor, University of Dayton Law Review. J.D., 1998, University of Dayton School of Law; B.S., 1995 University of Wisconsin-Madison. I wish to thank Professor Maria P. Crist for her guidance on this Comment. I wish to thank the men of 132 North Breese Terrace, Madison, WI, with special thanks to Mark D. Hudson and Jeffrey D. Schmidt, for giving me the inspiration to write this Comment. This Comment is dedicated to my family for all their love and support.

I. INTRODUCTION

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . . 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 . . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny . . . . In the domain of these indispensable liberties, . . . [including] association, . . . abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action.
>
> *Justice John Marshall Harlan*[1]

The fraternity system is as old as our country and predates our nation's Constitution. The first fraternity in the United States, Phi Beta Kappa, was established at the College of William and Mary on December 5, 1776.[2] The growth of fraternity and sorority systems on college campuses has increased immensely since that date. From 1972 until 1991, undergraduate membership in fraternities increased from 149,000 to over 400,000.[3] Sorority membership rose in a similar manner.[4]

Despite the increase in popularity of social fraternities among students, college and university administrators have targeted the Greek system, fraternities in particular, as an inimical adversary to the learning process on American College campuses. Many colleges have determined that fraternities are "incompatible with [the college's] vision of the future."[5] Indeed, several private colleges have banned and refused to recognize fraternities entirely, finding it easier to abolish the system than to

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[1] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958) (recognizing, for the first time, the freedom of association as a separate constitutional guarantee). The freedom of association has not yet received the protection argued for so vigorously by Justice Harlan, writing for a unanimous Court.

[2] BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES, I-10 (20th ed. 1991).

[3] Connie Pryzant, *Fraternities' New Pledge*, DAL. MORN. NEWS, April 29, 1990, at 12A.

[4] *Id.*

[5] Anthony Flint, *Liberty, Equality—But No Fraternities; That's the Mood on Many New England Campuses*, BOSTON GLOBE, Dec. 18, 1989, at 70 (quoting Middlebury College Task Force Report on Fraternities).

allow their students to associate in Greek organizations.[6] Fraternities are perceived by many outsiders as breeding grounds for obnoxious behavior, excessive drinking and discriminatory treatment of others. Moreover, fraternities are generally considered to encourage sexual misconduct, theft, and sexism.[7] In short, as the president of the Northeastern Inter-Fraternity Conference points out, "[t]here's a lot of Greek-bashing going on."[8]

While colleges and universities strive to provide an environment conducive to both learning and personal growth for every student, constitutional questions arise when these institutions impose restrictions on Greek organizations. Most notably, university-imposed restrictions and mandatory requirements placed on Greek organization members may violate the constitutionally guaranteed right to freely associate. Courts have recognized that a complete denial of official recognition of student organizations can constitute an abridgment of the freedom of association.[9]

This Comment purports that university requirements placed on Greek social organizations, short of a complete denial of official recognition, may violate the constitutionally protected freedom of association. Part II-A of this Comment provides the freedom of association doctrinal framework for the present debate concerning the constitutional rights of fraternity members.[10] Part II-B of this Comment provides a brief history of the Greek organization system on American campuses.[11] Part III-A analyzes how the freedom of association doctrine is applicable to Greek social organizations,[12] while Part III-B addresses the pertinence of the doctrine of unconstitutional conditions to this analysis.[13] Part III-C addresses recent requirements, short of a complete denial of university recognition, placed on Greek organizations and argues that many of these restrictions on Greek

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[6] Dickinson, Colby, Amherst, and Franklin & Marshall are examples of such colleges. Michael W. Gosk, *From Animal House to No House: Legal Rights of the Banned Fraternity*, 28 CONN. L. REV. 167, 168 (1995).

[7] *Id.*

[8] Flint, *supra* note 5, at 66. Fraternity supporters argue that the problems fraternity students encounter, such as excessive drinking, are not solely limited to Greek organizations, but merely are representative of the increasingly turbulent atmosphere on college campuses. Debbie Goldberg, *Crack Down on Hazing and Alcohol: New Rules for Fraternities and Sororities*, WASH. POST, Aug. 7, 1988, at 5. According to the former executive director of the National Inter-Fraternity Conference, "the thought that eliminating fraternities is going to eliminate the problems is really a naive one." *Id.*

[9] Healy v. James, 408 U.S. 169, 181 (1972) (stating that "[t]here can be no doubt" that a university's denial of official recognition to college organizations abridges the associational right). *See also* Gosk, *supra* note 6 at 170, 199.

[10] *See* discussion *infra* part II.A.

[11] *See* discussion *infra* part II.B.

[12] *See* discussion *infra* part III.A.

[13] *See* discussion *infra* part III.B.

social organizations violate the constitutionally protected freedom of association.[14] Finally, Part IV concludes that Greek social organizations are protected under the freedom of intimate association. As a result, in light of the doctrine of unconstitutional conditions, university restrictions imposed upon Greek social organizations, short of a complete denial of university recognition, should be rendered unconstitutional.

II. BACKGROUND

A. The Freedom of Association As a Constitutional Right

While the right to freely associate had previously been recognized for several years, the Supreme Court's first official recognition of the freedom of association as a *constitutional* right occurred in 1958 in *NAACP v. Alabama ex rel. Patterson.*[15] Fourteen years later, the Supreme Court recognized that this associational right was implicated when a state university denied official recognition to a student organization in *Healy v. James.*[16] Since *Patterson* and *Healy*, the Court has explicitly stated that the right of association has two strands, expressive and intimate, both of which are derived from constitutional guarantees.[17] Under both strands of the current freedom of association doctrine, state interference with

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[14] *See* discussion *infra* part III.C.

[15] 357 U.S. 449 (1958).

[16] Healy v. James, 408 U.S. 169 (1972).

[17] Although recognized for forty years as a constitutional right, the freedom of association has never been recognized as an independent constitutional right by a majority of the Court. Several Supreme Court Justices have vehemently argued the notion, however, that the freedom of association is an independent constitutional right which stands on its own ground rather than as an adjunct to other constitutional guarantees. DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 561-63 (1963) (Douglas, J., concurring). In *Gibson*, Justice Douglas recited that "[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." 372 U.S. at 562 (quoting DeJong, 299 U.S. at 364). A textual reading of the First Amendment supports this rationale: "Congress shall make no law . . . abridging [(i)] the freedom of speech, or [(ii) the freedom] of the press; or [(iii)] *the right of the people peaceably to assemble*, and [(iv) the right of the people] to petition the government for a redress of grievances." U.S. CONST. amend. I (emphasis added). Accordingly, one may assert that the text clearly supports the notion that the right of association is the right of the people "peaceably to assemble." Under this assertion, the freedom of association would be elevated to full constitutional protection. Such recognition comports with the general understanding with respect to other constitutional rights that each is independent of the others and protected by itself. For example, one could not plausibly argue that the constitutionally implied right to travel only has force when one is engaging in First Amendment protected activity.

associational freedom must serve compelling state interests in order to be constitutionally permissible.[18]

1. *NAACP v. Alabama ex rel. Patterson*

NAACP v. Alabama ex rel. Patterson involved a state court order that required the NAACP to produce membership lists of all of its Alabama members.[19] The NAACP failed to comply with this order and was held in civil contempt.[20] As a result, the NAACP was fined ten thousand dollars, which was to increase tenfold in five days if not paid.[21] The NAACP complied with all of the order except that part which compelled production of its membership lists, and sought review of that portion of the order.[22]

The NAACP argued that the order compelling it to produce its membership lists violated its constitutional rights of freedom of speech and assembly as protected from state action under the Fourteenth Amendment to the United States Constitution.[23] The Supreme Court agreed. The Court held that the "freedom to engage in association for the advancement of beliefs and ideas" is protected from state action by the Fourteenth Amendment's Due Process Clause.[24] Reasoning that abridgments of the freedom of association can occur indirectly,[25] the *Patterson* Court recognized that government action may be suspect even when the action appears totally unrelated to the freedom to associate.[26] *Patterson* established that the freedom of association allows one to maintain privacy

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[18] *See infra* notes 52-56 and accompanying text.

[19] 357 U.S. 449, 451. This requirement was to achieve compliance with an Alabama law requiring foreign corporations to submit a corporate charter to its secretary of state. *Id.* Failure to comply with this statute allowed the state to impose a fine on the corporation and criminal sanctions on the officers of the corporation. *Id.* In addition to the constitutional challenges raised, the NAACP challenged that its association was not subject to this law. *Id.* at 453.

[20] *Id.* at 451.

[21] *Id.* at 453.

[22] *Id.* at 454. In particular, the NAACP challenged the state's authority to compel it to produce the list of its ordinary "rank-and-file" members, but not its employees or officers. *Id.* at 459, 464.

[23] *Id.* at 453. The NAACP argued, *inter alia*, that the forced disclosure of membership lists would abridge the constitutional rights of its rank-and-file members to engage in association in support of their beliefs. *Id.* at 460.

[24] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

[25] *Id.* The Court implicitly recognized the doctrine of unconstitutional conditions, which provides that government may not constitutionally do indirectly that which it may not constitutionally do directly. For more on the doctrine of unconstitutional conditions, *see infra* notes 104-109 and accompanying text.

