

First Amendment Associational Rights in Higher Education: May Institutions Impose Non-Discrimination Requirements as a Condition of Access to Campus?

Name: Neal H. Hutchens

Institution: University of Maryland

Department: Department of Education Policy and Leadership, Higher Education Program

Address: 8333 16th Street, Silver Spring, MD 20910

Email: nhutchen@umd.edu

Degrees Earned and Expected:

(1) Ph.D. student, University of Maryland, Department of Education Policy and Leadership, Higher Education Program (September 2003-present).

(2) J.D., University of Alabama School of Law (May 2002).

Program Director: Professor Jeffrey Milem, University of Maryland, Department of Education Policy and Leadership, Higher Education Program Coordinator. Address: 2205 Benjamin Building, University of Maryland, College Park, MD 20742. 301-405-2875.

jm385@umail.umd.edu

Abstract

The ability of colleges and universities to enforce non-discrimination policies as a requirement of access to campus has recently sparked conflict on two legal fronts. One issue involves the constitutionality of the Solomon Amendment, a federal provision that denies funding to higher education institutions interfering with on-campus military recruiting. Another legal controversy centers on claims by student religious groups that college or university non-discrimination policies violate their expressive associational rights. The article examines associational rights in a higher education context and the authority of institutions to enforce non-discrimination policies as a condition of access to campus.

First-Amendment Associational Rights in Higher Education: May Institutions Impose Non-Discrimination Requirements as a Condition of Access to Campus?¹

Neal H. Hutchens
University of Maryland

I. Introduction

The ability of colleges and universities to maintain non-discrimination policies as a condition of access to campus has recently sparked conflict on two legal fronts. First, the issue of non-discrimination policies as a requirement for student organizations to receive formal institutional recognition has generated controversy at several campuses.² One of these disputes, involving a lawsuit against the University of North Carolina at Chapel Hill (UNC), centers on claims that the school's non-discrimination policy for student organizations infringes on the First Amendment rights of a student religious group.³ Second, opposition to a federal provision, the Solomon Amendment,⁴ requiring higher education institutions to provide access and assistance to military recruiters has also brought college and university non-discrimination policies to the legal forefront.⁵ The U.S. Supreme Court has agreed to review a decision from the U.S. Circuit Court of Appeals for the Third Circuit holding that the Solomon Amendment violates the First

¹ An earlier version of this article was presented at the 2004 Education Law Association Conference in Tucson, Arizona, on Friday, November 19, 2004.

² See Burton Bollag, *Choosing Their Flock: Conservative Christian Groups have Forced Colleges to Allow Them to Bar Gay Student Nonbelievers. Some Institutions are Finally Ready to Fight Back*, CHRONICLE OF HIGHER EDUCATION, Jan. 28, 2005, at A33 (noting lawsuits pending at the University of North Carolina at Chapel Hill, Arizona State University at Tempe and the University of California Hastings College of Law); *Christian Group Sues Rutgers after University Revokes its Recognition*, CHRONICLE OF HIGHER EDUCATION, Jan. 10, 2003, at A31; Jeffrey R. Young, *Gay Student is Forced out of a Campus Leadership Post at an Iowa College*, CHRONICLE OF HIGHER EDUCATION, Nov. 22, 2002, at A58.

³ *Alpha Iota Omega v. Moeser*, No. 1: 04CV00765 (M.D.N.C. filed Aug. 25, 2004).

⁴ 10 U.S.C. § 983 (2004).

⁵ See *Forum for Academic and Institutional Rights (FAIR) v. Rumsfeld*, 390 F.3d 219 (2004), *cert. granted*, 2005 U.S. LEXIS 3756 (U.S., May 2, 2005); *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509 (E.D. Pa. Aug. 19, 2004); *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004).

Amendment right of law schools to exclude recruiters based on the military's policy toward gay and lesbian individuals.⁶

Though important legal distinctions exist in clashes over access to campus by military recruiters and student organizations at public colleges and universities, this article examines how both controversies implicate institutional authority to restrict access to promote non-discriminatory practices. Part II of the article discusses U.S. Supreme Court and lower federal court decisions addressing institutional recognition of student groups. The article, in Part III, considers the applicability of *Boy Scouts of America v. Dale*⁷ to the associational rights of student organizations and higher education institutions. In Part IV, the article examines the litigation involving the Solomon Amendment. Finally, the article turns in Part V to the case involving the student organization at UNC and the authority of colleges and universities to impose non-discrimination policies as condition for groups to receive formal institutional recognition.

While higher education institutions may not prevail in challenges to the Solomon Amendment, the cases indicate that colleges and universities, at least private ones, qualify as expressive associations under *Dale*. Whether against federal legislation affecting higher education or in the regulation of student organizations, recognizing colleges and universities as expressive associations— especially when coupled with concepts of academic autonomy—may provide institutions with authority to regulate the campus environment in relation to non-discrimination standards. Alternatively, *Dale* could provide little shelter for colleges and universities from federal law and may result in a higher level of constitutional protection for student organizations at public institutions. Though containing legal differences, both sets of legal disputes concern the extent to which colleges and universities enjoy a First Amendment right to promote non-discrimination standards as part of an institution's educational mission.

II. Access to Campus and Institutional Resources by Student Groups

Official institutional recognition of student groups often imparts important privileges,

⁶ *Forum for Academic and Institutional Rights (FAIR) v. Rumsfeld*, 390 F.3d 219 (2004), *cert. granted*, 2005 U.S. LEXIS 3756 (U.S., May 2, 2005).

⁷ 530 U.S. 640 (2000).

including use of campus facilities and potential access to financial support. In considering the First Amendment rights of student groups seeking access to public higher education institutions, the U.S. Supreme Court—while acknowledging the unique nature of the university environment—has often looked to its public forum cases.⁸ In *Widmar v. Vincent*⁹ the Court considered whether a university that opened its facilities to student groups could then exclude a registered student organization "desiring to use the facilities for religious worship and religious discussion."¹⁰ In analyzing the group's claim, the majority opinion determined that a university possesses many of the attributes of a public forum in regards to student speech.¹¹ The Supreme Court concluded that restrictions on student groups allowed access to campus "must be subjected to the level of scrutiny appropriate to any form of prior restraint" but also recognized the university setting as unique from other forums:

A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.¹²

Though noting the distinctiveness of the university environment, the Court held that once an institution creates a forum for student groups the school "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."¹³ Despite these restrictions, a public college or university remained free to establish reasonable time, place, and manner rules and also enjoyed discretion in the appropriate distribution of "scarce resources."¹⁴

⁸ For an in-depth discussion of the use of forum analysis at colleges and universities, see Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. (2005).

