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Rushing to Get Rid of Greek Life and Social Clubs: The Impact of *Bostock* on Single-Sex College Organizations

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— Comment —

RUSHING TO GET RID OF GREEK LIFE
AND SOCIAL CLUBS: THE IMPACT
OF *BOSTOCK* ON SINGLE-SEX
COLLEGE ORGANIZATIONS

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The death of George Floyd in May of 2020 pushed America to a point of reckoning with its history of systemic racism still permeating

in society today.¹ America has been forced to reflect on the injustices our country was built upon, to reimagine a new way forward, and to scrutinize the organizations that are considered staples in our culture and acknowledge how they play a part in racism and other forms of discrimination.² From workplace diversity to culture on college campuses, nearly every aspect of life is under examination to determine ways to dismantle systemic racism and push for a truly inclusive society.³

Greek Life organizations were hit particularly hard by the nation's self-reflection.⁴ Throughout the spring and summer of 2020, Greek Life members disaffiliated⁵ from their chapters in mass,⁶ with some colleges and universities estimating that nearly 10% of all active Greek Life members disaffiliated from their chapters.⁷ Coupled with the mass

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1. Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), <https://time.com/5851855/systemic-racism-america/> [<https://perma.cc/667T-AD93>].
 2. *Id.*
 3. See, e.g., Paul H. Barber, Tyrone B. Hayes, Tracy L. Johnson & Leticia Márquez-Magaña, *Systemic Racism in Higher Education*, SCIENCE (Sept. 18, 2020), <https://science.sciencemag.org/content/369/6510/1440.2.full> [<https://perma.cc/A5QM-VCWR>]; Robert P. Jones, *Racism Among White Christians is Higher than Among the Nonreligious. That's No Coincidence.*, NBC NEWS (July 27, 2020), <https://www.nbcnews.com/think/opinion/racism-among-white-christians-higher-among-nonreligious-s-no-coincidence-ncna1235045> [<https://perma.cc/ZK9Q-JUMS>]; Marguerite Ward & Melissa Wiley, *15 Racist Brands, Mascots, and Logos that Were Considered Just Another Part of American Life*, BUS. INSIDER (July 13, 2020, 10:56 AM), <https://www.businessinsider.com/15-racist-brand-mascots-and-logos-2014-6> [<https://perma.cc/SFJ5-Q368>]; Laura Collins-Hughes, Michael Paulson & Salamishah Tillet, *Four Black Artists on How Racism Corrodes the Theater World*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/theater/systemic-racism-theater.html> [<https://perma.cc/M33B-Z7XS>].
 4. See Ezra Marcus, *The War on Frats*, N.Y. TIMES (Aug. 1, 2020), <https://www.nytimes.com/2020/08/01/style/abolish-greek-life-college-frat-racism.html> [<https://perma.cc/8BLH-3GEH>] (discussing Greek life on college campuses through the lens of systemic racism).
 5. Disaffiliation refers to the process by which a student no longer is associated or considered a member of a Greek Life organization. This can be temporary or permanent. It is also different than becoming "inactive," which is when a fraternity or sorority member is not an active member of the chapter for a given semester, usually because of financial, health, or other extenuating circumstances.
 6. Marcus, *supra* note 4.
 7. The actual number of students has yet to be calculated, but at Vanderbilt University, roughly 10% of Greek Life members disaffiliated. Charlotte Hogg, *Sororities and Fraternities Are Finally Confronting Their Racist Past*, WASH. POST (Oct. 21, 2020), <https://www.washingtonpost.com/>

disaffiliation were calls from students for colleges and universities to abolish Greek Life.⁸ But this is not the first time there has been a push to abolish Greek Life—calls to do so have been loud for decades. Campus Greek Life has had a problematic history filled with racism, sexism, alcohol abuse, and sexual assault.⁹ Colleges and universities are in the tough position of having to regulate a powerful system that many see as a ticking time bomb.

In 2016, Harvard issued a controversial Policy that barred students who participated in single-sex organizations, even those not affiliated with campus, from holding leadership positions, athletic team captain positions, and obtaining prestigious fellowships.¹⁰ As the premiere university in the United States, Harvard's policies and procedures often set an example or serve as a template for other colleges and universities, and this Policy was no exception. Had Harvard finally found a way to conveniently rid itself of Greek Life all while promoting a more inclusive campus? The Policy promised to send sweeping reform across college and university campuses across the country. To prevent this from happening, sororities and fraternities that catered to Harvard students sued the university, arguing that the Policy discriminated against students on the basis of sex.¹¹ Harvard initially fought the lawsuit, but in June of 2020, the school announced it would no longer enforce the

outlook/2020/10/21/sororities-fraternities-are-finally-confronting-their-racist-past/ [https://perma.cc/J2ZF-DXUX].

