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Constitutional Law - The Right of Free Association - Sigma Chi Fraternity v. Regents of Univ. of Colo., 258 F. Supp. 515 (D. Colo. 1966)

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Constitutional Law—The Right of Free Association. A resolution adopted by the Board of Regents of the University of Colorado declares that any fraternity, social organization or other student group compelled by its constitution, rituals or government to deny membership to any person because of his race, color or religion will be placed on probation.[1] The Regents found that the local chapter of Sigma Chi Fraternity did not comply with this policy and accordingly suspended that chapter.[2] The national fraternity and local chapter sought injunctive relief. The District Court held that the Regents had the authority to take such action under Colorado statutes[3] and did not violate the fraternity's right of free association in exerting this power.

The Court recognized the constitutional right of free association which the Supreme Court in *N.A.A.C.P.* v. *State of Alabama*[4] held to be guaranteed in the Due Process Clause of the Fourteenth Amendment.[5] However, after searching for a closely analogous precedent the Court found that, "It can not be said that any of the above decisions uphold the right of association as applied to a social fraternity." [6]

Although the phrase "freedom of association" is of recent origin, it is a well established principle that a voluntary private association, whether religious, political or social, is free to make its own rules on the subject of admission.[7] Membership requirements may include a pro-

1. Sigma Chi Fraternity v. Regents of Univ. of Colo., 258 F. Supp. 515 (D. Colo. 1966).

2. *Id.* at 521 where the Court declares, "Whether Beta Mu Chapter is compelled by its constitution, rituals or government to deny membership to any person because of his race, color or religion is not an issue."

3. Const. Colo. art. IX, sec. 14 states: "The Board of regents shall have the general supervision of the university . . ."

4. 357 U.S. 449 (1958). Accord: Gibson v. Florida, 372 U.S. 539 (1963); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Louisiana v. N.A.A.C.P., 366 U.S. 293 (1961); Bates v. City of Little Rock, 361 U.S. 516 (1960).

5. U.S. const. amend. XIV, sec. 1 proclaims: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

6. *Supra* note 1, at 526. The Court accepted Sigma Chi's argument as having substantial merit and assumed for this decision that the right of free association applies to a social fraternity. Therefore, the fact that it overlooked a branch of authority that establishes this principle is inconsequential to the Court's reasoning and ultimate decision.

7. *E.g.*, Wash. Branch of Amer. Ass'n of Univ. Women v. Amer. Ass'n. of Univ. Women, 79 F. Supp. 88 (D. D.C. 1948); Chapman v. American Legion, 244 Ala. 553, 14 So. 2d 225 (1943); Leeds v. Harrison, 7 N.J. Super. 558, 72 A. 2d 371 (1950); Kronen

vision for exclusion on the basis of race, color or religion.[8] The 1964 Civil Rights Bill recognizes this concept by excluding private clubs and other establishments in fact not open to the public from the provisions of the act.[9] Congress considers fraternities as private clubs and denies the Civil Rights Commission the authority to investigate the membership practices of any fraternal order.[10] What this line of reasoning advocates is obviously the equivalent of "freedom of association." [11]

The right of free association here was viewed in relationship to the authority of the Regents.[12] Two leading cases reflect the law in regard to the power of the governing body of a state institution. The Supreme Court in *Waugh* v. *Board of Trustees*[13] held that it was not unconstitutional for the trustees of a state university to prohibit the existence of Greek letter fraternities. In *Webb* v. *State University of New York*[14] the District Court applied that precedent declaring that a state may adopt such measures as it deems necessary to supervise and control its

v. Pac. Coast Soc. of Orthodontists, 46 Cal. Reptr. 808 (1965). Only in certain situations have the courts made exceptions to this general rule. Some courts have compelled admission of duly licensed members of a profession to a voluntary association where the state requires membership as a prerequisite to practice. See Hawkins v. N.C. Dental Society, 230 F. Supp. 805 (W.D. N.C. 1964).

