

27th Annual National Conference on Law and Higher Education
Center for Excellence in Higher Education Law and Policy
Stetson University College of Law
February 18-22, 2006

WHAT IS ACADEMIC FREEDOM, WHO HAS IT,
AND WHEN?

STUDENT/STUDENT AND STUDENT/ADMINISTRATION CLASHES

Barbara A. Lee
Rutgers University

Ideological conflict seems to be endemic on many college campuses. A headline in a November, 2005 *New York Times* article stated “University is Accused of Bias Against Christian Schools.”¹ At a rural New Jersey community college, an adjunct instructor is forced to resign after excoriating a student in an email who was organizing a pro-war rally.² Congress and the legislatures of several states are considering passing an “Academic Bill of Rights”³ that would require “balance” in the presentation of ideas in the classroom, in faculty hiring, and possibly in the selection of campus speakers, the focus of student organizations, and other campus activities. The U.S. Supreme Court is considering a challenge to the “Solomon Amendment”⁴ which, if upheld, will require universities to allow military recruiters the same access to students as other potential employers, despite the fact that the military’s “don’t ask, don’t tell” policy with respect to

¹ Carolyn Marshall, “University is Accused of Bias Against Christian School,” *New York Times*, November 20, 2005 at 24 (reporting allegations that the University of California “discriminates” against applicants from evangelical Christian high schools with respect to admissions. A coalition of applicants, schools, and the Association of Christian Schools International has sued the University of California system because it refuses to certify certain high school courses whose curricula have an evangelical Christian viewpoint.)

² “Adjunct in E-Mail Uproar Quits,” *Inside Higher Ed News*, November 23, 2005, available at <http://insidehighered.com/news/2005/11/23/adjunct>.

³ “Academic Bill of Rights,” available at <http://www.studentsforacademifreedom.org/abor.html>.

⁴ 10 U.S.C. § 983.

gays in the military is contrary to the nondiscrimination policies of many U.S. colleges and universities.

Although the speech and association rights of students at public colleges and universities are protected by the U.S. Constitution, student academic freedom issues have been prominent on the campuses of private institutions as well. Many private institutions have developed student codes of conduct or student handbooks that promise academic freedom or provide free speech guarantees. And at institutions controlled by religious organizations, students may have a certain amount of academic freedom, depending upon the institution's own policies and the promises it has made in handbooks or catalogs. Therefore, although the source of the legal rights may differ (the Constitution for students at public institutions, the "contract" for students at private and at public institutions), the issues facing faculty and administrators are quite similar in nature and equally difficult, at times, to resolve.

In some respects, the clashes between conservative students and their often more liberal professors are a mirror image of the campus unrest in the late 1960s and early 1970s, during the civil rights movement and the anti-war protests. The din of dissent and conflict may make it difficult for administrators and faculty to know just what rights students have vis-à-vis faculty, administrators, and their fellow students. This paper sketches out some of the areas of recent conflict between students and their peers and between students and institutional policies or rules.⁵ There are still unresolved issues, however, which our courts will continue to wrestle with for a number of years to come.

⁵ This paper does not address faculty/student conflict in the classroom, or conflicts between students in a classroom setting. The companion paper to this one, by Ann Springer, discusses classroom academic freedom issues.

What is Student Academic Freedom?⁶

Although the concept of student academic freedom has its roots in the German doctrine of “Lernfreiheit,” the freedom to learn, student academic freedom was not the subject of a formal statement until 1967, when representatives of five higher education associations drafted and approved a “Joint Statement on Rights and Freedoms of Students.”⁷ The Joint Statement discusses student academic freedom rights in access to higher education, in the classroom, in the compilation of and access to student records, in student affairs, off campus, and in disciplinary proceedings. With respect to academic freedom in student affairs, the Joint Statement discusses student freedom of association in creating and belonging to student organizations, student freedom of inquiry and expression outside the classroom, student participation in institutional government, and student publications.

The U.S. Supreme Court, beginning with *Sweezy v. New Hampshire*⁸ in 1957, has recognized that students at public institutions have First Amendment protections with respect to speech, student press, and freedom of association. Landmark decisions include *Widmar v. Vincent*,⁹ 454 U.S. 263 (1981), in which the Court ruled that public institutions must give recognized student groups access to institutional facilities for religious worship purposes; *Papish v. Board of Curators of the University of Missouri*,¹⁰ in which the Court

⁶ For an extended discussion of student academic freedom, see William A. Kaplin and Barbara A. Lee, *The Law of Higher Education*, 4th ed. (Jossey-Bass, 2006), section 8.1.4.