8. *Id.*
9. See, e.g., Kelly-Leigh Cooper, *The Deadly Problem with US College Fraternities*, BBC (Nov. 17, 2017), <https://www.bbc.com/news/world-us-canada-42014128> [https://perma.cc/URL4-Z7ZA] (noting that there have been over seventy hazing-related deaths since 2000); Lisa Wade, *Why Colleges Should Get Rid of Fraternities for Good*, TIME (May 19, 2017, 9:00 AM), <https://time.com/4784875/fraternities-timothy-piazza/> [https://perma.cc/QL6X-W3T9] (arguing that the death of Timothy Piazza illustrates that Greek Life needs to be banned).
10. Drew Gilpin Faust, *Unrecognized Single-Gender Social Organizations*, HARVARD (Dec. 5, 2017), <https://www.harvard.edu/president/news/2017/unrecognized-single-gender-social-organizations> [https://perma.cc/2CQ6-TQES]. Harvard, as discussed *infra* Part III, has not recognized Greek Life or social clubs as official campus organizations since 1984 and all of the affected organizations are technically “unrecognized.” Jeremy Bauer-Wolf, *Harvard Committee Urges Ban on Fraternities and Sororities*, TIMES HIGHER EDUC. (May 17, 2017), <https://www.timeshighereducation.com/cn/harvard-committee-urges-ban-fraternities-and-sororities> [https://perma.cc/MG9X-8NXY].
11. Complaint at 1, *Kappa Alpha Theta Fraternity, Inc. v. Harvard Univ.*, 397 F. Supp. 3d 97 (D. Mass. 2019) (No. 18-cv-12485); Complaint at 1–2, *Alpha Phi Int’l Fraternity, Inc. v. President and Fellows of Harvard Coll.*, No. 1884CV03729, 2020 WL 741544 (Mass. 2020).

Policy.¹² In announcing its reasoning, Harvard pointed to the Supreme Court's decision in *Bostock v. Clayton County*¹³—which was decided only fourteen days prior to the announcement.

To be clear, Harvard's decision to no longer enforce the single-sex Policy is not binding on other colleges and universities. There was never a federal or state court decision that decided the merits of the fraternity and sorority's claims that the Policy discriminated on the basis of sex. But there is no doubt that having such an elite university interpret a Supreme Court decision this way will deter other colleges and universities from enacting similar policies. And this creates an obstacle in colleges' and universities' ability to respond to the growing public relations problem that is the American Greek Life system.

This Comment seeks to examine the background of the Harvard single-sex Policy and how the Supreme Court's *Bostock* opinion now prevents Harvard from enforcing that Policy. Part I will examine the current status of single-sex organizations on college campuses. Part II will lay out current Supreme Court jurisprudence and Congressional action on the matter. Part III will provide a background into Harvard's Policy. Part IV will analyze the effect of the *Bostock* opinion on Harvard's single-sex Policy. Finally, Part V will explore what this means for colleges who wish to exert more control over their Greek organizations.

As an initial matter, it is important to note that this Comment will only be examining social Greek organizations that are members of the National Panhellenic Conference¹⁴ or the North American Interfraternity Conference.¹⁵ Greek Life in reality is much more expansive. It also includes local Greek organizations,¹⁶ Historically Black Greek

12. Lawrence S. Bacow, *Policy on Unrecognized Single-Gender Social Organizations*, HARVARD (June 29, 2020), <https://www.harvard.edu/president/news/2020/policy-on-unrecognized-single-gender-social-organizations> [https://perma.cc/Y4QR-885B].

13. 140 S. Ct. 1731 (2020).

14. For a membership list, see *National Panhellenic Conference Member Organizations*, NAT'L PANHELLENIC CONF., <https://www.npcwomen.org/about/our-member-organizations/> [https://perma.cc/4MB4-37S5].

15. For a membership list, see *Member Fraternities*, N. AM. INTERFRATERNITY CONF., <https://nicfraternity.org/member-fraternities/> [https://perma.cc/H7C4-L9PH].

16. See Claudia Chow, *Local Chapters Make Greek Life One-of-a-Kind*, OCCIDENTAL (Jan. 1, 2016), <https://www.theoccidentalnews.com/features/2016/01/01/local-chapters-make-greek-life-one-of-a-kind/2882722> [https://perma.cc/NK49-BCGC] (explaining the difference between national sororities and fraternities and local chapters). Some colleges and universities only allow local chapters on campus. See, e.g., *Greek & Housing Groups*, GROVE CITY COLL., <http://www.gcc.edu/Home/Experience-the-Grove/Organizations-Clubs/Greek-Housing-Groups> [https://perma.cc/A879-NSAJ] (last

Letter Organizations,¹⁷ academic honor fraternities,¹⁸ major-specific fraternities,¹⁹ and service fraternities.²⁰ Though all aspects of Greek Life should be examined and reimaged to promote inclusiveness and equality on college and university campuses, these types of Greek organizations are beyond the purview of this Comment.

I. THE CURRENT STATUS OF SINGLE-SEX ORGANIZATIONS ON CAMPUS

College campuses are ripe with opportunities for students to expand their horizons through involvement in various campus groups. Groups may organize over a shared interest in all kinds of subject matter. These groups can include political groups,²¹ charitable organizations,²² and major-specific clubs designed to provide students networking

visited Feb. 22, 2021). Other colleges have found it beneficial to allow for a mixture. *See, e.g., Fraternity Listing*, CASE W. RSRV. UNIV., <https://community.case.edu/greeklife/fraternities/> [<https://perma.cc/JR95-UBR2>] (last visited Feb. 22, 2021).