8. *E.g.*, Robinson v. Holman, 181 Ark. 377, 26 S.W. 2d 66 (1930); Trautwein v. Harbourt, 40 N.J. Super. 247, 123 A. 2d 30 (1956); Burrell v. Michaux, 273 S.W. 847 (Tex. Civ. App.). *reversed on other grounds* 279 U.S. 737 (1925); Ross v. Ebert, 275 Wis. 523, 82 N. W. 2d 315 (1957).

Also see Bell v. Maryland, 378 U.S. 226, 313 (1964) where Justice Goldberg sets forth the right of free association:

> Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

9. U.S. CODE title 42, sec. 2000 a (e). There is no distinction made between social organizations and any other type of voluntary association.

10. U.S. CODE title 42, sec. 1975c (a) (6) which states:

> Nothing in this or any other act shall be construed as authorizing the Commission, its Advisory Committee, or any person under its supervision or control to inquire into or investigate any membership practices or internal operations of any fraternal organization, any college or university fraternity or sorority, any private club or any religious organization.

11. It is difficult to understand why the Court overlooked the volume of cases and legislation following this line of reasoning and how it could conclude that the right of free association does not apply to a social fraternity.

12. *Supra* note 3.

13. 237 U.S. 589 (1915).

14. 125 F. Supp. 910 (N.D. N.Y. 1954). A resolution of the Board of Trustees of the State University of New York banning social organizations having a direct or indirect affiliation with any national organization was held to be constitutional.

educational institutions.[15] Of course, this power must be used to reasonably further the state's educational objectives.[16] The Supreme Court has recognized the importance of eliminating racial discrimination at state institutions.[17] The Court concludes, therefore, that it is within the Regents' power to regulate against discrimination.

The court resolves the conflict between the right of free association and the power of a governing board of a state school to control the activities of its students in favor of the latter principle of law. This decision is not based on the concept of "state action," [18] and certainly does not contend that a fraternity at a state university falls within the "state action" category.[19] Instead, the Court holds that the students' right of free association if any is restricted by the fact that they are students and is subordinate to the educational objectives of the university.[20]

"State action" has been extended to include any activity with which the state is even remotely connected.[21] In the instant case, the Court has resisted the temptation to stretch this doctrine even further. It is an indication that courts may hesitate to elaborate on the overused doctrine of "state action" but rather base their decisions on other applicable legal principles.

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15. Accord: Dixon v. Alabama State Board of Educ., 186 F. Supp. 945 (M.D. Ala. 1960); Hughes v. Caddo Parish School Board, 57 F. Supp. 508 (W.D. La. 1944); Pyeatte v. Board of Regents of Univ. of Okla., 102 F. Supp. 407 (W.D. Okla 1951); Robinson v. Sacramento City Unified School Dist., 53 Cal. Rptr. 781 (1966).

16. Waugh v. Board of Trustees, *supra* note 13; Webb v. State Univ. of N.Y., *supra* note 14.

17. See, *e.g.*, Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

18. *Supra* note 4. See generally Lewis, *The Meaning of State Action*, 60 COL. L. REV. 1083 (1960); Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1964).

19. For articles advocating such an extension see, Note, *Racial Discrimination in Fraternities and Sororities–State Action?*, 1964 ILL. L. FORUM 631; Horowitz, *Discriminatory Fraternities at State Universities–A Violation of the Fourteenth Amendment?*, 25 So. CAL. L. REV. 289 (1952).

20. *Supra* note 1 at 527.

21. *E.g.*, Terry v. Adams, 345 U.S. 461 (1953); Shelly v. Kraemer, 334 U.S. 1 (1948); Marsh v. State, 326 U.S. 501 (Ala. 1946); Kerr v. Enoch Pratt Free Library, 1949 F.2d 212 (4th Cir. 1945). See generally Comment, *State Action Under the Equal Protection Clause of the Fourteenth Amendment and the Remaining Scope of Private Choice*, 50 CORNELL L. Q. 473 (1965).