⁷ This statement was approved by the American Association of University Professors, the United States Student Association, the Association of American Colleges and Universities, the National Association of Student Personnel Administrators, and the National Association for Women in Education. The statement is reprinted in AAUP, *Policy Documents and Reports*, 9th ed. (2001), pp. 261-267.

⁸ 354 U.S. 234, 250 (1957).

⁹ 454 U.S. 263 (1981).

¹⁰ 410 U.S. 667 (1973).

applied First Amendment principles to student press, and *Healy v. James*,¹¹ in which the Court ruled that the First Amendment's freedom of association protections applied to the process whereby student organizations are recognized at state institutions.

In 1995, the Court addressed the issue of whether a public institution (the University of Virginia) could constitutionally deny funding to a student organization whose purpose and activities were explicitly religious in nature. In *Rosenberger v. Rector and Visitors of the University of Virginia*,¹² the Court ruled that the university could not make decisions on the funding of student organizations based upon the viewpoint of the student organization. The Court based its ruling on the free expression rights of the students at the publicly-funded university, and also upon their "freedom to learn."¹³

Other Supreme Court cases addressing freedom of association protections in a nonacademic setting have important implications for student academic freedom. In *Roberts v. U.S. Jaycees*,¹⁴ the Court ruled that state laws barring discrimination in public accommodations applied to private membership organizations, and that the states' compelling interest in preventing discrimination outweighed the private associational rights of the organizations' members. However, in *Boy Scouts of America v. Dale*,¹⁵ the Court rejected the application of New Jersey's Law Against Discrimination to the Boy Scouts (which would have required the Boy Scouts to allow an openly gay man to serve as a scoutmaster), stating that forcing the organization to violate its principles against

¹¹ 408 U.S. 169 (1972).

¹² 515 U.S. 819 (1995).

¹³ 515 U.S. at 835-836.

¹⁴ 468 U.S. 609 (1984). See also *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), upholding the applicability of California's nondiscrimination law and requiring Rotary Clubs to end their practice of barring women from membership.

¹⁵ 530 U.S. 640 (2000).

homosexuality would violate its members First Amendment rights of expressive association.

This paper will briefly address several areas where the expressive rights of students may conflict with the views or beliefs of other students or with institutional policy (such as nondiscrimination policies). It will review the recognition and funding of student organizations, student press issues, and external factors that have created conflict among students and between students and administrators.

Recognition of Student Groups

Institutions may develop criteria for recognition of student organizations as long as those criteria do not result in viewpoint discrimination. Under the teachings of *Healy v. James*,¹⁶ a public institution may not refuse to recognize a student organization simply because it disagrees with the viewpoint of its members. (A religiously-controlled college or university, however, may condition recognition on adherence to that religion's doctrines, although it may face legal challenges under state nondiscrimination law if it denies the group access to campus facilities).¹⁷

Recognition of student organizations is important because it may give the organization access to institutional funding, may mean that the organization is permitted to use institutional facilities for meetings, events, etc., and may also confer other benefits. Withdrawal of recognition of student organizations may be used as a punishment for misconduct by the organization's members or for the organization's failure to abide by

¹⁶ *Supra*, note 11.

¹⁷ See, for example, *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1 (D.C. 1987). For analysis of this case, see Fernand N. Dutille, "God and Gays at Georgetown: Observations on *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*," 15 J. COLL. & UNIV. L. 1 (1988).

institutional rules on alcohol use, for example, or for criminal conduct of an organization's members or officers.¹⁸

A difficult issue regarding recognition of student organizations has arisen in recent years regarding student organizations with a religious mission that conflicts with the institution's nondiscrimination policy. For example, the Christian Legal Society, a national organization with student chapters on various college and university campuses, has initiated lawsuits against institutions that refuse to recognize these chapters when the organizations will not affirm that they will comply with the institution's nondiscrimination policy, which prohibits discrimination on the basis of religion and sexual orientation, among other characteristics.

For example, in *Christian Legal Society v. Walker*,¹⁹ a chapter of the Christian Legal Society at the Southern Illinois University's School of Law had been a recognized student organization until March of 2005. Recognition provided the organization with access to space on the law school's bulletin boards, meeting space in the law school building, access to the law school's website and publications, email access on the law school's list-serve, eligibility for funding from the law school, and use of the institution's name.

The Christian Legal Society (CLS) requires its members to agree to a statement of faith that includes belief in Jesus as the individual's savior, belief in the Trinity, the virgin birth, and "the Bible as the inspired Word of God." The members understand these requirements to require them to believe in the prohibition of sexual conduct

¹⁸ See, for example, *Pi Lambda Fraternity v. University of Pittsburgh*, 229 F.3d 435 (3d Cir. 2000)(university removed fraternity from list of recognized student organizations after several members were arrested for drug offenses; court ruled that the de-recognition has only an indirect effect on members' expressive and associational activities.