17. Kathleen E. Gillon, Cameron C. Beatty & Cristobal Salinas Jr., *Race and Racism in Fraternity and Sorority Life: A Historical Overview*, NEW DIRECTIONS FOR STUDENT SERVS., Spring 2019, at 9, 11 (2019). These Greek organizations founded at historically Black colleges and universities chose not to become members of the same national umbrella organizations that have traditionally served predominately white social fraternities and sororities. Instead, these historically Black colleges and universities created the National Panhellenic Council, which aims to promote social change through brother and sisterhood. *About the NPHC*, NAT'L PAN-HELLENIC COUNCIL, <https://nphcq.com/millennium1/about/> [<https://perma.cc/KD5S-GXDR>] (last visited Feb. 22, 2021).
18. Examples include Alpha Chi (scholarship), Alpha Kappa Mu (scholarship), Chi Epsilon (civil engineering), Mortar Board (student leadership), and Sigma Theta Tau (nursing). BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES 593, 600–01, 609–10, 630–32, 680–81 (John Robson ed., 19th ed. 1977). These organizations tend to be co-ed. *See id.* at 593–711.
19. Examples include Chi Beta Phi (science), Kappa Pi (arts), and Phi Lambda Upsilon (chemistry). *Id.* at 733–34, 744–45, 750–51. These organizations tend to be co-ed. *See id.* at 719–73.
20. Examples include Alpha Phi Omega and Gamma Sigma Sigma. *Id.* at 711–16. These organizations tend to be co-ed. *See id.* at 711–18.
21. *See, e.g.,* STUDENTS FOR LIBERTY, <https://studentsforliberty.org/north-america/> [<https://perma.cc/LG7L-NQG5>] (last visited Feb. 22, 2021); COLL. DEMOCRATS OF AM., <https://democrats.org/cda/> [<https://perma.cc/BM92-YHCP>] (last visited Feb. 22, 2021).
22. *See, e.g., #FortheKids*, CHILD.'S MIRACLE NETWORK DANCE MARATHON, <https://dancemarathon.childrensmiraclenetworkhospitals.org/> [<https://perma.cc/B3ZX-MSCF>] (last visited Feb. 22, 2021); CAMP KESEM, <https://www.campkesem.org/> [<https://perma.cc/Z2KH-E5KY>] (last visited Feb. 22, 2021).

opportunities.²³ In general, college and university campuses aim to be inclusive and tolerant of different upbringings, viewpoints, and socio-economic status.²⁴ But some college organizations have requirements to become members, which inherently goes against the inclusiveness campuses purport to value. For example, some organizations require a certain GPA to be offered membership.²⁵ Other performance-based groups may require an audition.²⁶ But the most controversial types of groups, of which social Greek organizations are a part of, are those that require members to identify as a certain sex for membership.²⁷

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23. See, e.g., *About AMA*, AM. MKTG. ASS'N., <https://www.ama.org/about-ama/> [<https://perma.cc/6DJU-JA7Y>] (last visited Feb. 22, 2021); *About ASDA*, AM. STUDENT DENTAL ASS'N., <https://www.asdanet.org/about-asda> [<https://perma.cc/EHF6-8HSM>] (last visited Feb. 22, 2021).
 24. For example, Case Western Reserve University's Core Values specifically reference inclusiveness and diversity, writing that the school values "[a]ppreciation for the distinct perspectives and talents of each individual." *Mission, Vision + Core Values*, CASE W. RSRV. UNIV., <https://case.edu/about/mission.html> [<https://perma.cc/78X2-5BEG>] (last visited Feb. 22, 2021). Similarly, Ohio State University's mission states its goal is to "[t]o provide an unsurpassed, student-centered learning experience led by engaged world-class faculty and staff, and enhanced by a globally diverse student body." *Mission, Vision, Values and Goals*, OHIO STATE UNIV., <https://oaa.osu.edu/mission-vision-values-and-core-goals> [<https://perma.cc/7796-WLWU>] (last visited Feb. 22, 2021).
 25. See, e.g., *Scholar Eligibility*, NAT'L SOC'Y OF COLLEGIATE SCHOLARS, <https://nscs.org/member-eligibility/> [<https://perma.cc/XVL3-TRZE>] (last visited Feb. 22, 2021). GPA requirements exist throughout high school organizations as well, the most common being the National Honors Society, which requires a 3.0 GPA on a 4.0 scale for acceptance. *How to Become a Member*, NAT'L HONOR SOC'Y, <https://www.nhs.us/students/membership/how-to-become-a-member/> [<https://perma.cc/UR9T-V6JJ>] (last visited Feb. 22, 2021).
 26. Most choir, music, theatre, and a cappella groups require some sort of audition. See, e.g., *Frequently Asked Questions*, VILLANOVA UNIV., https://www1.villanova.edu/villanova/studentlife/be_engaged/music/faqs.html [<https://perma.cc/BM4S-CJTE>] (last visited Feb. 22, 2021).
 27. Joshua Block, *Colleges Should Not Fund Student Groups that Discriminate*, JURIST (June 25, 2014), <https://www.jurist.org/commentary/2014/06/joshua-block-student-discrimination/> [<https://perma.cc/26V9-2WUL>]. For example, Pi Beta Phi's website explicitly says: "Pi Beta Phi is a women's organization for individuals who live and self-identify as women." *Join Pi Phi*, PI BETA PHI, <https://www.pibetaphi.org/join> [<https://perma.cc/68ZD-6Z6J>] (last visited Feb. 22, 2021). There is a fine line that social Greek organizations must walk in order to be inclusive while still maintaining their federal protections as single-sex organizations, as discussed *infra* Part II.B. For an interesting look at how these policies become more complicated with transgender potential new members, see Stevie V. Tran, Note, *Embracing Our Values: Title IX, the "Single-Sex Exemption," and Fraternities' Inclusion of Transgender Members*, 41 HOFSTRA L. REV. 503, 516 (2012).