[26] Patterson, 357 U.S. at 461.

in his or her associations, finding that privacy in group association is, in many cases, indispensable from associational freedom.[27]

When applied to the case before it, the Court found that the order compelling membership lists would place a "substantial restraint" on the rights of the NAACP's rank-and-file members to freely associate.[28] The Court reasoned that the restraint was substantial because the order forcing membership disclosure: 1) adversely affected the ability of the NAACP's members to pursue their right to foster beliefs; 2) would induce members to withdraw from its association; and 3) would dissuade prospective members from joining.[29]

However, the right to freely associate, though of constitutional origin, is not an absolute right.[30] Accordingly, *Patterson* adopted a balancing test in which the judge must ascertain whether the state interest is sufficient to justify the adverse effect imposed upon the affected party's freedom of association.[31] The Court held that a state interest would overcome the freedom of association only if the interest were compelling.[32] The Court found that the asserted Alabama state interest of determining whether the NAACP was complying with its corporate law was not compelling and the order requiring the disclosure of membership lists was therefore an unconstitutional abridgement of the freedom of association.[33] Thus, the NAACP was not required to turn over its rank-and-file membership lists.

2. *Healy v. James*

In *Healy v. James*,[34] decided just fourteen years after *Patterson*, the Court considered a situation highly analogous to the situation faced by social fraternities on college campuses today. The group seeking relief in *Healy* was a group of students who wanted to form a local chapter of

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[27] *Id.*

[28] *Id.* at 462.

[29] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958).

[30] *Id.*

[31] *Id.* at 463.

[32] *Id.*

[33] *Id.* at 465. The Court noted in dicta that the state could require, consistently with the freedom of association, the NAACP to disclose items such as the NAACP's charter, the names of its directors and officers, and the total number of its membership. *Id.* Within its holding in *Patterson*, the Court noted limitations to its rule as it distinguished and reaffirmed *New York ex rel. Bryant v. Zimmerman*. 278 U.S. 63 (1928). *Zimmerman* was distinguished because the association involved there was the Ku Klux Klan, an organization which engaged in acts of unlawful intimidation and violence. *Id.*

[34] 408 U.S. 169 (1972).

Students for a Democratic Society ("SDS") on a state college campus.[35] The university's dilemma in officially recognizing the group was that SDS chapters on other campuses were catalysts to many situations involving unrest, seizure of buildings, vandalism, and arson occurring during that time period.[36] The university therefore denied SDS official recognition.[37] The impetus behind denying this group campus recognition was its possible affiliation with the national SDS and the potential for violence and unrest caused by other local SDS chapters.[38] The "burden of nonrecognition" placed on the SDS's members caused them to file a complaint in United States District Court seeking injunctive relief requiring the college to grant the SDS chapter official recognition.[39] After being denied relief by both the district court and Second Circuit, SDS made its case to the Supreme Court.[40]

In its analysis, the Supreme Court noted the real benefits associated with official university recognition as well as the "serious problems for [an] organization's existence and growth" without such recognition.[41] The benefits included the ability to place announcements regarding meetings and activities on campus kiosks and bulletin boards, the ability to place notices of meetings and recruitment activities in the student newspaper, and the ability to hold meetings in campus facilities.[42]

Healy noted that state colleges and universities are state institutions subject to First Amendment constraints.[43] Therefore, the Court rejected the

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[35] *Id.* at 170-72.

[36] *Id.* at 171.

[37] *Id.* at 170.

[38] *Id.* at 171-75. The time period was 1969-1970. *Healy*, 408 U.S. at 171. The factual background of *Healy* involved a setting of unrest and civil disobedience on campuses across the country. *Id.* Students had seized buildings and perpetrated crimes against university property, including vandalism and arson. *Id.* Some colleges were forced to shut down altogether, while at others, files were stolen and manuscripts destroyed. *Id.*

[39] Healy v. James, 408 U.S. 169, 177 (1972). Both the District Court for the District of Connecticut, 319 F. Supp. 113 (1970), and the Second Circuit, 445 F.2d 1122 (1971) (2-1 decision), refused to grant the SDS this relief.

[40] *See supra* note 34.

[41] *Id.* at 176.

[42] *Id. See also* Gay and Lesbian Students Ass'n. v. Gohn, 850 F.2d 361, 362 (8th Cir. 1988) (recognizing that benefits to student organizations on the University of Arkansas campus included use of university facilities for meetings and projects, as well as being listed in university publications). However, the Court wisely stopped short of classifying the possibility of university funding as a benefit of official recognition. *Healy*, 408 U.S. at 182 n.8. Official recognition only entitled a group to apply for funding. *Id.* It did not guarantee any student group college financial support. *Id.*

[43] *Healy*, 408 U.S. at 180. The Court noted that, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* (quoting Tinker v. DesMoines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).

argument that the need for states and schools to prescribe and control *conduct* caused First Amendment protections to apply with less force on college campuses than the same protections as applied to the community at large.[44] Additionally, the Court reaffirmed the position that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools."[45]

Although not explicitly listed as a First Amendment right, the Court noted its long recognition of the freedom of association as implicit in the freedoms of speech, assembly, and petition.[46] The Court held that "[t]here [is] no doubt that denial of official recognition, without justification, to college organizations . . . abridges [the student members'] associational right[s]."[47] The Court found that the primary burden placed on such organizations was the denial of use of campus facilities for meetings and other purposes.[48] Additional burdens also abridged the SDS students' association rights. *Healy* reasoned that an organization must have means to communicate with other students if it is to remain a viable entity on a college campus and found that denial of recognition deprived the SDS of such means.[49] Essentially, *Healy* recognized that on a campus where students enter and leave on a regular basis, it is essential that organizations have access to university facilities in order to communicate with other students and recruit new members.

In finding an abridgment of the SDS students' associational rights, the Court rejected the proposition that all the group was denied was "the college's stamp of approval."[50] Instead, the Court found that the inability to use campus facilities was a legally cognizable deprivation due to nonrecognition. With respect to associational rights, the Court noted that the Constitution also protects against indirect interference with fundamental rights, which may be burdened by subtle governmental interference.[51]

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[44] Healy v. James, 408 U.S. 169, 180 (1972).

[45] *Id.* (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[46] *Id.* at 181 (citing Baird v. State Bar of Arizona, 401 U.S. 1, 6 (1971); NAACP v. Button, 371 U.S. 415, 430 (1963); Louisiana *ex rel.* Gremillion v. NAACP (1961); and NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (Harlan, J., for a unanimous Court)).

[47] *Healy*, 408 U.S. at 181.

[48] *Id.* In *Healy*, the SDS was denied the ability to hold a meeting in the campus coffee shop merely because they were not an officially recognized group. *Id.*

[49] Healy v. James, 408 U.S. 169, 181 (1972).

[50] *Id.* at 183.

[51] *Id.* The Court, though not explicitly stating the same, was concerned with those government actions which burden constitutional rights by placing unconstitutional conditions on them. *See id.* S*ee also infra* notes 104-09 and accompanying text.

Healy also ruled on the procedural aspects of recognition and nonrecognition of associations on public college and university[52] campuses. The Court held that the college maintained the burden to justify the nonrecognition of a student organization.[53] The Court likened the decision of nonrecognition to a prior restraint, since it denied the organization a wide range of associational activities.[54] Therefore, the state was required to meet a "heavy burden" in order to justify nonrecognition of a student group.[55]

The Court rejected various justifications for interference with the freedom of association and held that the only one offered in *Healy* which met the "heavy burden" test in the university nonrecognition setting is if a group "substantially interfere[s] with the opportunit[ies] of other students to obtain an education."[56]

3. Testing the Constitutionality of Infringements of Associational Freedom

To properly state a claim that one's constitutionally protected freedom of association was abridged, a party must first pass the threshold issue of whether the freedom of association is even implicated. Therefore, because current freedom of association doctrine recognizes only intimate and expressive strands,[57] the asserting party must show that his or her organization is engaged in expressive or intimate activity. The test of constitutionality is similar under the two strands of the freedom of association.

States may infringe upon the freedom of expressive association in a manner consistent with the Constitution only when: 1) acting under a statute or rule which serves a compelling state interest; 2) the state interest

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[52] *Healy* dealt with a state college. However, private colleges and universities need not necessarily comply with the same requirements placed upon similar state institutions.

[53] *Healy*, 408 U.S. at 184.

[54] Healy v. James, 408 U.S. 169, 184 (1972). *But see id.* at 203 (Rehnquist, J., concurring). Justice Rehnquist saw a distinction between constitutional limitations when the states act in their capacities as college administrators versus the limitations on states acting as sovereigns to enforce their criminal laws. *Healy*, 408 U.S. at 203. Because of the lessened constitutional restrictions placed on the states in their capacity as college administrators, Justice Rehnquist doubted that the nonrecognition of an organization amounted to a prior restraint. *Id.* The Supreme Court has not addressed this issue since their decision in *Healy*.

[55] *Healy*, 408 U.S. at 184.

[56] *Id.* at 189.

[57] *See infra* notes 66-91 and accompanying text.

is unrelated to the suppression of ideas; and 3) the state interest cannot be achieved by means significantly less restrictive of associational freedoms.[58]

States may infringe upon the freedom of intimate association consistently with the constitution only when: 1) the statute or rule serves a compelling state interest; and 2) the statute or rule is the most narrowly drawn means of achieving that interest.[59] In either case, the burden is on the challenging party to show that associational freedoms are infringed, and only then does the burden shift to the state to justify the infringement.[60]

B. The Fraternity and Sorority Systems on College and University Campuses

1. History and Purpose

Fraternities first began on American College campuses in 1776.[61] Many of the older fraternities, although originally formed for professional reasons, came together for social events and activities. The initial creation and growth of fraternities occurred at a time when colleges and universities were dominated by men. Naturally, then, men dominated the ranks of fraternity membership. In the 1850s and 60s, more women were attending college institutions and desired membership in fraternal-type organizations.[62] The sorority system thus began as a separate system of all-women organizations.[63] These sororities largely mirrored the men's fraternal organizations, having characteristics of professionalism, honorary membership, and a social nature.