¹⁹ 2005 U.S. Dist. LEXIS 13881 (S.D. Ill., July 5, 2005).

between individuals of the same sex. The regulations also exclude homosexuals or those who tolerate homosexuality from serving as officers of the organization or from being members at all. In March of 2005, the law school dean notified the organization's president that this interpretation of the organization's membership requirements violated Southern Illinois University's nondiscrimination policy, which prohibits discrimination on the basis of religion and sexual orientation, among other characteristics. The dean then revoked the organization's status as a recognized student organization.

The organization, through several of its members, sought a preliminary injunction in federal district court, seeking the restoration of its recognized status. The organization argued that the university's requirement that the organization comply with its nondiscrimination policy violated its members' First Amendment rights of freedom of expressive association and free speech.

The court refused to grant the injunction, ruling that the organization was not irreparably harmed by the withdrawal of its recognized status. The court noted that the nondiscrimination policy was facially neutral, and thus only in its application might it be unconstitutional. The court then examined whether the lack of recognition coerced the organization in any way. The court noted that the university's nondiscrimination policy did not require the CLS chapter to accept anyone as a member whom it did not wish to accept, which distinguished this situation from that of the *Boy Scouts of America v. Dale*²⁰ case, discussed above. In addition, said the court, de-recognition had not forced the CLS chapter to "alter its message or expression." The chapter could still "meet, assemble, evangelize, and proselytize." The court minimized the negative impact of cutting off the CLS chapter's access to the law school's website, bulletin boards, funding

²⁰ *Supra*, note 15.

eligibility, and use of the SIU name, saying that these losses did not significantly impact the chapter's ability to continue functioning. Given the availability of alternate space in which to meet and alternate ways of communicating with its members, said the court, the harm done by de-recognition did not seem to be irreparable.

According to the website of the national CLS, other litigation is in progress. A CLS chapter at the Arizona State University College of Law has filed a motion for a preliminary injunction seeking a court order to force the university to recognize the chapter as a registered student group and "to allow the chapter to select members and officers who agree with the CLS 'Statement of Faith.'" This motion supplements the chapter's earlier lawsuit, filed in November of 2004, in which the CLS chapter alleges that the university is violating its rights of expressive association, free speech, and free exercise of religion by refusing to exempt the chapter from the nondiscrimination provision of the university's code of student conduct.²¹ The group's lawsuit demands that the university exempt all religious organizations, not just itself, from the nondiscrimination requirements. A lawsuit against Hastings College of the Law is also in progress.²²

According to the CLS website, Washburn University agreed in January of 2005 to amend its policies regarding student organizations to exempt all religious student organizations from the university's nondiscrimination policy.²³ The CLS website also

²¹ "Christian Student Group Asks Federal Court to Prevent Arizona State University from Violating its Constitutional Rights," Press Release, Christian Legal Society, March 7, 2005 (http://www.clsnet.org/clrfPages/pr_CLSvASU2.php).

²² "District Court Declines to Dismiss Lawsuit Against UC Hastings: Board of Directors to Remain as Defendants," Press Release, Christian Legal Society, April 13, 2005 (http://www.clsnet.org/clrfPages/pr_CLSvHastings2.php).

²³ "Washburn University Changes Student Organization Policies to Recognize Religious Groups' Right to be Religious," Press Release, Christian Legal Society, January 18, 2005 (http://www.clsnet.org/clrfPages/pr_washburn3.php). The University's revised equal educational

reports an “interim settlement” of a lawsuit against Pennsylvania State University in which religious student groups asked the university to exempt them from the university’s nondiscrimination policy. When Penn State refused to exempt the groups from its nondiscrimination policy, they sued, claiming violations of the First Amendment’s rights of expressive association, free speech, and free exercise of religion. The lead group in the litigation, DiscipleMakers, allows students of all religions to attend meetings, but requires officers of the organization to “profess faith in Jesus Christ and to exhibit a lifestyle consistent with orthodox Christian doctrine, including the prohibition on homosexual practice.”²⁴ According to the press release, Penn State and the plaintiffs entered a mediated settlement under which the university would amend its policies regulating student organizations so that they may select leaders “based on sincerely held beliefs.”