⁹ 454 U.S. 263 (1981).

¹⁰ *Id.* at 264-65.

¹¹ *Id.* at 268 n.5.

¹² *Id.*

¹³ *Id.* at 270.

¹⁴ *Id.* at 276. The *Widmar* Court referenced *Healy v. James*, 408 U.S. 169 (1972), as setting acceptable standards for denial of access to student groups. In the case, which dealt with

The cases discussed below illustrate how Supreme Court and lower federal court decisions have refined the public forum standards appropriate for student organizations at public colleges and universities, determining the context as often analogous to establishment of a limited public forum. While greater limits exist on government with a traditional or open public forum, in the context of a limited public forum the government "is not required to and does not allow persons to engage in every type of speech" and may choose to limit the forum to certain groups and/or categories of speech.¹⁵ Despite more control over a limited public forum, governmental restrictions "must be 'reasonable in light of the purpose served by the forum.'"¹⁶

A. Viewpoint Neutrality and Student Organizations

A key restraint on the treatment of student groups by public colleges and universities derived from limited public forum standards prohibits institutions from engaging in viewpoint discrimination and favoring the message of some student organizations over others. For instance, a college or university might create a limited public forum for student groups dedicated to consideration of K-12 educational reform issues. Under standards of viewpoint neutrality, the school could not exclude an otherwise eligible student group based on its support or opposition to school vouchers. Supreme Court decisions have dealt with viewpoint neutrality applied to student organizations in higher education in relation to groups receiving institutional funds¹⁷ and the permissibility of mandatory student fees.¹⁸ The Court has also analyzed access for religious groups in a limited public forum at elementary and secondary schools under standards of viewpoint neutrality.¹⁹ While the concept of viewpoint neutrality may appear straight forward, as

recognition of a student group that university officials feared would disrupt campus activities, the Supreme Court determined "that denial of official recognition without justification" encroaches on groups' First Amendment rights of freedom of association. *Healy*, 408 U.S. at 181. Despite limits on institutional authority, a school remained free, in addition to imposing time, place and manner restrictions, to require organizations "to adhere to reasonable campus law." *Id.* at 192-193.

¹⁵ *Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001).

¹⁶ *Id.* at 107 (quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

¹⁷ *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

¹⁸ *Board of Regents of the Univ. of Wisconsin System v. Southworth*, 529 U.S. 217 (2000).

¹⁹ *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

illustrated below by a case from the U.S. Circuit Court of Appeals from the Eleventh Circuit,²⁰ other decisions reveal that at times distinguishing viewpoint neutrality from a permissible restriction on content in a limited public forum represents an ambiguous endeavor.

1. *Rosenberger v. Rector and Visitors of Univ. of Virginia*

In *Rosenberger*,²¹ the Supreme Court held that the University of Virginia could not prohibit funding of a student publication because it "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or ultimate reality."²² The Court concluded that the University of Virginia engaged in viewpoint discrimination because the school did not exclude religion as a subject of discussion but barred the student publication based on its religious viewpoint.²³ The majority rejected the university's argument that its refusal was permissible because it "discriminate[d] against an entire class of viewpoints," those urging students to accept a particular set of religious beliefs.²⁴ Instead, the majority determined that the denial of access stemmed from discrimination against the student group based on espousing a religious viewpoint even though religion was an acceptable subject for the forum. The majority opinion in *Rosenberger* characterized viewpoint discrimination as "an egregious form of content discrimination" and held a university may not engage in viewpoint discrimination "even when the limited public forum is one of its own creation."²⁵ The majority found viewpoint neutrality especially appropriate in a higher education setting, stating that viewpoint discrimination "risks the suppression of free speech and creative inquiry in one of the vital center's for the Nation's intellectual life."²⁶

2. *Board of Regents of the Univ. of Wisconsin System v. Southworth*

In *Southworth*,²⁷ the Supreme Court upheld the constitutionality of the use of mandatory student fees at public colleges and universities. Several university students claimed that the use

²⁰ *Gay Lesbian Bisexual Alliance (GLBA) v. Pryor*, 110 F.3d 1543 (11th Cir. 1997).

²¹ 515 U.S. 819 (1995).

²² *Id.* at 822.

²³ *Id.* at 831.

²⁴ *Id.*

²⁵ *Id.* at 829.

²⁶ *Id.* at 836.

²⁷ 529 U.S. 217 (2000).

of mandatory student fees to support campus groups espousing ideologies they found objectionable constituted a form of compelled speech that violated "their rights of free speech, free association, and free exercise under the First Amendment."²⁸ The students sought to rely on previous cases in which the Court held that employees required to belong to unions or professional associations had their First Amendment rights violated when fees they paid were used to support speech they found objectionable. The majority determined, however, that a public university charging a mandatory student fee does not violate the First Amendment rights of students who object to the views of certain groups receiving a portion of the fees as long as funds are distributed in a viewpoint neutral manner.²⁹

At the outset of his analysis in *Southworth*, Justice Kennedy, writing for the majority, noted that the controversy before it did not involve the university using funds obtained from student tuition to advance speech over which it controlled the content.³⁰ The Court instead described the speech at issue as "spring[ing] from the initiative of . . . students, who alone give it purpose and content in the course of their extracurricular endeavors."³¹ Though recognizing the use of mandatory fees "infringes" on the rights of students compelled to support speech they oppose, Justice Kennedy's opinion stated that consideration must be afforded "to the important and substantial purposes of the University, which seeks to facilitate a wide range of speech."³²

²⁸ *Id.* at 227.

²⁹ *Id.* at 221.

³⁰ *Id.* at 229.

³¹ *Id.* at 230.