Today there are predominately three types of fraternities: professional, social, and honorary.[64] Under federal law, neither professional nor honorary fraternities can discriminate based on gender and have therefore become mixed-gender.[65] The only system left with single-gender groups is fraternities and sororities in the social spectrum. This social system of fraternities and sororities is the subject of this Comment.

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[58] Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

[59] Bowers v. Hardwick, 478 U.S. 186, 189 (1986).

[60] *Id.* (stating "[at] trial . . . the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end").

[61] *See supra* note 2 and accompanying text.

[62] BAIRD'S *supra* note 2, at I-12.

[63] *Id.*

[64] *Id.* at I-9.

[65] *See* 122 Cong. Rec. 13535-36 (1976).

2. Requirement to Maintain National Affiliation

The majority of fraternity and sorority chapters on university campuses are affiliated with national[66] organizations of the same title.[67] National fraternity and sorority organizations generally require their individual chapters to obtain official recognition from the university that its members attend. Meeting this requirement enables local chapters to operate under the Greek organization's name, remain in good standing with the national organization (in order to keep its charter), and receive continued support from its national chapter.

Therefore, in addition to the benefits of official university recognition noted in *Healy*,[68] official recognition grants individual chapters the ability to maintain their associational ties with their respective national organizations. In most instances, the ability to remain in good standing with a chapter's national organization is essential to that chapter's livelihood. This is because without such good standing, the chapter may not use their national fraternity or sorority letters or indicia, nor may it recruit new members under the national's name.[69] Moreover, many universities will not officially recognize local chapters on their campuses.[70] Rather, many universities *require* that fraternities and sororities maintain a charter from and remain in good standing with their national organization in order to achieve and maintain fully recognized status.

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[66] Several fraternities and sororities have expanded to Canada and other countries, thus making them international fraternities and sororities. However, this Comment will refer to all national and international organizations as national organizations. This is to distinguish them from *local* fraternities, which generally exist only on one campus, and local chapters, which are the individual units of a fraternity acting in part under the guidance of their national organization. BAIRD'S *supra* note 2, at I-10.

[67] For example, a national fraternal organization such as Zeta Psi has several chapters on several different campuses, also bearing the name Zeta Psi.

[68] *See supra* notes 42-43 and accompanying text.

[69] BAIRD'S *supra* note 2, at I-10.

[70] For example, the University of Wisconsin-Madison has this policy. In stark contrast, some colleges and universities see affiliation with a national organization as detrimental and thus allow *only* local chapters to exist on their campuses.

III. ANALYSIS

A. Dichotomous Strands of the Freedom of Association[71]

Freedom of association doctrine recognizes two strands of the freedom of association, expressive[72] and intimate,[73] both of which are potentially applicable to Greek social organizations. While the issue of a right of expressive association in Greek organizations has been litigated,[74] the issue of freedom of intimate association in such organizations has not. Determining the applicability of the strands of associational freedom to Greek organizations, as a threshold issue, is imperative to a proper understanding of when constitutional violations may occur. This is because without a showing that the organization engages in expressive or intimate activities, the organization and its members have no constitutionally recognized associational rights to assert.

1. Right of Expressive Association

The right of expressive association is essentially an adjunct right to the First Amendment freedom of expression. As such, it is implicated only when a group engages in some form of expression protected by the First Amendment.[75] The right of expressive association includes the right to associate for the purpose of engaging in First Amendment activities including speech, assembly, the exercise of religion, and petitioning the government for a redress of grievances.[76] The Supreme Court recently characterized this right of expressive association as the "right to associate

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[71] It should be noted that the freedom of association is protected from both state and federal invasion due to its "incorporation" into the Fourteenth Amendment's protection by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that the freedom of association is "fundamental [in] nature"). Specifically, the *Griswold* Court noted that marriage is "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* *See also*, Justice Goldberg's concurrence, which emphasized the relevance of the Ninth Amendment to the Court's holding that "the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights." *Id.* at 487 (Goldberg, J. concurring).

[72] *See infra* notes 75-81 and accompanying text.

[73] *See infra* notes 82-110 and accompanying text.

[74] *See infra* notes 75-81 and accompanying text.

[75] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958); Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

[76] Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[77]

Fraternities and sororities do engage in religious or ritualistic activities, community service, and political activities that are protected by the First Amendment.[78] Although the degree of involvement in these expressive activities varies among different chapters and on different campuses, nearly all Greek social fraternities and sororities emphasize their social, rather than their expressive, nature.[79] As a result, the claim for protection under expressive association for social fraternities and sororities is marginal at best.[80] Indeed, one judge has expressed his view that:

> Fraternities don't generally engage in [First Amendment expressive] activities, at least not in the way constitutional protection is normally thought to be afforded to these activities. Fraternities are rarely founded because its members have a desire to propagate philosophical ideas, freely exercise religion, or petition the government about grievances—activities that one would normally consider protected by the Constitution's guarantee of group expression.[81]

Accordingly, the freedom of expressive association provides only limited protection to Greek social organizations.

2. Right to Intimate Association

The right to intimate association protects the right to privacy of various groups. Intimate association includes the right to enter into close personal relationships with others without fear of government intrusion.[82] The rationale for recognizing such a right is that "[c]hoices to enter into and maintain certain human relationships must be secured against undue

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[77] *Id.* at 622.

[78] For a thorough discussion of the nature of Greek activities, see *Horton*, *infra* note 81, at 442-45.

[79] *Id.*

[80] *See, e.g.*, Gay Students Org. of Univ. of N.H. v. Bonner, 509 F.2d 652, 659 (1st Cir. 1974) (stating that "a university may have some latitude in regulating organizations such as fraternities or sororities which can be purely social . . .").

[81] Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive in the 1990's?*, 18 J.C. & U.L. 419, 444 n.128 (1992) (quoting Nathaniel R. Jones, *The Future of Single Sex Fraternities*, 23 FRATERNAL LAW 1, 4 (Jan. 1988)). Judge Jones' position is not universally accepted. *See id.* (quoting James C. Harvey, *Fraternities and the Right of Expressive Association*, 32 FRATERNAL LAW 1, 2 (Mar. 1990) ("[Judge Jones'] statement is typical of the genre and represents a myopic view of the activities of Greek organizations.")).

[82] Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984).

intrusion by the State because of the [vital] role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[83] Therefore, the right to intimately associate is not affiliated with any particular amendment, but rather is said to derive from the "right to privacy" implicit in the Bill of Rights and protected from state invasion by the Fourteenth Amendment's Due Process Clause.[84] As such, the intimate associational right is an intrinsic element of personal liberty which acts as a "critical buffer between the individual and the power of the State."[85]

Relationships that are protected under the freedom of intimate association include familial relationships, marital relationships, and relationships involving cohabitation among relatives.[86] Therefore, the validity of a group's claim to intimate associational freedom depends on the group's nature.

In *Roberts v. United States Jaycees*,[87] the Supreme Court sought to define more precisely those who may assert the right to intimate association. The continuum of groups for intimate association analysis has at one end the family, possessing the most highly protected intimate relationships, and at the other end a large, profit-motivated corporation, having no chance of claiming intimate associational rights.[88] *Roberts* delineated characteristics of the groups whose members hold a constitutionally protected right of intimate association. The factors pertinent to establishing the requisite intimacy[89] of a group include its

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[83] *Id.* at 617-18. *Roberts* recognized that the freedom of intimate association plays a critical role in our nation's culture and traditions by allowing the cultivation and transmission of shared ideals and beliefs. *Id.* at 618-19. In this sense, intimate association allows individuals to foster diversity and acts as a "critical buffer" between individuals and the states' powers. *Id.* at 619. Protecting intimate associations of individuals acknowledges that individuals gain much emotional enrichment from close personal ties with others. *Id.* This protection from unwarranted state interference thereby "safeguards the ability . . . to [independently] define one's identity that is central to any concept of liberty." *Id.*

[84] *See Roberts*, 468 U.S. at 618; Zablocki v. Redhail, 434 U.S. 374, 384 (1977); Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977) (plurality opinion); *cf.* Wisconsin v. Yoder, 406 U.S. 205, 232-34 (1972) (holding that the First and Fourteenth Amendments prevent the states from compelling Amish parents to cause their children to attend formal high school to age sixteen and basing this holding on the "primary role" of parents in the upbringing of their children); Griswold v. Connecticut, 381 U.S. 479, 482-85 (1965) (a marital relationship lies "within the zone of privacy created by several fundamental constitutional guarantees").

[85] *Roberts*, 468 U.S. at 619.

[86] *Id.* at 618-20; Bd. of Dir. of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987).

[87] 468 U.S. at 620.

[88] *Id.* at 618.