Single-sex organizations are typically some of the oldest and most established organizations on campus. The most obvious and widespread are Greek organizations, where fraternities cater to men and sororities cater to women.²⁸ But, at some of the elite Ivy league universities, the wealthiest and most qualified men are members of “social clubs.”²⁹ Traditionally, Greek organizations and social clubs have a history of promoting underage-drinking and committing sexual assault at parties that their members throw.³⁰ More recently, as the concept of gender and sex become more fluid, there is concern that Greek Life organizations and social clubs discriminate against members of the other sex and those who do not identify as strictly male or female. Thus, there is a growing argument that the continuation of single-sex organizations is an antiquated tradition that colleges and universities should abandon.³¹

A. Greek Life: Where Binge Drinking, Hazing, and Sexual Assault Run Rampant

The first fraternal organization, Phi Beta Kappa, was founded in 1776 as a literary and social club at the College of William and Mary.³² It had the characteristics found in most present-day fraternities: an emphasis of friendship, oaths, ritual, a badge, and a desire for nationwide expansion.³³ In 1779, the organization expanded and chartered chapters at Harvard and Yale.³⁴ Sororities followed in 1851 at Wesleyan Female College with the Adelphean Society, now known as Alpha Delta Pi.³⁵ Kappa Alpha Theta was founded in 1870 at DePauw University, which was the first sorority to be founded with

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28. Maura Hohman & Josh Moody, *What to Know Before Joining Greek Life*, U.S. NEWS & WORLD REP. (Dec. 30, 2019), <https://www.usnews.com/education/best-colleges/articles/2015/09/17/what-to-ask-before-joining-greek-life> [https://perma.cc/DQC3-JUTC].
29. Dana Schuster, *Inside the Harvard Clubs That Groom the 1%*, N.Y. POST (July 22, 2017), <https://nypost.com/2017/07/22/harvard-wants-to-ban-elite-social-clubs-to-be-more-inclusive/> [https://perma.cc/835D-RF4C].
30. See THE HIGHER EDUC. CTR. FOR ALCOHOL AND OTHER DRUG ABUSE AND VIOLENCE PREVENTION, FRATERNITY AND SORORITY MEMBERS AND ALCOHOL AND OTHER DRUG USE (2008) (finding that fraternities and sororities were the main source of binge-drinking culture on college campuses which in turn leads to a higher incidence of sexual assault).
31. See Tran, *supra* note 27, at 527 (examining Title IX policies as they relate to Greek Life’s acceptance of transgender members).
32. BAIRD’S MANUAL OF AMERICAN COLLEGE FRATERNITIES, *supra* note 18, at 5.
33. *Id.*
34. *Id.*
35. *Id.* at 7.

Greek letters.³⁶ Sororities and fraternities eventually created councils to govern all the organizations, the National Panhellenic Conference³⁷ and the North American Interfraternity Conference.³⁸

As the Baird's Manual notes, "[t]he American college fraternity is an American institution and the chapter in the form it ideally exists on the college campus is a miniature of the larger American democracy."³⁹ Fraternities are formed through mutual selection where younger members share a common purpose to promote the well-being of the group and the older members aim to teach and guide the younger members in their training.⁴⁰ Until the middle of the nineteenth century, Greek organizations were prohibited on most college campuses and usually required faculty members supervise meetings.⁴¹ Francis Wayland, president of Brown University from 1827 until 1855 once wrote, "I would incomparably rather resign my place than allow young men the right to meet in secret when they choose without the knowledge of the Faculty."⁴² Because of widespread prohibitions on meeting, a major component of fraternities and sororities was, and still is, secrecy.

An important part of this secrecy is each fraternity or sorority's ritual. The ritual is a somber ceremony where initiated members reflect on the purpose for their fraternity and proclaim their loyalty to these ideals and to their brothers.⁴³ Though fraternity values can be publicly proclaimed, each organization's ritual is secret, and Greek members are sworn to secrecy as to the specifics of the ceremonies.⁴⁴ Ritual ceremonies bind members and promote social, scholastic, and moral growth.⁴⁵ Ritual ceremonies are the same across all chapters of one national organization, making the members bound to a greater national

36. *Id.* at 450.

37. *Id.* at 37–39.

38. *See id.* at 29–36. The North American Interfraternity Conference was previously known as the National Interfraternity Conference. *See The Interfraternity Council*, UNIV. R.I., <https://web.uri.edu/greek/the-interfraternity-council/> [<https://perma.cc/8TAD-C26F>] (last visited May 19, 2021).

39. BAIRD'S MANUAL OF AMERICAN COLLEGE FRATERNITIES, *supra* note 18, at 1.

40. *Id.* at 2.

41. NICHOLAS L. SYRETT, *THE COMPANY HE KEEPS: A HISTORY OF WHITE COLLEGE FRATERNITIES* 32 (2009).

42. *Id.*

43. *Id.* at 34.

44. *Id.* at 32–33.