These cases present difficult, perhaps intractable, conflicts between an institution’s right to insist on equal opportunity for all of its students, and the rights of religious groups to associate with others of similar “sincerely held beliefs” and to obtain institutional recognition. According to a respected scholar of First Amendment issues:

In evaluating the conflict between a student organization’s beliefs and the institution’s non-discrimination policy, it is sometimes helpful to make a distinction between discrimination based upon status and discrimination based upon belief or conduct. If an organization wishes to discriminate against people simply because they are of a particular race, gender, or some other immutable characteristic, then the university probably can force the organization to refrain from such discrimination. Alternatively, if the organization is discriminating

opportunity policy now states: “Organizations must comply with the University’s EEO policy and applicable Federal, state and local laws in all their activities, subject to the two following exceptions: . . . (2) organizations formed to foster or affirm the sincerely held religious beliefs of members may adopt a non-discrimination statement that is consistent with those beliefs. Organizations qualifying for one of these limited exceptions must comply with the University’s EEO policy in all other respects.” Correspondence with Washburn’s General Counsel, December 2, 2005.

²⁴ “Christian Student Group and Penn State University Reach Settlement,” Press Release, Christian Legal Society, March 30, 2005 (http://www.clsnet.org/clrfPages/pr_DMvPennState2.php).

against persons because those persons disagree with the organization's philosophy or because they wish to engage in conduct that the organization finds offensive, then it is unlikely that the university can stop the discrimination.²⁵

It appears that the issue of the recognition of religious student groups, and the applicability of the institution's nondiscrimination policy, is still evolving. Institutions in the public sector should recognize that the uniform application of their nondiscrimination policies to religious student organizations may be challenged by evangelistic organizations. Nonsectarian private colleges and universities have less legal exposure, but may wish to review their recognition policies to ensure that they do not conflict with any state constitutional protections for free speech, religious expression, or expressive association.

Funding of Student Organizations

Public institutions, and private institutions whose regulations or policies provide protections similar to those of the Constitution, face some constraints on the criteria used for funding student organizations. The institution can require the organization to abide by reasonable rules, such as procuring insurance for student-sponsored events, having a faculty or staff advisor, or being strictly accountable for the organization's funds. The institution may also make rules that restrict the time, place, and manner in which members of organizations express themselves, in order to prevent or minimize disruption to campus educational activities. And, of course, the institution may prohibit the organization and its members from engaging in illegal activity. The institution cannot, without inviting litigation, refuse to fund an organization on the basis of the views of its

²⁵ William A. Thro, "But That Group is Offensive: Recognition, Facility Access, and Funding for Political and Religious Groups." Continuing Legal Education Conference, National Association of College and University Attorneys, March 2005, available at <http://www.nacua.org>.

members, even if those view contravene institutional policy (such as an institutional policy against discrimination on the basis of sexual orientation); nor can it, because of the *Rosenberger* decision, refuse to provide funding to a student organization whose purpose is explicitly religious in nature.

The U.S. Supreme Court has also addressed the issue of institutional funding for student organizations. Many institutions charge students a fee that is then distributed to various recognized student organizations. Cases brought in the lower courts had made inconsistent rulings with respect to whether students could refuse to allow part of their mandatory student fee to be allocated to various student organizations whose political, religious, or social purposes they disagreed with. The students claimed that these fees required them to support speech with which they did not agree—a potential first amendment violation. In *Board of Regents of University of Wisconsin System v. Southworth*,²⁶ the Court addressed the issue of whether students could be required to pay a mandatory student fee if they objected to the use of such fees for certain purposes. The Court ruled that the university could constitutionally require student to pay a mandatory fee as long as the system of fee allocation was administered in a viewpoint neutral fashion and as long as those individuals allocating the fees to recognized student organizations followed a series of guidelines created to ensure such viewpoint neutrality,, rather than giving “unbridled discretion” to these decision-makers. Although the Court discussed the use of an opt-out system, through which objecting students could choose not to pay the portion of their mandatory fee that supported organizations with which

²⁶ 529 U.S. 217 (2000).

they disagreed, it did not require such a provision in order to enable public institutions to require students to pay mandatory fees without constitutional challenge.²⁷

The Supreme Court in *Southworth* ruled that a student referendum to make funding decisions for recognized student organizations had the potential to violate the First Amendment's free expression protections because a majority of students who disagreed with a particular viewpoint could cause funding to be denied to a student organization. Viewpoint neutrality, according to the court, treats minority views with the same respect as the views of the majority.

This principle was tested in *Amidon v. Student Ass'n of State University of New York*,²⁸ in which members of a conservative student organization sued the student association at SUNY Albany under §1983, asserting that the student association's "advisory referendum" that was used to determine the allocation of mandatory student fees violated their First Amendment expressive rights and their Fourteenth Amendment equal protection rights. The plaintiffs had formed a conservative student organization that had received funding, but which was denied a place on the referendum ballot used to determine future funding for student organizations. Although the defendant student association attempted to claim Eleventh Amendment immunity, the court rejected that defense, ruling that the student association was a state actor, and thus potentially liable under §1983, but was not eligible for Eleventh Amendment immunity because it was not "an arm of the state."