[89] The right of intimate association in relationships between a group's members follows from the intimacy of the group generally. *See id.* at 620.

selectivity, size,[90] policies, congeniality, purpose, and seclusion of others from critical aspects of the relationship.[91]

Within this framework, the Supreme Court has decided whether the members of two groups, the United States Jaycees and Rotary International, could assert the right of intimate association among its membership. In both cases the Court answered the question in the negative.[92] The Jaycees was not an intimate group because of its unselective membership policies, its large size,[93] and its practice of including non-members in a substantial portion of its group activities.[94] The Court also held that Rotary International was not an intimate group because of its low selectivity in membership, its policy of including non-members in group meetings, and its broad overall purpose of inclusivity, rather than exclusivity, of others.[95]

The question of whether social fraternities and sororities hold the constitutional right of *intimate* association has gone unanswered.[96] This Comment asserts that fraternities and sororities exhibit many of the criteria of intimate association, notably selectivity in membership, exclusion of others in critical aspects of their relations, intimate purposes in choosing to organize, and relatively small size.

First, fraternities and sororities are highly selective in choosing their membership. A student wishing to join such an organization must ordinarily do so while attending a four-year educational institution. The group of potential members is further narrowed through the rush process,

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[90] *But see* Horton, *supra* note 81 at 444 (citing Nathaniel R. Jones, *The Future of Single Sex Fraternities*, 23 FRATERNAL LAW 1, 4 (Jan. 1988), who argues that significance should not be placed on the size of an organization in determining whether it is an intimate group). Jones' argument has force, given that the Supreme Court itself recognizes that *relative* smallness is what is significant, as well as the intimacy of the *relationships* among group members, not the intimacy of the entire group. *Roberts*, 468 U.S. at 619-20. However, it is from *Roberts* we learn that the Court will place significance on the size of an organization in determining whether or not it is intimate. *See* 468 U.S. at 621 (noting the significance of the Jaycees' local chapters having upwards of 400 members).

[91] Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984). In assessing whether intimate associational freedoms exist in a given case, the analyzing court must engage in a "careful assessment of where . . . [the] objective characteristics [of a group's relationships] locate it on a spectrum from the most intimate to the most attenuated of personal attachments." *Id.*

[92] *Id.* at 621; *Rotary Int'l*, 481 U.S. at 546.

[93] The Jaycees had local chapters with membership exceeding 400 members. *Roberts*, 468 U.S. at 621.

[94] *Id.* at 616-21.

[95] *Rotary Int'l*, 481 U.S. at 546-47.

[96] Some commentators, however, have stated that the familial relationships within fraternities are of a type that the Supreme Court would recognize as intimate and therefore its members should hold the right of intimate association. *See, e.g.*, Horton, *supra* note 81 at 435-440.

whereby the fraternities and sororities meet each candidate and determine to whom they will extend an invitation of membership.[97] In addition, once a person gets an invitation to join, he or she must undergo an extensive pledge period,[98] usually one or two semesters in length, in order to achieve full membership. It is only once the pledging period is complete that the student may gain full membership rights in the fraternity or sorority.[99] The rationale for having extensive rushing and pledging processes is at least twofold. Greek organizations want to be sure that the people they initiate are capable of retaining confidential information from disclosure and also that members get along with one another so that organizational goals can be furthered.[100] Thus, fraternities and sororities are highly selective in choosing their membership.

Second, fraternities and sororities exclude others from critical aspects of their relations. Most fraternities and sororities have meetings open to members only.[101] Not only are the general public and guests prevented from joining in the meetings, but pledges are precluded from entering the meeting as well.[102] In addition, rituals are a critical aspect of Greek organizations' relations. Most fraternities and sororities require that their rituals be kept secret, and require their members to swear under oath to keep them secret.[103] In some Greek organizations, violations of this oath can result in expulsion from the group for life.[104] Not all aspects of Greek life are limited only to members, however. Fraternities and sororities hold formal and semi-formal dances and social parties to which members are permitted to bring a non-member guest. Nonetheless, even if such dances

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[97] "Rush" is the period during which fraternity and sorority members and non-members desiring to become members, interact to determine whether the non-member is compatible with the fraternity or sorority and vice versa. BAIRD'S, *supra* note 2, at I-12 to -13.

[98] This pledge period usually entails a full semester or full year program. *See* BAIRD'S, *supra* note 2, at I-12. In such a program, pledges are generally required to interview all or a substantial number of the chapter's active members; learn chapter history; maintain a specified grade point average; participate in the organization's activities; and to show dignity and respect for his or her fellow pledges, the organization, and its active and alumni members.

[99] Full membership rights enable members to run for offices of, and other leadership positions within, the fraternity or sorority, to participate and have a vote in chapter meetings, to wear the organization's Greek letters, to travel to and participate in the national organization's convention, to live in the chapter house if it has one, to travel to the organization's houses on other campuses, and to participate in all other group events. *See* BAIRD'S, *supra* note 2, at ix-x.

[100] While ensuring that members get along with one another is important in any organization, it is of utmost importance in a Greek organization where members often live together in one house. *See* BAIRD'S, *supra* note 2, at I-14.

[101] BAIRD'S *supra* note 2, at I-10.

[102] *Id.*

[103] *Id.*

[104] *Id.*

and parties are deemed to be a critical aspect of Greek relations, a substantial number of other activities exist from which non-members are excluded. Therefore, Greek organizations are groups that exclude non-members from critical aspects of their relationships.

Third, many intimate relationships do exist among members in Greek organization chapters. Many fraternity and sorority members join their organization because the organizations are like a family away from home. Other members discover this family-likeness after they have joined. Many Greek organizations occupy houses in which their members live and eat together.[105] Members of Greek organizations not owning houses frequently room together elsewhere. Moreover, almost all fraternities and sororities provide pledge mothers or fathers for new members—senior active members who take new initiates under their wings to teach them generally about the organization and help them with personal matters.[106] These programs, providing pledge mothers or fathers for new members, further the creation of close relationships within Greek organizations. Further, fraternity and sorority members often share intimate secrets with each other during meetings or elsewhere. Thus, fraternities and sororities, unlike the Jaycees or Rotary International, are organized, in large part, for intimate purposes.

Fourth, most fraternity and sorority chapters are relatively small in size, generally having twenty to seventy-five members.[107] The Supreme Court recognizes that it is the size of the local chapter, not the entire national organization that weighs into the determination of intimacy.[108] Therefore, the size of a Greek organization's local chapters should weigh in favor of its members possessing a freedom of intimate association in their Greek relationships. To be sure, the Jaycees' local chapters number about 400 members in size and were held not to possess a freedom of

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[105] BAIRD'S *supra* note 2, at I-10.

[106] *Id.*

[107] This is contrary to groups like the Jaycees, which has upwards of 400 members at local chapters and did not have a right of intimate association. *See supra* text accompanying note 93. Nevertheless, this Comment asserts that the size of the group asserting associational rights should be a *de minimis* factor in determining whether the group is intimate. To illustrate, the fact that a family is extremely large, or that a normally small family has gathered at a large family reunion, should not preclude it from asserting that its members have intimate relations with each other. It is these intimate relations which, in large part, determine whether a group's members may in fact assert a right of intimate association.

[108] Roberts v. United States Jaycees, 468 U.S. 609, 621 (1984) (noting the size of the *local chapters* of the Jaycees as a factor in determining whether or not the group's members held a freedom of intimate association) (emphasis added).

intimate association.[109] The largest Greek organizations, however, number about 125 members at a local chapter.[110] Therefore, the size of Greek organizations is *relatively* small under the intimate association doctrinal framework.

As the foregoing discussion illustrates, courts should find that Greek social organizations are intimate organizations as defined in *Roberts*. Such a finding would compel the court to engage in heightened scrutiny when determining whether a regulation imposed upon such an organization abridges the constitutional freedom of association of its members.

B. The Doctrine of Unconstitutional Conditions

The doctrine of unconstitutional conditions provides that the government may not constitutionally do indirectly that which it may not do directly.[111] This doctrine most often applies in the context of conditions placed upon the granting of government benefits. One distinguished commentator has characterized the doctrine as holding that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[112] For example, the government may not grant drivers' licenses only on the condition that people not speak negatively about the government in public. In relation to associational rights, this doctrine prevents the government from imposing penalties upon or withholding benefits from individuals because of their membership in a disfavored group.[113]

The doctrine of unconstitutional conditions is germane to understanding the freedom of association and how courts determine when that freedom is abridged. The Supreme Court in both *Patterson*[114] and *Healy*[115] held that the doctrine of unconstitutional conditions is applicable

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[109] *Id.*

[110] BAIRD'S, *supra* note 2, at I-14 to –15.

[111] *See* Healy v. James, 408 U.S. 169, 183 (1972). In *Healy*, the Supreme Court held that the freedom of association is protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Id.* (quoting Bates v. City of Little Rock, 361 U.S. 516, 523 (1960)).

[112] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

[113] Roberts v. United States Jaycees, 468 U.S. 609, 621 (1984). *Roberts* recognized that government actions abridging the freedom of association can take a number of forms. *Id.* These forms include, *inter alia*, an attempt to require disclosure of one's membership in a group seeking anonymity or an attempted interference with the internal organization or affairs of a group. *Id.*

[114] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958).

[115] 408 U.S. at 183.

to the constitutionally protected freedom of association.[116] Accordingly, although a state university need not officially recognize fraternities and sororities in the first place, it cannot require these organizations to give up constitutional rights in order to gain the benefits of official university recognition.

C. Restrictions on Students Analyzed

In response to concerns raised by the presence of Greek organizations, university officials have imposed increasing restrictions on these groups.[117] Such restrictions take a wide variety of forms, ranging

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[116] These holdings are not explicitly stated as applying the doctrine of unconstitutional conditions because commentators, not courts, gave the doctrine its name.