³² *Id.* While acknowledging *Abood v. Detroit Board Of Education*, 431 U.S. 209 (1977), and *Keller v. State Bar of California*, 496 U.S. 1 (1990), as a starting point to "identify the interests of the protesting students," the Supreme Court found the tests for compelled speech fashioned in those decisions unworkable "in the context of extracurricular student speech at a university." *Id.* In *Abood* and *Keller*, the Court determined that requiring individuals to fund political expression they found objectionable in an employment context violated the First Amendment. The Court held in *Abood* that teachers required to join a union could prevent their membership fees from supporting political views and candidates they did not support. The Court arrived at a similar result in *Keller*, finding it permissible for bar association dues to fund activities deemed germane to the bar's mission but invalidating the practice of allocating a portion of a member's dues to fund political expression objectionable to the member. Justice Kennedy's opinion in *Southworth* agreed that if a university "conditions" the opportunity for students to receive a diploma on supporting "objectionable, extracurricular speech by other students, the rights acknowledged in *Abood* and *Keller* become implicated." *Id.* at 231.

Noting the difficulties in applying a germaneness test for unconstitutionally compelled speech to organizations like labor unions,³³ Justice Kennedy wrote that such a standard "becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas."³⁴ While announcing that a university could establish an "optional or refund system" if it chose to do so, the majority opinion stated that a public university could constitutionally require mandatory student fees as part of its overall "mission."³⁵

The Court, seeking to provide some First Amendment protection to students, looked to its public forum cases as "instructive . . . by close analogy."³⁶ Relying on *Rosenberger*, Justice Kennedy stated that "[w]hen a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others."³⁷ The majority determined that disallowing a university from favoring certain views in the distribution of funds from student fees created a "symmetry" with the requirement of viewpoint neutrality announced in *Rosenberger*.³⁸ The Court concluded that "[v]iewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected."³⁹

3. *Good News Club v. Milford Central School*

The Supreme Court considered access for an organization in a limited public forum and viewpoint discrimination in a K-12 education setting in *Good News Club*.⁴⁰ In the case, the Supreme Court held that disallowing a Christian organization the right to use public primary and secondary school facilities open to the public for general civic and educational purposes constituted viewpoint discrimination. The school district contended that the organization engaged

³³ *Id.* at 231-32.

³⁴ *Id.* at 232.

³⁵ *Id.* at 233.

³⁶ *Id.* at 229-30.

³⁷ *Id.* at 233.

³⁸ *Id.* at 234.

³⁹ *Id.* at 233.

⁴⁰ 533 U.S. 98 (2001).

in religious worship, which was not a use permitted under the applicable policy. The parties stipulated that the school district's use policy created a limited public forum, and the majority opinion determined the exclusion of the group constituted impermissible viewpoint discrimination by denying the organization access based on its religious views. Though not a decision set in a university environment, this case is potentially relevant because a student religious group seeking recognition from a college or university would likely assert the denial stems from the organization's religious views and constitutes a form of viewpoint discrimination.

4. *Gay Lesbian Bisexual Alliance (GLBA) v. Pryor*

The Eleventh Circuit's decision in *Gay Lesbian Bisexual Alliance (GLBA)*,⁴¹ illustrates use of standards of viewpoint neutrality applied to a student organization in a higher education setting. In the case, the GLBA, an officially recognized student organization at the University of South Alabama, successfully challenged the university's denial of an on-campus bank account and funding for the group's activities based on a state statute prohibiting public funding for any "group that fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws."⁴² The attorney general of Alabama argued that the expression by the student group represented unprotected First Amendment speech advocating violation of laws.⁴³

Relying on the Supreme Court's decision in *Rosenberger*, the Eleventh Circuit held that the university's funding system created a limited public forum in which the "university may determine what subjects are appropriate for the forum, but the university may not proscribe positions students choose to take on those subjects."⁴⁴ The court determined that "blatant" viewpoint discrimination had occurred because the statute would permit funding of groups that promoted compliance with the sodomy or sexual misconduct laws but not the speech of the GLBA and described the attorney general's efforts to distinguish *Rosenberger* as "feeble."⁴⁵

B. Amorphous Nature of Viewpoint Neutrality

⁴¹ 110 F.3d 1543 (11th Cir. 1997).

⁴² *Id.* at 1545-46.

⁴³ *Id.* at 1547.

⁴⁴ *Id.* at 1548-49.

⁴⁵ *Id.* at 1549.

While viewpoint discrimination appeared solidly cognizable in *GLBA*, the Eleventh Circuit "recognize[d] the malleability of the distinction between content discrimination, which is permissible, and viewpoint discrimination."⁴⁶ In certain instances viewpoint neutrality represents an uncertain concept with "no easy way to tell when the exclusion is of a category comprising multiple views or of a particular viewpoint."⁴⁷ The Supreme Court cases *Boos v. Barry*⁴⁸ and *Police Department v. Mosley*⁴⁹ illustrate the possible uncertainty in distinguishing between viewpoint- and content-based restrictions. In *Boos*, the majority determined that a District of Columbia ordinance prohibiting the display of signs critical—but not ones favorable—of a foreign government within 500 feet of the nation's embassy constituted a content-based exclusion rather than a viewpoint based one because "[t]he display clause determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments."⁵⁰ In contrast, in *Mosley* the Court determined that a city ordinance that prohibited picketing within 150 feet of a school, except for peaceful picketing of a school involved in a labor dispute, resulted in an unconstitutional distinction between peaceful labor picketing and other peaceful picketing because the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."⁵¹

The majority in *Rosenberger* reflected on the amorphous nature of viewpoint based restrictions when suggesting that restrictions on multiple views, rather than a permissible content restriction, could rise to the level of viewpoint discrimination.⁵² And at least one commentator believes that such language "compels the conclusion that restrictions on speech deemed 'political,' 'offensive,' or 'controversial' must be understood as viewpoint-based."⁵³ The idea that restrictions on multiple views may violate viewpoint neutrality was raised in *Legal Services Corp.*

⁴⁶ *Id.*

⁴⁷ Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309, 324 (1999).

⁴⁸ 485 U.S. 312 (1988).

⁴⁹ 408 U.S. 92 (1972).