The court ruled that the student association (SA) was acting "under color of state law," a finding sufficient to make it a state actor. Said the court:

²⁷ For a lengthy discussion of *Southworth* and a list of suggestions for avoiding Constitutional challenges to mandatory fee allocation systems, see Kaplin and Lee, *supra*, note 6, Section 10.1.3.

²⁸ 2005 U.S. Dist. LEXIS 28432 (N.D.N.Y. Nov. 7, 2005).

On the facts of this case, the SA clearly acts in concert with the state to create a forum for the exercise of First Amendment rights. The SA determines the amount of the fee. The state collects it, enforces its payment, and turns it over to the SA. The SA distributes the money pursuant to state regulation and approval. See N.Y. COMP. CODES R. & REG. tit. 8, § 302.14(c) (2005). The SA is intertwined with the state in collecting, budgeting, and allocating funds to create a forum for speech, and therefore, the SA acts under the color of state law. See *Carroll v. Blinken*, 42 F.3d 122, 131 (2d Cir. 1994) (finding NYPIRG to be a state actor because its conduct "was made possible by state regulations, enforced by SUNY Albany, that make payment of the entire fee a condition of registration, attendance, matriculation and graduation at SUNY Albany.").²⁹

The court concluded that "SUNY Albany's student referendum is a content-based criterion that cannot be saved by its advisory nature or the fact that it is only used to set the amount of funding as opposed to the question of funding or defunding altogether." The court granted summary judgment to the plaintiffs on their First Amendment claim concerning the referendum and dismissed their other claims because the award of summary judgment resolved these additional claims as well.

Student Press Issues

Student newspapers, magazines, and other publications are typically considered to be student organizations, and thus are subject to the same protections, particularly on public campuses, as other student organizations. The funding of student press outlets is subject to the Supreme Court's ruling in *Rosenberger*, which involved the funding of a religious magazine. But the primary issue that courts have dealt with with respect to student press is pre-publication censorship, or, in Constitutional terms, "prior restraint."³⁰

²⁹ *Id.* at *25. For another challenge by a student organization denied funding, see *College Standard Magazine v. State University of New York, et al.*, 03-CV-505, Tr. Bench Decision, James T. Foley Courthouse, Albany, New York, August 8, 2005.

³⁰ The U.S. Supreme Court has not addressed the censorship of college student newspapers or magazines, but several federal appellate court opinions have created guidelines for administrators with respect to attempts to censor the content of student newspapers. See *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973)(termination of funding for student newspaper by president who disagreed with its content violated

A recent case, *Hosty v. Carter*,³¹ addresses the issue of prior restraint and also deals with the important question of whether a U.S. Supreme Court case, *Hazelwood School District v. Kuhlmeier*,³² applies to the pre-publication review by administrators of a student publication. In *Hazelwood*, the U.S. Supreme Court was asked to decide whether the principal of a high school could restrict the content of a student newspaper that was produced as part of a high school journalism course. The Court ruled that, because the journalism course had been supervised and the content of the newspaper had been consistently reviewed prior to publication, the newspaper was not a public forum. The principal had justified his decision on the basis of his belief that some of the content in the newspaper was inappropriate for younger high school students who would read it, and that some of the information in the newspaper violated certain students' privacy rights. The Court ruled that such restriction did not run afoul of the First Amendment in the high school setting, stating that courts in situations such as that in *Hazelwood* should be deferential to educators' judgments about the appropriateness of the content of student newspapers, plays, or other activities. The Court, however, expressly refused to consider whether such deference to educators' judgments was appropriate at the college level.³³

The court in *Hosty* was not addressing the merits of the case, but was deciding whether the sole remaining defendant, Dean Carter, was entitled to qualified immunity from liability in damages. Carter, the Dean of Student Affairs and Services, had ordered the printer who usually printed the student newspaper not to print any issues that she had

students' First Amendment rights); *Bazaar v. Fortune*, 476 F.2d 570, *rehearing*, 489 F.2d 225 (5th Cir. 1973)(stopping the publication of a literary magazine on the grounds of "taste" was an unconstitutional breach of the students' free speech rights); *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975)(university president's action of firing the editors of the student newspaper on the basis of his evaluation of its quality was an impermissible limitation on the students' free speech).

³¹ 412 F.3d 731 (7th Cir. 2005)(en banc).

³² 484 U.S. 260 (1988).