[117] State legislatures, in addition to the universities themselves, have acted in regard to Greek organizations. Such legislative action is usually in the form of anti-hazing statutes, which more than thirty states have now passed or have pending. Susan J. Curry, *Hazing and the 'Rush' Toward Reform: Responses from Universities, Fraternities, State Legislatures, and the Courts*, 16 J.C. & U.L. 93, 117 n.6 (1989) (citing NEWSWEEK ON CAMPUS, Apr. 1988, at 10, col. 1). Rather than dealing with regulatory requirements on *organizations* generally, such statutes usually deal with penalties for *individual* members who engage in hazing activity. For example, a Texas anti-hazing statute provides:

> (6) "Hazing" means any intentional, knowing, or reckless act, occurring on or off the campus of an educational institution, by one person alone or acting with others, directed against a student, that endangers the mental or physical health or safety of a student for the purpose of pledging, being initiated into, affiliating with, holding office in, or maintaining membership in an organization. The term includes:
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> (A) any type of physical brutality, such as whipping, beating, striking, branding, electronic[ally] shocking, placing of a harmful substance on the body, or similar activity;
>
> (B) any type of physical activity, such as sleep deprivation, exposure to the elements, confinement in a small space, calisthenics, or other activity that subjects the student to an unreasonable risk of harm or that adversely affects the mental or physical health or safety of the student;
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> (C) any activity involving consumption of a food, liquid, alcoholic beverage, liquor, drug, or other substance that subjects the student to an unreasonable risk of harm or that adversely affects the mental or physical health or safety of the student;
>
> (D) any activity that intimidates or threatens the student with ostracism, that subjects the student to extreme mental stress, shame, or humiliation, that adversely affects the mental health or dignity of the student or discourages the student from entering or remaining registered in an educational institution, or that may reasonably be expected to cause a student to leave the organization or the institution rather than submit to acts described in this subdivision; and
>
> (E) any activity that induces, causes or requires the student to perform a duty or task that involves a violation of the Penal Code.

TEX. EDUC. CODE ANN. § 37.151(6)(A)-(E) (West 1996). The next section of the code provides a penalty which the court may impose:

> (F) Except if an offense causes the death of a student, in sentencing a person convicted of . . . [hazing], the court *may require the person to perform community service*,

from restrictions on recruitment of new members to mandates regarding an organization's living arrangements. This section discusses the constitutionality of four requirements recently placed on Greek organizations, and their members, which must be met in order to maintain official university recognition.

1. Controlling the Period of Rush

Within the last fifteen years, the rushing process has become strictly regulated and university rule-driven. One of the primary methods of controlling the rush process is through the imposition of limits on the periods in which fraternities and sororities may "rush" or recruit new members. When governed by fraternity and sororities, this period generally lasts about five weeks.[118] When governed by university rule, however, the period is usually only one to two weeks long.[119] An additional regulation related to rush requires Greek organizations to submit bid lists to university officials.[120]

A policy of establishing a time frame within which Greek organizations may recruit students to their respective groups is a wise maneuver by university officials. Such a policy encourages fair competition, as it places all Greek organizations on a level playing field in recruitment. Moreover, engagement in official recruitment during the entire year could potentially impose burdens on students at times when they need to study. Despite the benefits derived from limitations on recruiting terms, however, such a rule must be self-imposed rather than university-compelled.

When the university imposes a "rush" term on Greek organizations, it disallows associational activities, in this case recruitment, from taking place except at certain times. This has the effect of preventing some prospective members from joining since it prevents fraternities and sororities from admitting new members except during university prescribed "windows of time."[121] The prevention of prospective members from joining

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> subject to the same conditions imposed on a person placed on community supervision under . . . [a provision of the Texas] Code of Criminal Procedure, for an appropriate period of time in lieu of confinement in county jail or in lieu of part of the time the person is sentenced to confinement in county jail.

Id. at § 37.152(f) (emphasis added).

[118] BAIRD'S *supra* note 2, at I-10.

[119] *Id.*

[120] *Id.*

[121] For example, those individuals unwilling to commit or otherwise unable to join within the university-prescribed shortened time frame are precluded from joining in the present semester. These

an organization is the very reason why *Patterson* struck down state action against the NAACP.[122] Further, the Supreme Court in *Healy* recognized that college organizations, once given official recognition, must have ample opportunity to communicate with and recruit new members.[123] Restrictions on the period of rush deprive Greek organizations of this opportunity. Accordingly, university regulations requiring Greek organizations to submit to reduced rush periods abridge the freedom of association under *Patterson* and *Healy*.

Although Greek organizations may be able to successfully assert that restrictions on rush do encroach upon a group's freedom of association, it merits recognition that such regulations are still permissible if the university is able to demonstrate that its rule furthers a compelling interest. On a college campus, the state has a compelling interest in preventing the interruption of classes and substantial interference with the opportunity of other students to obtain an education.[124] The restrictions on rush do not serve to further this interest, however. Rather, Greek recruiting activities occur in a non-intrusive manner.[125]

The compelling state interest of preventing the interruption of classes is not implicated in the case of Greek rush. Because participation in Greek rush is voluntary and generally limited to in-house, off-campus or other non-intrusive activities, rush does not substantially interfere with the opportunity of other students to obtain an education. To be sure,

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same individuals may find it less desirable to join later when they get further along in their college career. Fraternities and sororities also might find that they are unable to effectively recruit during this time period because they must give out "bids" within a period of about a week in order to allow sufficient time for the prospective members to decide whether to accept their membership invitation. This shortened amount of time hardly gives the organization's members enough time to learn the prospective members' names, thereby denying the organizations the ability to effectively recruit new members. Moreover, Greek organizations with small chapters are precluded from admitting as many members as they otherwise could because they are constrained by their membership size from being able to meet and recruit as many people as larger organizations in the same amount of time. This reason causes many smaller chapters to utilize a longer recruitment period than larger chapters when they are given a choice. Such longer recruitment periods were previously used by smaller chapters and are still used today where university rules do not govern the recruitment period.

[122] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63; *see also supra* text-accompanying note 26.

[123] *See supra* text accompanying note 44; *see also* Healy v. James, 408 U.S. 169, 181 ("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.").

[124] *Healy*, 408 U.S. at 189; *see also supra* text accompanying note 51.

[125] Fraternities and sororities gather in a university banquet room or in a mall or field on campus to pass out pamphlets or information regarding their respective organizations. On their own, fraternities and sororities have rush activities including meals, parties, and other events at their chapter house or elsewhere in order to meet potential recruits. Moreover, all rush activities are voluntarily undertaken by students and usually take place outside of daytime class hours.

fraternities and sororities do not cause ruckuses by vocally soliciting student membership in classrooms or libraries during rush, nor do they recruit new members by making noise or handing out pamphlets while students are trying to learn or study. Further, Greek organizations do not force students to attend rush seminars or events. Rather, attendance at any and all Greek recruiting functions is voluntary, and students are free to attend as many different chapters' events during rush as each student desires.[126] Therefore, it does not seem that universities have a compelling interest in controlling the duration of Greek rush. Accordingly, university interference with the freedom of association during rush is likely unconstitutional.

An additional regulation imposed by university officials upon Greek organizations requires that all such groups submit bid lists to the university during rush.[127] The bid list submission requirement is highly analogous to the membership list disclosure requirement imposed on the NAACP in *Patterson*, which the Supreme Court declared unconstitutional.[128] Because of these similarities, the required disclosure of bid lists should be analyzed in the context of a social fraternity or sorority for constitutional validity.[129]

Patterson looked to the harmful effects such a requirement would impose in order to determine whether an abridgment of the freedom of association occurred. For fraternities and sororities, the required disclosure of bid lists does not appear to inflict any harm on the Greek organizations. The required submission of bid lists does not induce members to withdraw from Greek organizations nor is it likely that it dissuades prospective members from joining, either of which might be an abridgment under *Patterson*.[130] Rather, students are likely indifferent to such requirements as they require only a clerical duty of submitting typed recruiting lists.

This is not to say that the requirement of submitting bid lists to university administrators could never be an abridgment of associational freedoms. Indeed, an abridgment might occur if the university, upon receipt of the bid lists, sent information critical of Greek organizations to the prospective members. If the content of such letters were detrimental

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[126] BAIRD'S *supra* note 2, at I-10.

[127] Susan J. Curry, *Hazing and the 'Rush' Toward Reform: Responses from Universities, Fraternities, State Legislatures, and the Courts*, 16 J.C. & U.L. 93, 113 (1989). Bid lists are lists of the recruits a Greek organization has invited to become members in its group. *Id.*

[128] *See supra* notes 15 and 24 and accompanying text.

[129] The Court in *Patterson* did not say that government-ordered mandatory disclosure of membership lists violates the freedom of association per se. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958).

[130] Nor does the requirement of bid list disclosure prevent a group from communicating with and recruiting students on campus, which might be an abridgement of the freedom of association under *Healy*. *See* Healy v. James, 408 U.S. 169, 183 (1972).

enough, students may be dissuaded from further pursuing membership in a Greek social organization, thus constituting an abridgment of associational freedom under *Patterson*. Absent such a demonstration, however, the requirement that fraternities and sororities submit bid lists to the university is likely constitutional under the freedom of association.

2. Affirmative Requirements on Fraternity Members in Order to Maintain Their Associations

Many universities impose requirements that fraternities and sororities conduct community service in order to maintain their university recognition.[131] The requirement that a group perform community service as a prerequisite to both initial university recognition and maintenance of that recognition is a prior restraint on the fraternity or sorority message and/or conduct. That is, prior to a fraternity or sorority acting under university recognition, it must agree to perform various community service functions.[132]

It is not doubted that fraternities and sororities do provide a great vehicle to benefit the community. Nor is it doubted that benefiting the community is a task which many colleges take seriously. As noted in *Healy*, however, official university recognition is vital for a campus organization's livelihood.[133] When one chooses to become a member of a Greek organization, one is thus inherently subject to the requirement of performing community service.