⁵⁰ *Boos*, 485 U.S. at 318-19.

⁵¹ *Mosley*, 408 U.S. at 96.

⁵² *Rosenberger*, 515 U.S. at 831-832.

⁵³ Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 122 (1996).

v. Velazquez.⁵⁴ The case involved a challenge to a prohibition on Legal Services Corporation (LSC) grantees from representing clients seeking to amend or challenge welfare laws.⁵⁵ While the Court in *Velazquez* noted that its limited forum cases such as *Rosenberger* were not "controlling in a strict sense, . . . they do provide some instruction."⁵⁶ The opinion stated that the funding restrictions "alter[ed] the traditional role of the attorneys in much the same way broadcast systems or student publications networks were changed in the limited forum cases we have cited."⁵⁷ The majority found that the restrictions on LSC lawyers prevented them from performing certain necessary, fundamental functions of lawyers and were analogous to how restrictions in limited forum environments had "prohibit[ed] speech necessary to the proper functioning of those systems."⁵⁸ The discussion in *Velazquez* suggests that certain realms of content might be required by a court for inclusion in a limited public forum for student organizations created by a college or university.

III. Expressive Associational Rights and *Boy Scouts of America v. Dale*

Student groups and higher education institutions have both sought to rely on *Dale*⁵⁹ in legal disputes involving access to campus and non-discrimination policies. The decision involved the expulsion of an assistant scoutmaster, Dale, from the Boy Scouts based on his sexual orientation. Dale filed suit in New Jersey state court claiming that the expulsion violated the state's public accommodation statute. After a New Jersey trial court granted summary judgment for the Boy Scouts, the New Jersey Superior Court's Appellate Division held that the Boy Scouts violated the state's public accommodation statute, a decision upheld by the state supreme court.

The U.S. Supreme Court, in reversing, first determined that the Boy Scouts engage in expressive activity to promote moral values among young people. The Court then considered whether "the forced inclusion of Dale as an assistant scoutmaster would significantly affect the

⁵⁴ 531 U.S. 533 (2001).

⁵⁵ *Id.* at 536-537.

⁵⁶ *Id.* at 544.

⁵⁷ *Id.*

⁵⁸ *Id.* at 545.

⁵⁹ 530 U.S. 640 (2000).

Boy Scouts' ability to advocate public or private viewpoints" in relation to the Boy Scouts' position on homosexuality.⁶⁰ In considering if Dale serving as a scoutmaster would "significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior,'" the majority stated that "[a]s we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression."⁶¹ The majority determined that Dale's service would indeed convey the message that the Boy Scouts condoned "homosexual conduct."⁶²

The majority opinion, relying heavily on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,⁶³ noted that groups do not have to associate only to promote a particular message to receive First Amendment protection for their expressive activity. The majority decided that the Scout policy—expressed through selection of leaders rather than discussion of sexual issues—constituted protected expression. The majority opinion also stated that all members of a group do not have to agree to a particular stance and "[t]he fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."⁶⁴ The Court then determined that the Boy Scouts' First Amendment rights of expressive association outweighed New Jersey's interest in anti-discrimination expressed in the state's public accommodation law.

IV. Colleges and Universities as Expressive Associations

One potential consequence of the *Dale* decision involves recognition of colleges and universities as expressive associations. In the Solomon Amendment cases, litigants have sought to rely on *Dale* to invalidate the law's requirements that institutions must grant access to military

⁶⁰ *Id.* at 650.

⁶¹ *Id.* at 653.

⁶² *Id.*

⁶³ 515 U.S. 557 (1995). In *Hurley*, the Supreme Court held that parade organizers for the St. Patrick's Day parade could exclude groups communicating a message the organizers did not wish to communicate since the parade was a form of expressive communication receiving First Amendment protection. *Id.* at 566-80.

⁶⁴ 530 U.S. at 653.

recruiters.⁶⁵ While this article focuses on the Solomon Amendment decisions in relation to associational rights, the cases raise several other constitutional questions that this article will not explore in-depth. Congress enacted the provision via its Spending Clause powers, and an important issue before the Supreme Court involves whether access to military recruiters represents an impermissible coercion of colleges and universities, both public and private, through the Spending Clause. The dispute also touches on constitutional standards related to the military and allowing the armed services to conduct needed recruiting activities. The following discussion of cases involving the Solomon Amendment focuses on the issue of colleges and universities as expressive associations.

A. *Forum for Academic and Institutional Rights (FAIR) v. Rumsfeld*

In *FAIR*,⁶⁶ a Third Circuit panel reversed a district court ruling that denied a preliminary injunction to enjoin enforcement of the Solomon Amendment.⁶⁷ The Supreme Court has accepted the decision for review.⁶⁸ FAIR is an association of law schools and law faculty that oppose the Solomon Amendment. Other organizations comprised of faculty and/or students joined with FAIR in seeking a preliminary injunction against enforcement of the provision, asserting that it represents an unconstitutional exercise of Congress's spending powers and infringes on the First Amendment rights of students and faculty.

Before beginning analysis of the constitutionality of the Solomon Amendment, the majority opinion discussed the evolution of non-discrimination policies at law schools and the history of the Solomon Amendment. The opinion stated that law schools "have long maintained

⁶⁵ See *Forum for Academic and Institutional Rights (FAIR) v. Rumsfeld*, 390 F.3d 219 (2004), *cert. granted*, 2005 U.S. LEXIS 3756 (U.S., May 2, 2005); *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509 (E.D. Pa. Aug. 19, 2004); *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004).

⁶⁶ 390 F.3d 219 (3rd Cir. 2004).

⁶⁷ The court, in finding that the Solomon Amendment violated the expressive associational rights of the law schools, also addressed that the presence of military recruiters constituted compelled speech by determining that recruiting is expression. This discussion focuses on the part of the decision dealing with law schools as expressive associations and analysis of FAIR's claims under *Dale*.