³³ 484 U.S. at 273-4.

not approved in advance. The call was the result of a dispute between several college administrators and the editors of the student newspaper, who had published articles critical of the administration, and who refused to print the administration's response to the dispute. The newspaper temporarily ceased publication because the editorial staff refused to submit the newspaper for prior review, and the student editors sued Carter and several administrators, trustees, and others.

The case was before the court on the defendants' motion for summary judgment. A lower court had dismissed all defendants except Dean Carter from the lawsuit, ruling that *Hazelwood* did not apply to college student publications and that Dean Carter should have known that her actions were unlawful (thus rejecting her claim of immunity). Although an appellate panel affirmed that ruling, the *en banc* reversed the trial court, ruling that Carter was protected by qualified immunity.

The court rejected the lower court's assertion that *Hazelwood* does not apply to college student publications, stating that the age differences between high school and college students is not the issue upon which this question turns. On the contrary, the issue is whether the school or college has created a public forum or a non-public forum through the student publication. Said the court:

If private speech in a public forum is off-limits to regulation even when that forum is a classroom of an elementary school . . . then speech at a non-public forum, and underwritten at public expense, may be open to reasonable regulation even at the college level . . . We hold, therefore, that *Hazelwood's* framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools.³⁴

The court discussed the various forms of forums that are created by publications at colleges and universities, including alumni magazines, and stated: "Let us not forget that academic freedom includes the authority of the university to manage an academic

³⁴ 412 F.3d at 735.

community and evaluate teaching and scholarship free from interference by other units of government, including the courts.”³⁵ Assuming without deciding that the student newspaper was a public forum and thus the Dean’s actions were unconstitutional, the court’s determination that the Dean was protected by qualified immunity left the students without a remedy.

Hosty, and an earlier case, *Kincaid v. Gibson*,³⁶ in which an *en banc* federal appellate court considered whether the actions of a university vice president of student affairs to confiscate all copies of a student yearbook violated the First Amendment, both rely on *Hazelwood*’s framework that requires a court to first determine whether the publication in question is a public forum, a limited public forum, or a nonpublic forum. In *Kincaid*, the *en banc* court determined that the yearbook was a limited public forum because the university’s yearbook policy stated that the faculty advisor could not alter the content of the yearbook, but only “the form or the time and manner of expressions rather than alteration of content.” Thus, said the court, the vice president’s actions violated the First Amendment, because the vice president’s objections focused upon the content of the yearbook, and not the subjects which university policy provided were appropriate for regulation.

Given the potential for defamation claims against institutions that attempt to regulate the content of student press, it is unlikely that many colleges and universities will alter their policies of stating that student newspapers, magazines, etc. are not official institutional publications. Institutions cannot have it both ways, however—if the decision is made to disclaim any official relationship between the institution and the student

³⁵ 412 F.3d at 736.

³⁶ 236 F.3d 342 (6th Cir 2001)(*en banc*).

publication, then the administration will be quite limited in its to regulate the content of those publications.

External Limitations on Student Academic Freedom³⁷

Another issue that has created conflict on campus among students, and between institutions and military recruiters, is the question of allowing military recruiters access to campus. Congress has enacted various federal funding restrictions designed to prevent institutional interference with ROTC programs and with military recruiting on campus. These restrictions are often popularly referred to as the “Solomon Amendment,”³⁸ after the Congressman who originally introduced them. The law provides that institutions of higher education or their “subelements” that prevent ROTC access or military recruiting on campus will be denied grants and contracts from the Departments of Defense, Transportation, Education, Health and Human Services, Labor, and certain “Related Agencies,” as well as the Department of Homeland Security. Federal student financial aid funds are exempt from this legislation.³⁹ If the institution has no such practice, but one or more “subelements” prevent military recruiting, the “subelement” loses federal funding from all of the federal agencies listed above, while the institution loses only funds from the Department of Defense.⁴⁰ Such funds may not be provided to any college or university (or one or more subelements) that has, as determined by the Secretary of Defense, (a) “a policy or practice” against Solomon Amendment” restrictions.

³⁷ This section is adapted from Kaplin and Lee, *supra*, note 6 , Section 13.4.4.

³⁸ 10 U.S.C. § 983.

³⁹ Pub. L. No. 106-79, 113 Stat. 1212, 1260 (1999).

⁴⁰ 32 C.F.R. §216.3(b)(1)).