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[131] Peculiarly, community service is also a punishment increasingly imposed on criminals. State v. Cook, 679 P.2d 413, 415 (Wash. App. 1984); *accord In re* Erickson, 604 P.2d 513 (Wash. App. 1979). Courts recognize that "a major function of the [community service] disposition is *punishment*." State v. Cook, 679 P.2d at 415. *But see* State v. Lawton, 482 N.W.2d 142, 148 (Wis. Ct. App. 1992) (holding that community service furthers not only restitutionary but also rehabilitative goals and therefore its imposition is not a penalty for purposes of applying the Federal Double Jeopardy Clause). Moreover, legislatures define the requirement to perform community service as a "punishment" for committing a criminal offense. *See, e.g.*, WASH. REV. CODE ANN. § 13.40.020(2) (West 1996). Fraternities and sororities also see community service in another context—punishment for engaging in criminal hazing activities. *See supra* note 117. The belief that forced performance of community service is a punishment also comports with a long-held theory of criminal punishment, i.e., restitution, that one must pay back society for the harm he has caused. *See* Arnold H. Loewy, CRIMINAL LAW IN A NUTSHELL 6 (1975). If the requirement to perform community service is in fact a punishment, another question arises, i.e., may a state impose a penalty on members of a group merely because they choose to expressively or intimately associate together, without a showing that the group they form will incite unlawful conduct? The simple answer should be no. This question is, however, beyond the scope of this Comment.

[132] These community service, or "philanthropy," requirements are generally performed by the whole group a specified number of times per academic year, usually between one and four.

[133] *See supra* notes 41-42 and accompanying text.

This "preclearance" of freedom guaranteed by the Constitution, including the freedom of association, should not be and is not tolerated.[134] The Supreme Court has spoken on this issue and emphatically stated, "[o]ur cases have heavily disfavored all [forms] of prior restraint upon the exercise of freedoms guaranteed by the First Amendment. Although most often imposed upon speech, prior restraints are no less noxious, and have been no less condemned, when directed against associational liberty . . . ."[135]

The requirement that fraternity and sorority members perform community service fits under the category of abridgment under *Patterson,* for it may dissuade prospective members from joining. This is because prospective members may see themselves as having only a limited amount of time to devote to an organization while a full-time student. This limited amount of time may appear to a prospective member to be insufficient to devote to an organization when he or she sees peripheral requirements, such as the mandated performance of community service imposed on individual members of the organization. To be sure, participation in a fraternity or sorority by itself requires a substantial amount of time and dedication from each individual member. A student's busy schedule may therefore appear too crowded to join or continue participation in a Greek organization once involuntary activities are contemplated as well. As such, state-imposed performance of community service may dissuade prospective members from joining or cause members to discontinue membership, both of which amounted to abridgments of associational freedoms under *Patterson.*[136] Thus, state university-imposed performance of community service on Greek members is likely an abridgment of their freedom of intimate association.

The state is likely to be unable to justify this abridgment as furthering a compelling state interest because the regulations are not sufficiently tailored to meet any such interests. The state has an interest in promoting the welfare of its citizens which is furthered, at lease arguably, by imposing requirements on fraternity and sorority members to perform community service.

Assuming the state interest in promoting the welfare of its citizens is compelling, in order to survive constitutional scrutiny, the state must also demonstrate that the rule requiring performance of community service is the most narrowly drawn means of achieving that interest. It is under this prong that the rule requiring community service fails because a state may use more narrowly drawn means to promote the welfare of its citizens. For

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[134] Morse v. Republican Party of Virginia, 116 S. Ct. 1186, 1217-18 (1996).

[135] *See id.*

[136] *See supra* note 24-26 and accompanying text.

example, the state could grant tax breaks, or in this case tuition breaks, to those performing community service and thereby promote the citizens' welfare. The state university could also offer to its students course credit for the performance of community service. Neither of these proposals are based in any way on groups the student joins nor with whom the student associates.[137] As such, they are less restrictive of Greek organization members' freedom to associate. Further, these proposals do not condition membership in an organization on the performance of a community service activity. Rather, all community service performed under these proposals is *voluntarily* undertaken. A rule allowing a group composed entirely of voluntary citizens to perform community service is more narrowly drawn than a rule requiring a group of members of selected organizations, *some* of whom might otherwise voluntarily perform community service, to do so. This is because such a rule excludes one's associations from becoming a basis for determining who will and who will not perform community service. Both of these rules further the state interest of promoting the general welfare of its citizens. Because the state interest furthered by the rule requiring fraternities and sororities to perform community service could be served by a rule more narrowly drawn, university rules mandating Greek organizations to perform community service are likely unconstitutional.

While the performance of community service is beneficial and a wise function for many student and other groups to perform, it is a function which must be voluntarily undertaken by Greek organizations rather than required by the state.[138] While the imposition of these requirements is likely well-intentioned, affirmative requirements on fraternity members to conduct community service seem to place a prior restraint on the mere association of students. Under the doctrine of unconstitutional conditions, if the university could not place a prior restraint on students based on their future associational activities,[139] it cannot condition the grant of a benefit, here official university recognition, on the condition that the students give up their constitutional right to freely associate.

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[137] If, in fact, the state interest in promoting the general welfare of its citizenry is so important, then why do the states not require *all* students, not just those in Greek organizations, to perform community service as a condition of maintaining good standing with a university?

[138] It is worth noting that a substantial number of Greek fraternities and sororities *voluntarily* require or promote their organization's individual chapters to perform community service. BAIRD'S, *supra* note 2, at I-19.

[139] *See supra* text accompanying note 131, which states that universities may not impose such a requirement.

3. Minimum-Credit and Minimum-Year Requirements to Join Greek Organizations

Many universities have passed rules prohibiting their students from joining Greek organizations until the students receive a specified number of credits or reach a prescribed grade level. Generally, these prohibitions disallow either all freshmen or first-semester freshmen from pledging or joining Greek organizations.[140] As members of a campus organization, fraternity and sorority members have the associational right to maintain their organization as a viable entity.[141] An abridgment of this right can occur when state action infringes on the right of student members to maintain their group as a viable entity[142] or when prospective students are dissuaded from joining.[143]

The minimum-credit or -year requirements impose unconstitutional restraints on the rights of Greek organization members to freely associate. In order for any organization to maintain itself as a viable entity, it must be able to recruit and initiate new members. This is of utmost importance in the case of fraternities and sororities which operate on a university campus where students enter and leave on an accelerated basis.[144] In such a situation, the ability of students to join such groups is already limited by the nature and limited duration of our college and university system. This ability to join is lessened further when students are prohibited from joining fraternities or sororities until their second semester or second year of college.

The effect of minimum-credit and -year requirements is to give Greek organizations a smaller potential pool for membership. Additionally, many students will be dissuaded from joining a fraternity or sorority if they cannot do so until their second semester or second year of college due to the nature of Greek membership. First, students may decide after their first year that they have more compelling things to do than participate in a

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[140] *See, e.g.*, Curry, *supra* note 127, at 112-13 (1989) (noting a state university's requirement that students complete twenty-four credit hours to be eligible to join a fraternity and that students generally have that number of credits upon completing their first year). *See also*, BAIRD'S, *supra* note 2, at I-12 to -13 (noting that "[t]he deferred pledging of students until a fixed date and the deferred initiation of pledge members until they have completed a prescribed portion of their college courses or secured a predetermined grade have been adopted in a number of places").

[141] *See* 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.").

[142] *Id.*

[143] *See supra* note 25 and accompanying text.

[144] The Supreme Court, in *Healy*, recognized the increased importance of the need to communicate with and recruit new members in the accelerated campus setting. 408 U.S. at 181.

Greek organization. Joining a Greek organization is part of the learning and growing-up process for students. Perceiving themselves as more mature after their first year or semester of college, many students may no longer envision joining a Greek organization as a significant benefit to help them grow up. It also may not be desirable for such students to join a fraternity or sorority in their second year due to the age of the students they are pledging under. For example, a student is less likely to feel uncomfortable or disturbed about taking instructions as a pledge from upperclassmen when they are freshmen than when they are sophomores. As freshmen, these individuals will look up to the upperclassmen and feel less offended when told that they need to show more dedication to the organization. When only sophomores are allowed to join, however, students are more likely to feel uncomfortable when taught how to behave in the organization by students only one or two years their senior. As second year students, sophomores feel able to accomplish more on their own and needs less guidance from others in making decisions. Because entry into a Greek organization requires one to be, in some cases, humble, the freshman year of college is the best year for the students to join such organizations.[145] As minimum-credit and -year requirements will preclude some students from the pool of potential candidates, they diminish an organization's ability to maintain a viable entity.

Second, many students will be dissuaded from joining a Greek organization due to minimum-credit or -year requirements because of the nature of Greek membership. Greek membership entails significant but manageable commitments to the Greek organization. One of the most substantial commitments is the commitment to live in-house for a one or two year period during college. By necessity, this period can only occur after one has already achieved full-membership, as opposed to pledge status.[146] By limiting the period in which one may join a fraternity or sorority, the university also limits the amount of time in which one may live in the fraternity or sorority house or participate in organizational activities. Fraternities and sororities are capable of maintaining their viability only because they are able to receive new members on a continuing basis. With fewer people living in-house due to the shortened time in which members are able to do so, a fraternity or sorority may not

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[145] While some students do join Greek social organizations as juniors or seniors, the number doing so is small because most students joining such organizations do so as freshmen or sophomores. *See* BAIRD'S, *supra* note 2, at I-12 to -13.