⁶⁸ *Rumsfeld v. Forum for Academic & Institutional Rights*, 2005 U.S. LEXIS 3756 (U.S., May 2, 2005).

formal policies of nondiscrimination that withhold career placement services from employers who exclude employees and applicants based on such factors as race, gender, and religion."⁶⁹ The opinion noted that nondiscrimination policies expanded in the 1970s to include sexual orientation and resulted in the American Association of Law Schools endorsing sexual orientation as a "protected category" in 1990.⁷⁰ As a result of military policies towards gay and lesbian individuals, some law schools began "refusing to provide access and assistance to military recruiters" in the 1980s.⁷¹

Congressional notice of law school activities toward military recruiters resulted in Representative Gerald Solomon of New York sponsoring an amendment in 1994 to the defense appropriations bill that denied U.S. Department of Defense (DOD) funds to institutions that refused access to the military for recruiting.⁷² The reach of the Solomon Amendment was expanded in 1997 to include funds from other federal agencies.⁷³ A 1999 Amendment specified that the Solomon Amendment did not affect student aid and provided an exemption for schools with a "longstanding religious-based policy of pacifism."⁷⁴

Prior to the terrorist attacks in September 2001, the DOD did not hold schools in non-compliance as long as some form of access was provided to campus for military recruiters.⁷⁵ Harvard Law School, for example, allowed recruiters to operate through the offices of a veteran's group on campus, and the University of Southern California Law School directed military recruiters to use the campus ROTC office for interviews.⁷⁶ Following the 2001 attacks, the DOD began asserting that the Solomon Amendment required "equal treatment accorded other recruiters" at law schools and warned of the potential loss of federal funds.⁷⁷ In 2004, Congress

⁶⁹ 390 F.3d at 224.

⁷⁰ *Id.* at 225.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 226.

⁷⁴ *Id.*

⁷⁵ *Id.* at 227.

⁷⁶ *Id.*

⁷⁷ *Id.*

amended the Solomon Amendment to codify this position.⁷⁸

In weighing the granting of a preliminary injunction, the panel considered whether the Solomon Amendment imposed an "unconstitutional condition" on law schools. Under unconstitutional condition standards, the government "may not propose a penalty to 'produce a result which [it] could not command directly.'"⁷⁹ According to the majority opinion, "if the law schools' compliance with the Solomon Amendment compromises their First Amendment rights, the statute is an unconstitutional condition."⁸⁰ The majority analyzed FAIR's claims of expressive association under a three-pronged analysis, stating the claimants were required to establish: "(1) whether the group is an 'expressive association,' (2) whether the state action at issue significantly affects the group's ability to advocate its viewpoint, and (3) whether the state's interest justifies the burden it imposes on the group's expressive association."⁸¹

The majority opinion, in agreement with the district court and with little discussion, concluded that the law schools are expressive associations, stating that a "group that engages in some form of public or private expressions above a *de minimis* threshold is an 'expressive association.'"⁸² In turning to the second prong of the analysis, the court found that the situation of requiring military recruiters access to campus represented a scenario similar to that in *Dale*. According to the opinion, "Just as the Boy Scouts believed that 'homosexual conduct is inconsistent with the Scout Oath,' . . . the law schools believe that employment discrimination is inconsistent with their commitment to justice and fairness."⁸³ The majority agreed that making law schools assist and provide access to military recruiters would force them to send a message that the schools accept employment discrimination on the basis of sexual orientation.⁸⁴

The majority dismissed the district court's determinations that the present case was distinguishable from *Dale* because military recruiters were not required to become members of

⁷⁸ *Id.* at 228.

⁷⁹ *Id.* at 229 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

⁸⁰ *Id.*

⁸¹ *Id.* at 231.

⁸² *Id.*

⁸³ *Id.* at 232.

⁸⁴ *Id.*

the law school community but, instead, were visitors to the schools.⁸⁵ The opinion stated that a partial intrusion did not justify government encroachment of First Amendment rights and also pointed out that, rather than passive acceptance, the Solomon Amendment required institutions to "actively assist military recruiters in a manner equal in quality and scope to the assistance they provide other recruiters."⁸⁶ The opinion also stated that law schools should enjoy as much deference as the Boy Scouts because higher education institutions "occupy a special niche in our constitutional tradition."⁸⁷

Turning to the third prong, the majority determined that, though military recruiting represents an important governmental concern, the military had "ample" alternatives and resources for recruiting members for the armed services.⁸⁸ The court noted that the military could, for instance, provide loan repayment and make use of mass media to attract recruits.⁸⁹ The majority asserted that the "ill will" caused by the Solomon Amendment at law schools could actually hamper recruiting efforts in a way that other alternatives might not.⁹⁰ The majority rejected the dissent's contention of the need to give greater consideration to the special deference often given to the military in matters involving national defense, including recruiting.⁹¹

In the lower court decision in *FAIR*,⁹² the opinion stated that use of the spending power does not create an "unconstitutional condition unless the alleged infringement on Plaintiff's First Amendment interests rises to the level of a general constitutional violation."⁹³ The opinion then examined the First Amendment rights at stake. The decision discussed that, while expansive, academic freedom does not allow institutions to "erect an insurmountable or impenetrable wall against opposing public interests. Rather, the interests of educational institutions to shape their

⁸⁵ *Id.*

⁸⁶ *Id.* at 233.

⁸⁷ *Id.* at 234.

⁸⁸ *Id.* at 235.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ While the dissent would have upheld the Solomon Amendment, it did not challenge that law schools qualify as expressive associations. *Id.* at 95.

⁹² 291 F. Supp. 2d 269 (D. N. J. 2003).

⁹³ *Id.* at 301.

own pedagogical environments must be considered in proper context and not in disregard of any controlling facts or competing interests.”⁹⁴ The court noted that the Solomon Amendment did not interfere with the right of faculty members to express particular viewpoints and the law, “on its face, does not interfere with academic discourse by condemning or silencing a particular ideology or point of view.”⁹⁵ The court stated that, for purposes of its analysis, any violation of academic freedom depended upon the existence of a “foundational free speech or associational right.”⁹⁶ The decision then turned to an analysis of this issue.