Law school faculty, students, and law student organizations have filed several legal challenges to the Solomon Amendment. In *Forum for Academic and Institutional Rights (FAIR), Inc. v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003), *rev'd and remanded*, 390 F.3d 219 (3d Cir. 2004), a coalition of law schools, law faculty, and student associations challenged the constitutionality of the Solomon Amendment in federal court. The plaintiffs claimed that the Solomon Amendment conditioned federal funding on the law schools' giving up their first amendment freedom of speech and expressive association by requiring that the schools admit military recruiters to campus. The plaintiffs also claimed that the law discriminated on the basis of viewpoint because it required the law schools to espouse a pro-military recruiting message, punishing those schools (by making them ineligible for federal grants and contracts) which found the military's position on homosexuality "morally objectionable." Finally, the plaintiffs alleged that the statute was unconstitutionally vague in that it allowed the military "unbridled discretion" in determining which institutions to target for noncompliance. The plaintiffs sought a preliminary injunction to halt the enforcement of the law.

The U.S. government filed a motion to dismiss, arguing that the association of law schools lacked standing to bring the lawsuit because their parent universities were the appropriate parties to the litigation. The federal trial judge disagreed, ruling that because the law schools had the autonomy to develop their own nondiscrimination policies, which the Solomon Amendment required them to suspend in order to allow military recruitment at the law schools, they had demonstrated a "concrete injury fairly traceable to the Solomon Amendment," which was "the government-induced abandonment of the

schools' nondiscrimination.” Similarly, the court determined that the law student associations and the association of law professors also had standing to challenge the law.

The court rejected the plaintiffs' motion for a preliminary injunction, however, ruling that the Solomon Amendment did not violate the Constitution. Despite the fact that the statute requires law schools to offer “affirmative assistance” to military recruiters, said the court, it did not restrict either speech or academic freedom of students or faculty, nor did it limit the plaintiffs' ability to openly and publicly disagree with the military's policy on homosexuals. Because the recruiters' presence did not significantly intrude on the ability of the plaintiffs to express their views, and because the forbidden behavior and its potential consequences were very clear in the language of the statute, said the court, the plaintiffs did not have a strong probability of prevailing on the merits, and thus the preliminary injunction motion was denied.

A three-judge panel of the U.S. Court of Appeals for the Third Circuit, in a 2-1 decision, reversed the district court and remanded the case for the entry of a permanent injunction against the enforcement of the Solomon Amendment. With respect to the plaintiffs' claim that the Solomon Amendment violated their First Amendment right of expressive activity, the court, relying on *Boy Scouts of America v. Dale*,⁴¹ applied strict scrutiny. Under *Dale*, said the court, the group claiming a violation of its right of expressive association must demonstrate (1) that it is an expressive association, (2) that the state action being challenged “significantly affects the group's ability to advocate its viewpoint,” and (3) that the state's interest “justifies the burden it imposes on the group's expressive association” in that the state's interest is compelling and is narrowly tailored to achieve that interest. The court concluded that law schools are “highly” expressive

⁴¹ *Supra*, note 15.

organizations, and that the Solomon Amendment placed a substantial burden on the law school's expressive associational rights under the deferential standard articulated in *Dale*. Furthermore, said the court, the law's provisions to deny federal funding to institutions or "subelements" was not narrowly tailored, as there was no evidence that on-campus recruiting was the most effective mechanism for attracting talented lawyers to military service.

With respect to the plaintiffs' claim that the Solomon Amendment was a form of compelled speech, the court ruled that the law required the law schools to "propagate, accommodate, and subsidize" the military's recruiting message. Providing services to help military recruiters schedule appointments, communicating with students about the presence of military recruiters at the law school, and providing resources to assist the military in arranging for its campus visits constitute compelled speech, said the court, and the recently-added provision that military recruiters must be given the same quality of access to students as that given to other types of employers did not even allow the law school to disclaim the military's policies on homosexuals. Given the requirements of the law, said the court, it conflicted with the First Amendment's prohibition on compelled speech.

Although the court stated firmly that the Solomon Amendment should be analyzed under the strict scrutiny test because of its burdens on expressive association, the court briefly considered whether the law would survive the intermediate scrutiny test of *United States v. O'Brien*,⁴² which is applied to governmental regulations that only incidentally burden expressive conduct rather than burdening speech. While disavowing the *O'Brien* test as inappropriate in this case, the court concluded that the Solomon

⁴² 391 U.S. 367 (1968).

Amendment was likely to impair expressive conduct as well. Because the United States had not presented evidence that enforcement of the Solomon Amendment had enhanced on-campus recruiting, there was no showing of an important governmental interest at stake, a necessity to a finding that a law survives the *O'Brien* test. In fact, said the court, it was equally plausible that stricter enforcement of the Solomon Amendment actually hampered military recruiting because of the strong negative reaction on campus to the military's policies with respect to homosexuals.