45. *Id.* at 34.

mission.⁴⁶ Although many fraternities have similar ritual ceremonies, the secrecy of the ceremony differentiates members and promotes loyalty.⁴⁷

The Greek Life structure on college and university campuses is composed of many different people—students, alumni, and unaffiliated members. First are the individual Greek Life members.⁴⁸ These members are recruited, typically as freshmen or sophomores, by older members of chapters and taught the ways of the Greek organizations. Second are the leaders of individual college chapters.⁴⁹ The leadership is typically made of older members and advised by alumni. Third are the national chapter headquarters, which govern all the chapters of one Greek organization.⁵⁰ Fourth are the National Panhellenic Conference and the Interfraternity Conference which governs different social fraternities and sororities.⁵¹ These umbrella organizations can set the standards for all the other member organizations.⁵² Fifth are the individual colleges' and universities' Greek Life offices, which can oversee both the individual members and chapters on its own campus and set forth standards for continued recognition by the school.⁵³ Sixth is the Department of Education, which primarily influences Greek Life through its administrative decisions relating to Title IX enforcement.⁵⁴

Although social, scholastic, and moral growth are at the heart of Greek organizations' missions, Greek organizations have long exhibited problematic behavior that seems to contradict these values. The behaviors school administrators are likely most concerned about include racism, homophobia, sexual assault, and alcohol and substance abuse.⁵⁵

46. *Fraternity Secrets and Rituals*, THE FRATERNITY ADVISOR, <https://thefraternityadvisor.com/fraternity-secrets-and-rituals/> [https://perma.cc/6LXB-G6BY] (last visited Feb. 22, 2021).

47. SYRETT, *supra* note 41, at 34.

48. Tanya Asim Cooper, *#SororityToo*, 2020 MICH. ST. L. REV. 355, 377 (2020).

49. *Id.* at 378.

50. *Id.* at 380.

51. *Id.* at 381.

52. *Id.*

53. *Id.* at 382.

54. *Id.* at 383.

55. *See* FRATERNITY AND SORORITY MEMBERS AND ALCOHOL AND OTHER DRUG USE, *supra* note 30 (finding that fraternities and sororities were the main source of binge-drinking culture on college campuses, which in turn leads to a higher incidence of sexual assault); *see also* SYRETT, *supra* note 41, at 229–84 (explaining the historical context of alcohol abuse and violence); ALAN D. DeSANTIS, *INSIDE GREEK U.: FRATERNITIES, SORORITIES, AND THE PURSUIT OF PLEASURE, POWER AND PRESTIGE* 43–75

First, Greek organizations were created for white students and there have been issues in acceptance of students of color. One of the first examples came in 1948 when a Black male named Thomas Gibbs pledged Phi Kappa Psi of Amherst. Despite the local chapter accepting Gibbs and wanting him to be a part of the brotherhood, the national chapter yanked the chapter's charter for admitting a man of color to the organization.⁵⁶ After 1965, Title VI of the Civil Rights Act⁵⁷ required all universities that received public funds to desegregate.⁵⁸ Greek organizations enforced, through their alumni, policies that prevented the acceptance of Black students.⁵⁹ Although not representative of most Greek organizations' willingness to accept those of different races, publicized stories such as this certainly shape the public's perception of Greek organizations.

Second, Greek organizations sometimes attempt to regulate their members' sexual activity. In fraternities, homosexual brothers are occasionally shunned by other brothers. In one account, an Indiana fraternity brother came out as gay to his brothers, only to walk by the fraternity house later that day to see a sign hanging outside that said, "NO FAGS IN *OUR HOUSE*."⁶⁰ Another fraternity male recalled when his fraternity "kicked a kid out just because he talked with a lisp and the brothers thought that meant he was gay."⁶¹ Not surprisingly, sororities tend to regulate the sexual activities of their members too, but they do so by eliminating the "trashy" girls by black-balling them for questionable morals during the recruitment process.⁶² Put in more simple terms, "questionable morals" means that the woman in question has been heard to "screw[] around a lot."⁶³ Perhaps illustrative of systemic misogyny and a double-standard, fraternity men are praised for their sexual exploits with different women, while sorority women are expected to be more prudent.⁶⁴

(2007) (discussing the dynamics that lead to alcohol abuse and sexual assault).

56. SYRETT, *supra* note 41, at 248–49.

57. *Id.* at 250.

58. *See* 42 U.S.C. § 2000d (2018).

59. SYRETT, *supra* note 41, at 250. Some national chapters adopted special exceptions at the more prestigious and liberal colleges and universities to prevent expulsion from those campuses. *Id.*

60. *Id.* at 293.

61. DESANTIS, *supra* note 55, at 57.

62. *Id.* at 61–62.

63. *Id.* at 61.

64. *Id.* at 58.

Fraternities are also known for objectifying women on their campuses, which in turn creates a toxic culture among sororities. For example, some chapters require brothers to provide an update at chapter meetings on who each brother slept with the past week.⁶⁵ Stories from women in sororities have also shown that women in these organizations are held to unrealistic body expectations. Some sororities critique their members' bodies⁶⁶ while other chapters place a lot of pressure on members to improve or maintain their reputations on campus.⁶⁷ The pressure fraternity men place on sorority women to be beautiful and thin creates a perpetuating cycle.⁶⁸ One sorority woman explained the problem when she saw a "fat girl" attempting to rush: "I thought, Wow, I can't believe she is here. . . . No house wants big girls. If you get that reputation, everything falls apart [i.e., no fraternities will party with you; no cute girls will pledge you]. It's terrible to say but" ⁶⁹ Unfortunately, stories like this have plagued Greek Life since the post-WWII era.⁷⁰