In the context of expressive associations, the court pointed out the requirement to “cast a fairly wide net in its definition of what comprises expressive activity.”⁹⁷ Relying on *Dale*, the court also discussed that rights of expressive association are not limited to “pure advocacy groups.”⁹⁸ Though noting a minimum threshold for finding that a “group engages in expressive association,”⁹⁹ the court determined that “there appears to be no doubt that the law schools qualify as expressive associations entitled to constitutional protection.”¹⁰⁰ Like the Boy Scouts in *Dale*, the court found that law schools sought “to inculcate a certain set of values and principles in their students,” including the position “that invidious discrimination on the basis of sexual orientation is a moral wrong”¹⁰¹ The opinion also pointed out that law schools do not have to exist for the singular purpose of advancing one viewpoint and not all members have to agree with the law school’s “conception of tolerance or other related moral norms.”¹⁰² The court discussed that “law schools have adopted official policies with respect to sexual orientation, and this is sufficient for First Amendment purposes.”¹⁰³

The analysis then turned to whether allowing access by military recruiters interfered with

⁹⁴ *Id.* at 302.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 303 (quoting *Pi Lambda Phi Fraternity v. Univ. of Pittsburgh*, 229 F.3d 435, 443 (3rd Cir. 2000)).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 304.

¹⁰² *Id.*

¹⁰³ *Id.*

the message of the law schools to an extent overly burdensome on the message of inclusion. In concluding the law did not impose such a burden, the court distinguished *Dale* by stating that a law school was not required to accept a recruiter as a member of its organization, with recruiters “present on campus only a few times per year.”¹⁰⁴ The court also discussed that a school could take ameliorative actions to distinguish itself from the message of the military recruiters and emphasize the school’s stance on inclusion.¹⁰⁵ The decision highlighted that conditioning federal funding on access for military recruiters failed to constitute an “outright compulsion of speech.”¹⁰⁶ Another important factor was that the law was not an involuntary regulation since a school could choose to forgo federal funds to prevent access to campus by military recruiters. In contrast to the limited effect on institutions, the opinion pointed out the important interests of the government in recruiting individuals to serve in the military.¹⁰⁷ The court also dismissed assertions that the Solomon Amendment constituted viewpoint discrimination by “promoting a pro-military recruiting message and punishing only those schools that exclude the military because of their belief that the military’s recruiting policy is morally wrong.”¹⁰⁸

¹⁰⁴ *Id.* at 305.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 306.

¹⁰⁷ *Id.* at 312.

¹⁰⁸ *Id.* at 297.

B. *Burt v. Rumsfeld*

In *Burt*,¹⁰⁹ members of the Yale Law School faculty asserted that the Solomon Amendment violates First and Fifth Amendment rights of professors. The decision contains less detailed analysis than *FAIR* but provides another example of a court acknowledging associational rights of colleges and universities as expressed through faculty members and students.¹¹⁰ In addressing the question of standing, the decision discussed that the faculty at Yale set the rules and regulations that govern the law school and noted that a 1978 policy on non-discrimination based on sexual orientation “represents their own message about discrimination, and their own determination about the standards of conduct that should govern the law school community.”¹¹¹ Moving from standing, the court held that the faculty’s assertion that the law violated expressive rights of association constituted a cognizable claim.¹¹² While acknowledging a Fifth Amendment claim as “more difficult,” the court also accepted as a cognizable claim that the law potentially violates a special relationship between teachers and students.¹¹³ Based on its determinations of standing and existence of cognizable claims, the court refused to dismiss the lawsuit.¹¹⁴

C. *Burbank v. Rumsfeld*

*Burbank*¹¹⁵ stems from a challenge to the Solomon Amendment by professors and students at the University of Pennsylvania Law School. The school has an anti-discrimination policy that excludes employers who discriminate on the basis of sexual orientation from receiving

¹⁰⁹ 322 F. Supp. 2d 189 (D. Conn. 2004).

¹¹⁰ In a related suit involving a students at Yale opposed to the Solomon Amendment, *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004), the court, while dismissing one set of claims on standing grounds, held that students could pursue a claim that the Solomon Amendment violated a First Amendment right of students to receive information. The court described the right as a necessary corollary to a sender’s right to distribute information and pointed out that previous decisions had highlighted the right to receive information in an educational context. *Id.* at 394-395. The case illustrates how some students may argue that they enjoy a First Amendment right to attend institutions that communicate messages of non-discrimination through university policies.

¹¹¹ *Burt*, 322 F. Supp. 2d at 197.

¹¹² *Id.* at 198.

¹¹³ *Id.* at 199.

¹¹⁴ *Id.* at 203.

¹¹⁵ No. 03-5497, 2004 U.S. Dist. LEXIS 17509 (E.D. Pa. Aug. 19, 2004)

law school services.¹¹⁶ Plaintiffs argued, inter alia, that the statute violates First Amendment rights of free speech, expression, association, academic freedom, and Fifth Amendment due process and equal protection rights.¹¹⁷ In addition to rejecting that the plaintiffs lacked standing, the court held that they could continue to pursue claims that the law impermissibly infringed on First Amendment rights. The decision did reject, however, that an exception under the law for institutions with longstanding policies and traditions of pacifism potentially constituted content discrimination. As with the other cases involving the Solomon Amendment, then, the court refused to grant full summary judgment to the government, including in relation to the associational rights of educational institutions.

D. Expressive Associational Rights for Colleges and Universities

If the Supreme Court upholds the Third Circuit decision in *FAIR*, the case would establish a high level of institutionally-based associational rights for colleges and universities. A reversal would not necessarily mean, however, that institutionally-based associational rights are not present at colleges and universities.¹¹⁸ Instead, the Court, in agreement with lower federal court decisions, may recognize the existence of associational rights for colleges and universities but determine that other constitutional considerations permit upholding the Solomon Amendment. Accordingly, even if the Supreme Court does not rule favorably for the opponents of the Solomon Amendment, institutionally-based associational rights may exist in relation to other federal attempts to regulate higher education or in schools enacting campus policies that regulate student groups.

V. Student Groups Seeking Institutional Recognition: *Alpha Iota Omega (AIO) v. Moeser*

The issue of *Dale's* application at a college or university has also arisen with student organizations seeking exemptions from non-discrimination policies. *AIO*¹¹⁹ centers on claims by a Christian student fraternity that denial of official university recognition by the University of North

¹¹⁶ *Id.* at *5.