In closing, the court said:

The Solomon Amendment requires law schools to express a message that is incompatible with their educational objectives, and no compelling governmental interest has been shown to deny this freedom. While no doubt military lawyers are critical to the efficient operation of the armed forces, mere incantation of the need for legal talent cannot override a clear First Amendment impairment. Even were the test less rigorous than a compelling governmental riposte to the schools' rights under the First Amendment, failure nonetheless is foreordained at this stage, for the military fails to provide any evidence that its restrictions on speech are no more than required to further its interest in attracting good legal counsel.⁴³

The Third Circuit stayed its ruling pending the United States' petition for Supreme Court review. The U.S. Supreme Court has agreed to hear the case in its 2005-6 term.

Similar lawsuits have been filed by other law student organizations and law faculty, and have had mixed results. In *Burbank v. Rumsfeld*,⁴⁴ faculty, students and a student organization at the University of Pennsylvania Law School requested a declaratory judgment that the law school's treatment of military recruiters complied with the Solomon Amendment or, alternatively, sought a ruling that the Solomon Amendment violates their First Amendment rights of free speech, expression, association, and

⁴³ 390 F.3d at 246.

⁴⁴ U.S. Dist. LEXIS 17509 (E.D. Pa. August 19, 2004).

academic freedom, and their Fifth Amendment rights to due process and equal protection. The U.S. government moved to dismiss the case for lack of standing because the plaintiffs had not alleged an injury. The trial court refused to dismiss the plaintiffs' First Amendment claims, as well as their claim for unconstitutional conditions on the receipt of federal funding, but dismissed their claim that the Solomon Amendment impermissibly distinguished between institutions with a history of pacifism (who are exempt from the Amendment) and those without such a history, noting that such language was also used for exemption from military service and thus was not content-based discrimination.

Students at Yale Law School filed claims similar to those in *Burbank* and *FAIR*. In *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004), the trial court dismissed their First Amendment expressive association and viewpoint discrimination claims for lack of standing, saying that the faculty, not the students, were the appropriate parties to such a claim. The court refused to dismiss the students' claims of an injury to their First Amendment right to receive information concerning nondiscrimination against gays, and also permitted their equal protection claim to survive a motion to dismiss.

State colleges and universities in Connecticut found themselves caught between the Solomon Amendment and the state's nondiscrimination law that prohibited discrimination on the basis of sexual orientation. In 1996, the Connecticut Supreme Court ruled that the state's nondiscrimination precluded state colleges and universities from allowing military recruiters on campus (*Gay Law Students v. Board of Trustees*).⁴⁵ The Department of Defense threatened to cut off federal funding to the state university in response to the court ruling. In 1997, the Connecticut legislature enacted Conn. Gen.

⁴⁵ 673 A.2d 484 (Conn. 1996).

Stat. §10a-149c, which states that each public college and university “shall provide access to directory information and on-campus recruiting opportunities to representatives of the armed forces . . . to the extent necessary under federal law to prevent the loss of federal funds... (§10a-149c(a)).

The outcome of *FAIR v. Rumsfeld* should provide important guidance to public and private institutions with respect to the clash between institutional nondiscrimination policies and government attempts to provide a forum on campuses for military recruiting. The result may also provide guidance to institutions that are struggling to uphold their nondiscrimination policies in light of the demands of student groups that fervently believe they should be able to exclude individuals on the basis of religious beliefs or lifestyle.

Conclusion

The cases discussed in this paper demonstrate that the impact of the First Amendment (or provisions in state constitutions that may afford similar protections to student at private institutions) is still evolving on college campuses. The clash between religious student groups and institutional nondiscrimination policies is very much in progress, and institutions have chosen a variety of strategies to deal with this clash, from amending their nondiscrimination policies in order to exempt groups with “sincerely held religious beliefs” from portions of their policies on the one hand, to litigating the issue in federal court on the other. Funding of student groups that “majority” students may find offensive is still a difficult issue on many campuses, and litigation about this conflict continues. Student press issues, which many may have believed were resolved in 1970s,

have returned to cause conflict and lawsuits. And the struggle between institutional nondiscrimination policies and the rights of the military to have access to college campuses (and their students) continues. Although there may appear to be more questions than answers at this point, administrators and faculty need to remember that most institutions have created some type of a public forum,⁴⁶ and thus expressive speech, associational rights, and other Constitutional protections (under federal or state law) should be carefully protected, even if the majority of students, faculty, administrators, or alumni oppose the viewpoints or the beliefs of certain student organizations.

⁴⁶ Even private institutions may have created a public forum, depending upon their policies and practices. For example, Princeton University's policy of allowing public access to its campus resulted in the university being told that it had created a public forum and, under New Jersey's state constitution, must allow a non-University individual to distribute political flyers. *State v. Schmid*, 423 A.2d 615 (N.J. 1980).