In more recent years, a string of high-profile hazing incidents resulting in the death of pledges has renewed public outrage and renewed calls for colleges and universities to ban Greek organizations. One of the most well-known hazing deaths occurred at the Pennsylvania State University chapter of Beta Theta Pi in the spring of 2017.⁷¹ Timothy Piazza, a 19-year-old rush of Beta Theta Pi, died after a hazing event where he consumed copious amounts of alcohol. Despite security camera footage showing Piazza falling down a flight of stairs unconscious, no one called for help until the next morning.⁷² Piazza's death resulted in eighteen members of the fraternity being indicted on criminal charges ranging from involuntary manslaughter to furnishing

65. SYRETT, *supra* note 41, at 298.

66. See Phoebe Morgan, *Opinion: Words by Phoebe Morgan*, MARIE CLARE (Aug. 10, 2017), <https://www.marieclaire.co.uk/opinion/sorority-528009> [<https://perma.cc/6BCT-XAT8>] ("One girl I knew was made to sit on top of a washing machine, while her sisters circled the places on her body where her 'fat' jiggled.").

67. See Caity Weaver, *The Most Deranged Sorority Girl Email You Will Ever Read* (Apr. 18, 2013, 11:46 AM), <https://gawker.com/5994974/the-most-deranged-sorority-girl-email-you-will-ever-read> [<https://perma.cc/LC3R-J9T7>].

68. DESANTIS, *supra* note 55, at 119.

69. *Id.*

70. See generally SYRETT, *supra* note 41, at 229–84.

71. Wade, *supra* note 9.

72. *Id.*

alcohol to a minor.⁷³ Another high-profile hazing-related death also occurred in 2017 on Florida State University's campus.⁷⁴ Andrew Coffey was a Pi Kappa Phi pledge who died of alcohol intoxication following a hazing event.⁷⁵ With the power of the internet and social media, these stories, though sadly not new to Greek Life, are now plastered on the internet for all of America to see.

Even more recently, following the death of George Floyd and Breonna Taylor, and with more attention on an invigorated Black Lives Matter movement, fraternities and sororities have also been called out for their lack of diversity. It is undeniable that these organizations were founded by wealthy, educated, white individuals.⁷⁶ The idea is to recruit like-minded people, and chapters can accomplish this indirectly by making membership very expensive and making the recruitment process not transparent to potential new members. The fees to even go through the recruitment process can sometimes be over \$100.⁷⁷ Once a student becomes a member, dues can sometimes be more than \$4,000 each semester.⁷⁸ Additionally, fraternities and sororities often give preference of membership to what are called "legacies," those who are relatives of previous members.⁷⁹ These barriers continue to make it difficult for

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73. *Beta Theta Pi Fraternity and 18 Members Charged in the Death of Timothy Piazza: 8 Facing Manslaughter Charges*, CTY. OF CENTRE: OFF. OF THE DIST. ATT'Y (May 5, 2017), <https://assets.documentcloud.org/documents/3700902/Notice-11-FINAL-Charges-and-Presentment.pdf>.
74. Taylor Swaak, *Who Was Andrew Coffey? Nine Charged for FSU Hazing Death*, NEWSWEEK (Jan. 17, 2018), <https://www.newsweek.com/who-was-andrew-coffey-fsu-hazing-death-charged-783491> [<https://perma.cc/E98W-3K2X>]. In January 2020, Florida's First District Court of Appeal reversed a lower court's dismissal of the felony hazing charge against one of the defendants in the case. *State v. Petagine*, 290 So. 3d 991 (Fla. Dist. Ct. App. 2020), *reh'g en banc denied*, 290 So. 3d 1106 (mem.), *appeal denied*, 2020 WL 4524716 (Fla. Aug. 5, 2020).
75. Swaak, *supra* note 74.
76. SYRETT, *supra* note 41, at 211–12.
77. *See Fraternity Recruitment Frequently Asked Questions*, MISS. ST. UNIV. INTERFRATERNITY COUNCIL, <https://www.union.msstate.edu/sites/www.union.msstate.edu/files/FAQ%20IFC.pdf> [<https://perma.cc/9S9W-ZKWQ>] (last visited May 18, 2021) (explaining the cost to rush fraternities is \$100 and that fee covers the cost of T-shirts and other operational costs).
78. *See Financial Information*, UNIV. OF ALA., <https://ofsl.sa.ua.edu/prospective-students/financial-info/> [<https://perma.cc/9NP2-F2MS>] (last visited Mar. 4, 2021) (laying out the cost of being in a fraternity and sorority each semester).
79. *See Legacies as Defined by Each NPC Sorority at Auburn*, AUBURN, <https://cws.auburn.edu/shared/content/files/2041/legacychart.pdf> [<https://perma.cc/F5RB-829U>] (last visited May 18, 2021) (highlighting that different chapters have different definitions of a legacy). *But see Kappa Alpha Theta Legacy Update*, KAPPA ALPHA THETA, <https://www.kappa>

students of color to join Greek Life, and even if they do, students of color do not have brothers or sisters that look like them.⁸⁰ As an Emory University newspaper wrote, “Systemic racism is prevalent in the recruitment process, traditions and toxic culture of Greek Life, rendering it inhospitable and damaging to BIPOC students.”⁸¹

B. Social Clubs: Only for the Most Elite

Social clubs, also sometimes referred to as “finals clubs,” are traditionally single-sex organizations that are differentiated from fraternities and sororities by a highly selective invitation process available only at elite Ivy League universities. Students cannot join until their sophomore year, and students must be invited to apply for membership.⁸² Most clubs are actually corporations whose finances and assets are run by social club alumni.⁸³ Social clubs are most famously found at Harvard, although other Ivy League universities have them on campus as well⁸⁴—Princeton, Yale, University of Pennsylvania, Brown, Dartmouth, Columbia, and Cornell all have secret collegiate societies.⁸⁵

alphatheta.org/blog/fraternity/kappa-alpha-theta-legacy-policy-update/[https://perma.cc/7LT3-S9V6] (last visited Mar. 4, 2021) (eliminating preferential treatment for legacies during the recruitment process in response to the death of George Floyd in the spring of 2020).