[146] This is because only full membership rights generally allow one to live in a Greek house, where secrets of the organization could potentially be disclosed to non-members or pledges were they to live in the house. *Id.* at I-14.

be able to maintain itself as a viable organization. If the ability to prohibit students from joining organizations is abused, it could effectively destroy a Greek organization.

The interaction between members with differing seniority is of utmost importance to fraternities and sororities in order to maintain the organization's traditions and viability. Inside knowledge must have an adequate means of passage between generations of students. The minimum-credit and -year requirements threaten the organization's ability to pass inside knowledge from class to class. This occurs because by the time new members are recruited into the organization as sophomores, they will not have as much overall time to devote to the Greek organization as they would if they were able to join as freshmen. Since members will be of nearly identical seniority, they will not be able to adequately interact with younger members in order to pass on traditions and important management information.

The minimum-credit and -year requirements interfere with the freedom of association in several ways. First, as discussed above, organizations, if unable to initiate members of the freshman class, will have a difficult time maintaining viability, an element that was implicitly recognized as an associational right in *Healy*.[147] Second, organizational members' associational rights include the right to recruit and communicate with prospective members.[148] Without the ability to recruit from a large pool of potential new members, these organizations' recruitment activities are substantially affected. Assuming that interest in Greek organizations stays constant, the number of members in each organization will necessarily decrease in number, up to twenty-five percent, because of the inability to join the group until after one year's time.[149] In short, it is not feasible, given the fleeting status of students on college campuses, for Greek organizations to survive without being able to draw student members from a wide pool of candidates.

To illustrate, a university could take two extreme approaches, the first being no minimum-credit or -year requirement and the second being a minimum-credit or -year requirement of a student's full academic term at the university. Surely the latter prevents an organization from remaining as a viable organization, as it would be prohibited from ever admitting students into its group. A restriction falling in between the two also harms

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[147] *See supra* note 49 and accompanying text.

[148] *See supra* note 41 and accompanying text.

[149] Logically, by the time members are initiated as sophomores, the students who were in the senior class when the new members were freshmen will have graduated, thereby making the number of total members in a group decrease.

a group's viability, as well as deters or prevents new members from joining.

Since minimum-credit and -year requirements limit both the potential recruitment pool and the potential pool of members who will live in the organization's house, these requirements restrict the ability of an organization to remain a viable entity. Moreover, these requirements also deter or prevent new members from joining their group and hinder the group's recruitment activities. As such, courts should recognize that minimum-credit and year requirements abridge Greek organization members' associational freedoms.

Although Greek organizations may be able to successfully assert that minimum-credit or -year requirements do encroach upon the group's freedom of association, the restrictions are constitutionally permissible if the university is able to demonstrate a compelling interest. A state interest likely to be asserted here is the protection of freshman students from themselves. Given the rigorous demands of college curriculum and the potential for unpreparedness of the incoming freshmen, this interest is likely to be compelling. That is, the state has a compelling interest in seeing that its first-year students do not self-destruct by trying to engage in both extensive social and academic activities during their freshman year. Moreover, the state has an interest in seeing that the money with which it subsidizes the students' education is not wasted away by students too busy with social engagements to utilize the expenditure of these funds. This interest is likely compelling during these students' crucial first year of college when they are largely unaware of the challenges ahead of them and thus more susceptible to failure.

Minimum-credit and -year requirements likely serve both of these purposes. First, students are protected from trying to accomplish too much by joining a Greek organization in addition to their studies, thereby potentially harming themselves by receiving a poor academic start in college. Second, the state's money is more likely to be utilized for purposes for which it was intended, such as securing an opportunity to receive a quality education. Thus, imposing minimum-credit and -year requirements arguably makes it more likely that the state's investment in student education is not wasted.

Assuming the state interests alleged are compelling, the state must also demonstrate that the rule or statute is the most narrowly drawn means of achieving those interests in order to survive constitutional scrutiny.[150] Here, the states have utilized two methods of different breadth, a one-

[150] *See supra* notes 59-61 and accompanying text.

semester restraint and a one-year restraint preventing students from joining fraternities and sororities, both designed to achieve the same end.

Freshman students are largely in need of help during their first year as they are in an unfamiliar setting. As such, these students should have the opportunity to devote as much time as possible to their studies to make sure that: 1) they do not act to harm themselves, by failing to study and performing poorly in school; and 2) the state's funds are not wasted. Second-semester freshmen, however, have completed a full academic term and, perhaps more importantly, a round of finals. Because of this, they are more likely than first-semester students to be able to perform well in school, notwithstanding a busy social schedule. Moreover, after the first semester, students understand the time constraints imposed on them and are thus able to make more informed decisions as to what social or other organizations they may join and still be able to adequately perform their schoolwork. After the first semester, the state's need to ensure its investment in aiding the education of any given student is somewhat diminished. Because second semester students are more advanced and less in need of protection from themselves, rules prohibiting them from joining Greek organizations are not as significantly furthered as are rules prohibiting only first semester students from joining.

As such, it appears that the one-semester restriction is narrowly drawn to achieve the state's applicable interests. The minimum one-year prohibition from joining a Greek organization prevents students from joining where the state interests are less furthered or not furthered at all. By contrast, freedom to associate in Greek organizations is harmed more by the minimum one-year requirement.[151] It is thus likely that the one-year restriction on students' ability to join Greek organizations is not the most narrowly drawn to further the state's interest and is likely an unconstitutional abridgement of the freedom of association.

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[151] As it pertains to fraternities and sororities, the one-semester term is far more bearable than the one-year term. Allowing Greek organizations to recruit second-semester freshmen allows them to grant full membership rights to students at the end of their first year. In turn, this allows the organization to have active members with longer active careers, potentially three years. Thus, members are able to contribute more overall time and effort to the organization. The alternative rule, eliminating freshmen from the recruiting pool entirely, forces Greek organizations to maintain an active membership essentially comprised of all upperclassmen. It must be remembered that Greek organizations have a pledge period of at least one semester. Therefore, the rule disallowing membership during the entire first year disallows fraternities and sororities from admitting members until the end of their third semester of college.

4. Requiring Live-In Adults

Until the 1950s, many fraternity and sorority houses had housemothers living in their house.[152] These "house-moms" generally would cook and clean for the organization's members.[153] This practice of having a live-in housemother was undertaken voluntarily by fraternities and sororities in order to have an adult to take care of the house and efficiently provide meals for their members.[154] This practice is nearly non-existent today in fraternity houses, though house-moms still live and work in some sorority houses.[155] Some state universities, by university requirement, have sought to re-implement the practice of having house-parents live in fraternity houses. For example, Rutgers has considered a university rule "requiring each of the fraternity houses to have a live-in adult."[156] This modern policy would be university-mandated, not self-imposed as the practice of having a house-parent was many years ago.[157]

The university-imposed requirement of having a live-in adult in fraternity houses appears to fly in the face of current freedom of association doctrine. The freedom of association presupposes and includes a freedom *not* to associate.[158] Indeed, as the Supreme Court recognizes, "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[159]

While requiring a live-in adult does not force a fraternity to accept membership of another, i.e., it does not force the fraternity to award the live-in membership privileges, in practice it has the same detrimental effect. A fraternity house defines the fraternity's walls of privacy from the

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[152] BAIRD'S *supra* note 2, at I-16.

[153] *Id.*

[154] Having a live-in cook and caretaker provided the fraternities and sororities a cost-effective helper because a large part of a housemother's salary consisted of room and board. *Cf.* BAIRD'S, *supra* note 2, at I-14 (noting the impact of the fraternities' housing and feeding of students on the fraternity movement).

[155] BAIRD'S, *supra* note 2, at I-1 to -10.

[156] Curry, *supra* note 127, at 113. While the other restrictions discussed in this Comment are dealt with in the context of both fraternities and sororities, this rule is peculiarly directed only toward fraternities. As such, it will only be discussed in that context. The arguments applicable in the fraternity context, however, are largely the same as those pertinent to sororities subject to the same rule because of the strong similarities across Greek social organizations.

[157] *See id.*

[158] Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977), *reh'g denied*, 433 U.S. 915 (1977).

[159] *Roberts*, 468 U.S. at 623.

outside community. The fraternity maintains strict requirements of secrecy for its rituals and has other private gatherings within its house among its members only, or on occasion with invited guests. With the requirement of a live-in adult, however, the fraternity is required to plan its functions around this live-in as well as run a substantial risk of the live-in witnessing or interrupting private fraternal activities. This violates the purpose of having intimate associational freedoms in the first place, since it removes the "critical buffer" between individuals and the states' powers.[160]

Moreover, the live-in-adult requirement burdens association for one of the same reasons the government action in *Patterson* did, as it will likely dissuade prospective members from joining the organization. Many students enjoy leaving home for college in order to enjoy benefits such as independence, the ability to make their own decisions, and freedom to act without having their parents looking over their shoulder. Having a live-in-adult will dissuade many students from joining a fraternity, which usually includes a one- or two-year commitment to live in the fraternity house, because they want to live on their own.[161] Thus, the state-imposed requirement of live-in adults forces the fraternity to accept undesired people into the center of its associational activities and thereby abridges the affected fraternity members' associational freedoms.