¹¹⁷ *Id.* at *6.

¹¹⁸ As discussed in Part V, the issue of associational rights for public colleges and universities is also more ambiguous in relation to public institutions.

¹¹⁹ No. 1: 04CV00765 (M.D.N.C. filed Aug. 25, 2004).

Carolina at Chapel Hill (UNC) violates the group's associational, speech and free exercise rights. The fraternity was denied official university recognition based on the group's requirement that members adhere to a statement of faith that includes the belief that sexual activity is limited "to that which takes place in a marriage between one man and one woman."¹²⁰ Individuals disagreeing with the fraternity's standards of belief and conduct are not allowed to be members or serve as officers. As a condition for receiving official institutional recognition, the university requires all student organizations to comply with non-discrimination standards in membership criteria, including on the basis of religion and sexual orientation.

The plaintiffs argue that enforcement of the non-discrimination clause violates the "clearly established right to freedom of association for expressive purposes" and that the university has no compelling reason to deny recognition.¹²¹ The complaint asserts that the policy unconstitutionally forces the plaintiffs to "express approval of other religions, non-traditional and meretricious relationships, and homosexual behavior and other sexual activity outside of marriage" to gain university recognition.¹²² In March 2005, the court granted a preliminary injunction to the plaintiffs, stating that the non-discrimination policy for student organizations "raises significant constitutional concerns."¹²³ A key issue in the lawsuit involves whether *Dale* potentially creates an additional layer of First Amendment protection for student organizations at colleges and universities. Alternatively, *Dale* could work to provide more constitutional protection for colleges and universities to implement non-discrimination policies student organizations must follow.

The UNC case raises the prospect of trumping First Amendment rights. Even if higher education institutions are not successful in challenging the Solomon Amendment, the litigation involving the provision suggests that courts are likely to recognize that colleges and universities, or divisions within them, suffice as contexts for recognition of associational rights. If a parade

¹²⁰ *Id.* at 12.

¹²¹ *Id.* at 18.

¹²² *Id.* at 19.

¹²³ No. 1: 04CV00765 (M.D.N.C. March 2, 2005) (order granting preliminary injunction).

merits First Amendment protection to allow exclusion of a particular group, as in *Hurley*, then a higher education institution can contend that forced recognition of student organizations that discriminate on the basis of sexual orientation impinges on a school's message of inclusion. With public colleges or universities, an important question concerns the extent to which academic autonomy provides them a status similar to private higher education institutions in terms of recognition as expressive associations. A public college or university would likely point to concepts related to academic autonomy as a source of authority similar or analogous to expressive associational rights to enact a non-discrimination policies. Even if not deemed per se to enjoy expressive associational rights, concepts of academic autonomy may still provide public colleges and universities discretion to enact non-discrimination policies. In *Grutter v. Bollinger*,¹²⁴ for example, the Supreme Court recognized a right supported by the First Amendment for public higher education institutions to consider race as a factor in admissions. Similar considerations, grounded in academic autonomy, could support a First Amendment right for public schools to enforce non-discrimination policies against student organizations.

This kind of potential tension between student groups and academic autonomy at public institutions was present in *Southworth*.¹²⁵ In a concurring opinion, Justice Souter offered academic freedom as a possible alternate rationale for upholding the use of mandatory student fees, stating that "academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach."¹²⁶ Rather than exclusively focusing on the First Amendment rights of students, Justice Souter viewed the case as also involving a university's authority over its educational mission. He stated that the concept of First Amendment authority for colleges and universities was not absolute and "do[es] not compel the conclusion that the objecting university student is without a First Amendment claim

¹²⁴ 539 U.S. 306 (2003).

¹²⁵ 529 U.S. 217 (2000).

¹²⁶ *Id.* at 237.

here."¹²⁷ Asserting that the Court had never directly addressed the issue of First Amendment limits at issue in *Southworth* and noting that the university had not based its arguments on academic freedom, Souter stated that "it is enough to say that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees."¹²⁸

In his opinion, Justice Souter referred to the Supreme Court's decision in *Regents of University of Michigan v. Ewing*.¹²⁹ The case involved the academic dismissal of a student, Ewing, from a program designed to award an undergraduate and a medical degree through a six-year program.¹³⁰ While the Supreme Court considered Ewing's dismissal from the program on due process grounds,¹³¹ the Court discussed the special constitutional deference that institutions of higher education often enjoy. The majority stated that "[w]hen judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."¹³² The Court continued that "[c]onsiderations of profound importance counsel restrained judicial review of the substance of academic decisions." The deference accorded to universities stemmed from concerns for the academic freedom of universities, "a special concern of the First Amendment."¹³³ In a footnote, the majority opinion stated that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."¹³⁴ Justice Souter pointed out that previous decisions involving academic freedom were not dispositive in the *Southworth* case, but that the concept of academic freedom should be given considerable weight in reviewing the decisions of a

¹²⁷ *Id.* at 238.

¹²⁸ *Id.* at 239.

¹²⁹ 474 U.S. 214 (1985).

¹³⁰ *Id.* at 215-216.

¹³¹ *Id.* at 215.

¹³² *Id.* at 225.

¹³³ *Id.*

¹³⁴ *Id.* at 226 n.12.

university.¹³⁵

Justice Souter's concurrence in *Southworth* highlights the potential tension between the First Amendment rights of universities to determine the parameters of their educational mission and the speech rights of student groups. While the Supreme Court has been willing to exercise more direction over student discipline decisions as "sufficiently removed from core academic activity to call for greater due process protections" the realm of extra-curricular activities presents an area more closely linked to the academic mission of a school.¹³⁶ At some point, however, courts may determine that students' First Amendment rights outweigh a school's authority to set educational policies, as has been the outcome in several instances, for example, with institutional policies designed to address "hate" speech.¹³⁷ While Justice Souter declined to take a definitive stance as to the extent of educational authority, his opinion recognized that a requirement of viewpoint neutrality in the context of mandatory student fees potentially threatened to restrict a university's educational decision-making authority.