80. The National Panhellenic Conference published a resource guide in August of 2020 to help member organizations foster a more inclusive process, tackling tokenization within the membership experience, and cultivating equitable growth practices. *Cultivating a More Inclusive Recruitment Experience*, NAT’L PANHELLENIC COUNCIL (Aug. 2020), <https://www.npcwomen.org/wp-content/uploads/sites/2037/2020/08/NPC-Cultivating-a-More-Inclusive-Recruitment-Experience-Resource-Guide.pdf> [https://perma.cc/29UT-2RQU]. It is too soon to see if these practices or guidance will make a significant change in the culture of Greek Life across college and university campuses.
81. The Editorial Board, *Emory Greek Life, You Have a Racism Problem*, EMORY WHEEL (Oct. 28, 2020), <https://www.emorywheel.com/emory-greek-life-you-have-a-racism-problem/> [https://perma.cc/2FAA-4WF8].
82. C. Ramsey Fahs, *A Guide to Harvard’s Relationship with Finals Clubs*, HARV. CRIMSON (May 6, 2016), <https://www.thecrimson.com/article/2016/5/6/final-clubs-explained/> [https://perma.cc/TGA4-PPFK].
83. *Id.*
84. For a historical perspective of these secret societies, see Jennifer Domagal, *Keeping Secrets: Student Secret Societies in Historical Context*, 23 VT. CONNECTION, Jan. 2002, art. 6, at 1.
85. See also Mackenzie Crane, *The Tap: An Examination of the Controversy of Secret Societies on College Campuses* (2015) (Master’s thesis, University of South Carolina) (noting that these secret societies are not exclusive to Ivy League schools, using the secret society named The Machine at the University of Alabama as an example).

Social clubs are unaffiliated with the universities where their members attend, mostly to avoid administrators forcing them to become co-ed.⁸⁶ But that was not always the case. In 1990, two of Princeton's all-male social clubs, Tiger Inn and Cottage Club, were sued by a woman who aimed to bicker—the process by which individuals attempt to join social clubs.⁸⁷ Sally Frank filed suit when she was denied consideration for membership in the all-male social clubs.⁸⁸ Cottage Club reversed its single-sex policy and began to admit women in 1986, thereby settling the lawsuit with Frank.⁸⁹ Tiger Inn, however, refused to accept women, arguing that they had the freedom to associate with those of the organization's choosing.

The New Jersey Supreme Court found that because “the Clubs and Princeton have an interdependent relationship,”⁹⁰ they were subject to the gender-based anti-discrimination laws for places of public accommodation.⁹¹ Accordingly, the New Jersey Supreme Court held that the organizations were required to admit women to membership.⁹² Thus, remaining single-sex social clubs at elite universities made the decision to disaffiliate from their respective universities to avoid being required to become co-ed organizations.⁹³

At Harvard, where social clubs are the most prominent, there are six all-male clubs, five all-female clubs, and two co-ed clubs.⁹⁴ Many of the traditionally all-male clubs own real estate in Harvard Square, with the clubhouses usually including dining areas, libraries, and a game room.⁹⁵ Most are staffed with chefs and other staff members, and serve lunch and dinner meals throughout the week.⁹⁶ In 2014, Dean Rakesh Khurana said he was, “always suspicious of a club that builds itself on

86. Fahs, *supra* note 82; see Shera S. Avi-Yonah, Jonah S. Berger & Caroline S. Engelmayr, *Harvard Is Without All-Female Social Groups After Last Three Holdouts Agree to Go Co-Ed*, HARV. CRIMSON (Aug. 24, 2018), <https://www.thecrimson.com/article/2018/8/24/no-more-female-clubs/> [https://perma.cc/A6AB-ERAA].

87. Frank v. Tiger Inn, 576 A.2d 241 (N.J. 1990).

88. *Id.* at 244.

89. *Id.* at 244 n.1.

90. *Id.* at 260.

91. *Id.*

92. *Id.* at 261.

93. Fahs, *supra* note 82.

94. One of the co-ed clubs provide women with only provisional membership. *Id.*

95. Schuster, *supra* note 29.

96. *Id.*

gendered exclusivity.”⁹⁷ In the fall of 2015, Harvard President Drew Faust criticized the clubs for their “gender exclusivity and the potential for alcohol abuse and sexual assault on their off-campus properties.”⁹⁸ These social clubs face a lot of the same criticisms as social fraternities and sororities: criticisms regarding racism, sexism, alcohol abuse, and sexual assault.⁹⁹ The biggest difference is the type of student that these social clubs attract are among the wealthiest and connected individuals on an already highly selective campus. Money and influence are undoubtedly a reason for the clubs’ continued longevity despite such harsh criticism from the university itself.