Although Greek organizations may be able to successfully assert that the live-in adult requirement interferes with the group's freedom of association, the restrictions are constitutionally permissible if the university is able to demonstrate a compelling interest for them. One interest states might assert for requiring live-in adults is to avoid potential liability for the conduct of fraternities' members. That is, the live-in adults may cause these students living in fraternity houses to behave in a more adult-like manner and thereby avoid harm caused by irresponsible behavior. The interest in avoiding liability, however, is unlikely to be compelling in light of modern legal doctrine concerning the relationships between universities and fraternities.

As a general rule, colleges and universities are not liable for the actions of its fraternities and sororities.[162] There are, however, four bases

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[160] *Id.* at 619; *see supra* note 85 and accompanying text.

[161] Granted, the fraternity-implemented plan also may have prevented members from joining in the past. The decision of allowing a live-in adult to live in the fraternity house, however, should be a decision made from within the organization itself.

[162] This is due to the fact that universities normally do not owe a duty to protect other students against the acts of Greek organization students. *See* Booker v. Lehigh Univ., 800 F. Supp. 234, 237-40 (E.D. Pa. 1992) (refusing to find that university assumed a duty of care to protect its underage students from drinking alcohol by promulgating a social policy), *aff'd*, 995 F.2d 215 (3d Cir. 1993); Cooper v. Delta Chi Housing Corp., 674 A.2d 858, 860 (Conn. App. Ct. 1996) (refusing to hold a university liable for fraternity and sorority conduct under the doctrine of sovereign immunity).

on which universities have been held liable in the past. These are: 1) the *in loco parentis* doctrine; 2) the assumption of a duty of care; 3) a special relationship between the university and its students; and 4) the university as landowner. Nevertheless, each of these doctrines has either been abandoned in the university context or is largely inapplicable to most of the university relationships with Greek organizations.

The *in loco parentis* doctrine held that universities were responsible for a student's acts since they essentially took over the role, in the eyes of the law, as the student's parents.[163] As the Third Circuit recognized in the late 1970s, however, "the *modern* American College is not an insurer of the safety of its students."[164] The doctrine was largely eviscerated in the 1970s and 80s because of the dramatic expansion of student rights, including the right to vote, the recognition of the majority status of college students, and the students' right to privacy in college life.[165] Thus, the *in loco parentis* doctrine is not likely to supply a basis for university liability in the future. Courts are also less apt to find a duty of care based on an assumption of such duty or a special relationship than they may have been in the past.[166]

Turning to the question of the potential imposition of liability based upon the university acting as a landowner, it must be recognized that most fraternities own their houses or rent them from private parties.[167] These homes are usually non-university-owned, off-campus dwellings. While the university would like to see its students behave safely and in conformity with the administration's viewpoints, the students should not be forced to comply with university housing regulations when living in privately owned dwellings. To illustrate, should the mere fact that a group of citizens, say state employees, derives a benefit from the state allow the state to interfere with its most intimate relationships by intruding into the walls of the home? Should states be able to place sound bugs in its employees' homes

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[163] *Id.*

[164] Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979) (emphasis added), *cert. denied*, 446 U.S. 909 (1980).

[165] *Booker*, 800 F. Supp. at 238-40.

[166] *See Bradshaw*, 612 F.2d at 138-42. *Bradshaw* recognized that the competing interests of the student and of the university are much different than they were in the past. *Id.* at 140. At the risk of oversimplification, *Bradshaw* noted that the changes fundamentally derive from the recognition of the modern college student as an adult. *Id.* As such, *Bradshaw* was unwilling to find, and recognized other courts' preferences to refrain from finding, an assumed duty or one deriving from a special relationship. *Id.* at 140-42.

[167] *See, e.g.*, Anne C. Roark, *Value Questioned Fraternities: A Troubled Brotherhood*, L.A. TIMES, Mar. 10, 1985, at 1, which notes that all of the University of California's Greek organization houses are located on non-university property. Despite this fact, the University of California at Berkeley has imposed stiff restrictions on these Greek organizations and their housing arrangements. *Id.*

in order to ensure that these employees are behaving properly? As student Greek organization members, Greek students derive a benefit from the state—official university recognition of their organization. As such, students sit in a position similar to state employees, as both groups receive a state benefit, and the live-in adult requirement should seem as invasive when applied to them as would a sound bug required in the home of state employees. Thus, live-in adult requirements imposed on organizations occupying private structures are likely an unjustifiable abridgement of the freedom of association.

Where the Greek organization occupies university-owned land, however, the state's interest in maintaining order and protecting the value of its property is great, and likely compelling. For example, it could hardly be argued that university-employed resident assistants living in university-owned dormitories invade intimate relationships of the dormitory residents. The same should hold true if a Greek organization occupies such a university-owned dwelling. Therefore, in the limited context of a Greek organization's occupation of a university-owned complex, the state's interest in protecting its land and structure is likely compelling. Moreover, it is difficult to contemplate a less restrictive means for the state to protect this interest than to have a party occupying the university-owned facility. Thus, where the land or structure occupied by the Greek organization is owned by the state, a live-in adult requirement likely does not interfere with the students' associational freedoms.

Although some universities have been held liable for the conduct of their fraternities' members,[168] cases so holding are aberrations from the general rule. Moreover, it merits recognition that in the two recent cases which did find the university potentially liable to third parties for fraternity member conduct, the holding of the first case was binding on the lower state court in the second case.[169] Both cases also involved intentional conduct, punishable under the criminal law.[170] No matter how careful a university is, this conduct will occur on or near its campus and it is just as

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[168] In *Furek v. University of Delaware*, 594 A.2d 506, 518-20 (Del. 1991), Delaware's Supreme Court held that a university may be liable for a fraternity member's acts during a hazing ritual by assuming a duty of care to supervise and protect its students after providing protection for its students. However, this case is the exception to the long line of cases refusing to impose a duty of care on the university for fraternity conduct. Just nine months later, a court bound by *Furek* also held that the University of Delaware could be liable for the conduct of a university's fraternity members in *Marshall v. University of Delaware*. No. 82C-0C-10, 1986 WL 11566 (Del. Super. Ct. Oct. 8, 1986).

[169] The Delaware Supreme Court's ruling in *Furek* compelled the *Marshall* conclusion nine months later. *Id.*

[170] Furek v. Univ. of Delaware, 594 A.2d 506, 518-20 (Del. 1991) (involving a pledge who was severely burned on his face, neck, and back during a hazing activity). *Marshall*, 1986 WL 11566 (imposing liability where a student was stabbed in the eye with a beer bottle).

likely that the university should be held liable whether the criminal conduct takes place inside a fraternity house or in an outdoor university area.

To remove all potential threats of liability for the acts of fraternities, universities genuinely concerned about liability for the conduct of their Greek organizations should follow the lead of the University of Virginia. The University of Virginia requires all student groups, including fraternities, to sign "save harmless" contracts, exculpating the universities from liability arising from the organization's contracts, acts, or omissions.[171] One look at the thriving Greek system on the University of Virginia's campus compels the conclusion that this system is effective.[172] Accordingly, such exculpatory clauses are likely an effective tool to prevent third-party lawsuits against a university.

Thus, it appears that universities generally do not have a compelling interest in avoiding liability for conduct of fraternity members within privately owned homes.[173] This is, in large part, due to the fact that courts are unwilling to place potential liability on universities in this area. Alternatively, requiring a live-in adult is not the least restrictive means in which to avoid any liability because such liability is avoidable through the use of "save harmless" clauses in contracts with student organizations. The university requirement that a live-in adult occupy *non-university-owned* fraternity houses, therefore, is likely an unconstitutional abridgement of the freedom of fraternity members to associate.

IV. CONCLUSION

Under current freedom of association doctrine, unless restricted members of a Greek organization can demonstrate that their organization has been completely denied official recognition by a university, they are unlikely to have any legal recourse by asserting the freedom of association. Restrictions or burdens placed on fraternity and sorority members which are less than a full denial of recognition but have the same or similar effects as such a denial, however, should be recognized as an abridgment of the constitutionally guaranteed freedom of association. In order to reach this end, however, courts must first accept the conclusion that Greek social organizations are protected under the right of intimate association. To this

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[171] Debbie Goldberg, *Crack Down on Hazing and Alcohol: New Rules for Fraternities and Sororities*, WASH. POST, Aug. 7, 1988, at 5.

[172] *Id.*

[173] The state university's interest in avoiding liability is likely compelling, however, when applied to fraternities living on university-owned land.

end, lawyers for organizations challenging the state university action must assert that the organization's members are protected by the freedom of intimate association and distinguish their group's conduct from that of the Jaycees or Rotary International.

Once recognized as applicable to Greek social organizations, the freedom of intimate association, in conjunction with the doctrine of unconstitutional conditions, will protect such organizations from university-imposed restrictions such as minimum-credit and rush limitations. In light of this, universities should recognize the potential constitutional violations caused by their restrictions and scale back their restrictions on Greek social organizations.

Ultimately, on campus or elsewhere, intrusions into our intimate, as well as expressive, associational freedom must be fought for diligently and people must be allowed to associate with whomever they please absent a compelling reason against such freedom. It is thus incumbent upon our courts to protect the freedom of association to the extent Justice Harlan suggested. The freedom to engage in association with intimate groups and the freedom to associate for the advancement of beliefs and ideas are inseparable aspects of the liberty assured by the Fourteenth Amendment's Due Process Clause.[174]

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[174] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958); *see also supra* note 1 and accompanying text.