Concern with allowing a college or university control over its educational mission suggests strong arguments exist for upholding institutional non-discrimination policies for student organizations, even at public institutions. Unlike *Rosenberger*, schools are not attempting to exclude student groups deemed to be engaged in religious proselytizing while allowing access to other groups with religious viewpoints. All student groups at UNC appear barred from discriminating in membership and leadership criteria on the basis of sexual orientation. For instance, a gay and lesbian student organization would not appear able under the policy to place

¹³⁵ For a decision in which a court afforded an institution such autonomy, see *Erzinger v. Regents of the University of California*, 137 Cal. App. 3d 389 (1983), in which a California appellate court upheld the use of mandatory student fees to provide health services to students, including abortion services. The court upheld a lower state court's acceptance of an unchallenged assertion by a university that "providing comprehensive student health services is a proper University function serving the education-related purpose of minimizing the detrimental effects of students' health conditions on their academic performance." *Id.* at 393-394.

¹³⁶ Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools As Mediating Structures*, 48 OHIO ST. L.J. 663, 717 (1987).

¹³⁷ See generally, e.g., Catherine B. Johnson, Note: *Stopping Hate Without Stifling Speech: Re-Examining the Merits of Hate Speech Codes on University Campuses*, 27 FORDHAM URB. L.J. 1821 (2000); Matthew Silversten, Note: *What's next for Wayne Dick? The Next Phase for the Debate over College Hate Speech Codes*, 61 OHIO ST. L.J. 1247 (2000).

membership restrictions on heterosexual students. The university has determined that, in opening a limited forum, fostering participation in campus life by student groups must be balanced against permitting acts of discrimination in organizational leadership or membership, regardless of viewpoint. In striking that balance, the school has opened a limited public forum only to those student groups, religious or otherwise, that do not discriminate on the basis, *inter alia*, of sexual orientation. Unlike the Boy Scouts, student groups voluntarily submit to this requirement in exchange for the benefits of official recognition, including access to campus facilities. Students would remain free to meet off campus, at a local church for example, or meet informally in areas on campus. The university can argue that the group deserves the same constitutional protection for their expressive association as the Boy Scouts, but that *Dale* did not involve the Scouts seeking entry into a limited public forum in which membership discrimination is not allowed by any organization on the basis of sexual orientation or religion.

In *AIO*, then, the student organization arguably seeks a level of constitutional protection beyond standards of viewpoint neutrality announced in previous cases involving student groups at colleges and universities. Despite strong arguments in favor of a college or university requiring that student organizations not engage in discrimination in membership and leadership criteria, courts may decide in favor of student groups. Given the ambiguous nature of viewpoint neutrality and evolving standards of constitutional protection of student groups, legal uncertainty exists. The majority opinion in *Southworth* discussed, for instance, that university support of student groups is meant to foster a wide range of ideas and discourse and represents the speech of students. One commentator contends that under *Dale* and Supreme Court cases involving student groups in higher education, colleges and universities are prohibited from making student organizations follow non-discrimination policies that violate their religious beliefs.¹³⁸ The author also defends exemptions for non-discrimination standards on policy grounds, stating that requiring recognition of student groups that oppose non-discrimination policies for religious

¹³⁸ Mark Andrew Snider, Note: *Viewpoint Discrimination by Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies*, 61 WASH & LEE L. REV. 841 (2004).

reasons encourages a greater diversity of student speech.¹³⁹ Along these lines, AIO can argue that the situation is similar to that in *Velazquez* and the non-discrimination policy on sexual orientation unduly hampers student religious groups from meaningful participation in the forum, resulting in impermissible restrictions on expressive speech rights. The students can also point out that, like in *Southworth*, student organizations are obviously meant to foster speech that springs from students and not the university.

A decision from the Third Circuit demonstrates how student organizations at public institutions may seek to invoke *Dale* to protect themselves from university actions. In *Pi Lambda Phi Fraternity v. University of Pittsburgh*,¹⁴⁰ a fraternity lost status as an officially recognized student group following a drug raid at a residence that resulted in the arrest of several fraternity members. The fraternity chapter sued claiming, inter alia, that the university infringed upon its rights of expressive and associational freedoms.¹⁴¹ While the court determined that the fraternity merited no protection for associational activities under the facts of the case,¹⁴² the decision demonstrates that student groups may be able, especially in light of *Dale*, to receive constitutional associational protections to challenge university regulations. The panel for the Third Circuit, in the portion of the decision addressing expressive association, stated that its holding was specific to the facts of the present case and pointed out it was "not holding that fraternities per se do not engage in constitutionally protected expressive association. It is entirely possible that a fraternity (or sorority, or similar group) could make out a successful expressive association claim"¹⁴³

Uncertainty exists regarding the level of constitutional protection *Dale* provides student organizations, especially religiously-oriented ones, to engage in practices that violate college or university non-discrimination policies. *AIO* tests whether viewpoint neutrality suffices in the regulation of student groups. Even if a policy applies equally to all students groups regardless of

¹³⁹ *Id.* at 878, 881.

¹⁴⁰ 229 F.3d 435 (3rd Cir. 2000).

¹⁴¹ *Id.* at 440.

¹⁴² *Id.* at 441-447.

¹⁴³ *Id.* at 444. The court also held that any action by the university constituted only an indirect burden on any expressive activities by members since the university sought to regulate conduct rather than any speech activities. *Id.* at 446-447.

viewpoint, the court in *A/O* may determine that the expressive associational rights of student organizations provide shelter from certain university policies. The granting of a preliminary injunction in the case shows that the court considers the students to have raised credible constitutional issues. *A/O* and future litigation will help define the limits of institutional regulation of student organizations in relation to viewpoint neutrality and *Dale*.

VI. Conclusion

The authority of colleges and universities to require compliance with non-discrimination policies as a condition of access to campus stands at an interesting crossroads. Decisions may permit enforcement of non-discrimination policies at colleges or universities in both contexts, result in mixed results, or limit institutional control over access on two fronts. Litigation involving the Solomon Amendment and student organizations, despite significant legal distinctions, will help influence the authority of colleges and universities to shape the campus environment through non-discrimination standards. Ultimately, both legal controversies require courts to consider whether the special nature of the higher education environment permits colleges and universities to control access to campus in efforts to promote non-discrimination policies that align with a school's educational mission.

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