*C. Why Don't Schools Ban Single-Sex Organizations?
It's All About the Money*

There are a few reasons why schools have not outright banned Greek Life and social clubs from their campuses. First is the unmistakable threat of litigation. Greek organizations are national organizations with hundreds of thousands of wealthy and powerful alumni.¹⁰⁰ North-American Interfraternity Conference President & CEO Pete Smithhisler said of Greek Life, “A wholesale removal of recognition for all fraternities violates students’ right to the freedom of association—enrolled students should be able to join any recognized organization at the time of their choosing.”¹⁰¹ The Fraternity and Sorority Political Action Committee was created in 2005 as a lobbying firm in D.C. to promote the preservation of the fraternal experience in federal policy.¹⁰² Every year, the organization raises hundreds of thousands of dollars to defend lawsuits threatening the Greek Life

97. Fahs, *supra* note 82.

98. Theodore R. Delwiche & Noah J. Delwiche, *Fox Club Accepts Group of Women to Its Membership*, HARV. CRIMSON (Oct. 26, 2015), <https://the.crimson.com/article/2015/10/25/fox-accepts-women-to-join> [https://perma.cc/LTS2-3GDN].

99. *Id.*

100. *The Wealthiest Fraternities*, GREEK RANK (Mar. 31, 2019), <https://www.greekrank.com/the-wealthiest-fraternities/> [https://perma.cc/J7QA-5B6K].

101. Julia Ryan, *How Colleges Could Get Rid of Fraternities*, ATLANTIC (Mar. 3, 2014), <https://www.theatlantic.com/education/archive/2014/03/how-colleges-could-get-rid-of-fraternities/284176/> [https://perma.cc/JX5W-B95Z].

102. FRATERNITY AND SORORITY POL. ACTION COMM., <http://fspac.org/> [https://perma.cc/45WC-24EU] (last visited Mar. 7, 2021).

system.¹⁰³ This is in addition to the thousands of dollars individual Greek Life organizations pledge to pursue or defend lawsuits.¹⁰⁴

Second, statistics show that alumni of Greek organizations, specifically fraternity men, give more money to their alma maters than non-Greek alumni.¹⁰⁵ One study found that Greek Life members donated almost 9% more than their non-Greek counterparts.¹⁰⁶ At the University of Indiana, former members of Greek Life account for only 19% of the alumni database for the Indiana University Foundation, the fundraising arm of the university, but account for 60% of donations.¹⁰⁷

103. *See id.*

104. *See, e.g., Standing Up to Harvard*, KAPPA ALPHA THETA (Dec. 3, 2018), <https://www.kappalphatheta.org/blog/fraternity/standing-up-to-harvard> [<https://perma.cc/JGP4-S2WY>] (pledging “\$50,000 for three years” for the (at the time) pending litigation with Harvard).

105. Ryan, *supra* note 101.

106. ALBERT A. OKUNADE & PHANINDRA V. WUNNAVA, ALUMNI GIVING OF BUSINESS EXECUTIVES TO THE ALMA MATER: PANEL DATA EVIDENCE AT A LARGE METROPOLITAN RESEARCH UNIVERSITY 6 (2011).

107. Laura Camera, *Is Greek Life Worth Saving?*, U.S. NEWS & WORLD REP. (Dec. 4, 2017, 3:52 PM), <https://www.usnews.com/news/education-news/articles/2017-12-04/is-greek-life-worth-saving> [<https://perma.cc/6KJ8-N8D8>]; *see also* Cassandra Kidwell, *Fundraising and Spirit: Breaking Down Penn State Greek Life’s Impact on THON*, DAILY COLLEGIAN (Oct. 4, 2019), https://www.collegian.psu.edu/news/article_76cb5c42-e63e-11e9-a35c-7bcfe31b0574.html [<https://perma.cc/G37R-QJP2>] (noting the percentage of donations coming from Greek organizations).

Some small liberal arts colleges like Colby,¹⁰⁸ Bowdoin,¹⁰⁹ Amherst,¹¹⁰ and Williams¹¹¹ were able to successfully get rid of existing Greek organizations on their campus.¹¹² But banning Greek Life at the liberal

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108. A student initially sued the school over the ban in 1984, and the Maine Supreme Court found in favor of Colby. *Phelps v. President & Trs. of Colby Coll.*, 595 A.2d 403, 407 (Me. 1991) (challenging that the policy was a violation of the Maine Civil Rights Act because it impeded the right of association and holding that courts should not “mediate disputes between private parties exercising their respective rights of free expression and association”). Legal scholars are skeptical, however, as to the merits of the court’s opinion in this case. See Martha T. McCluskey, *Privileged Violence, Principled Fantasy, and Feminist Method: The Colby Fraternity Case*, 44 ME. L. REV. 261, 274–78 (1992) (noting that the Maine Supreme Court failed to actually resolve the issue at hand). Despite this, the ban still went into effect. *Id.* at 273–74. But see Chris Quintana, *Secret Frats, and What Else to Look Out for During College Fraternity Rush*, USA Today (Sep. 5, 2019, 7:02 AM), <https://www.usatoday.com/story/news/education/2019/09/05/fraternity-rush-greek-life-college-frat-benefits-hazing/2178676001/> [<https://perma.cc/2XS4-RER8>] (noting that although the school has outright banned Greek Life, underground chapters had been thriving for more than thirty years after the ban); Julia Hanauer-Milne, *The End: Divisive Demise of Colby’s Fraternities Was the End of a Tradition and the Beginning of a New Era*, COLBY MAG., Apr. 2006, at 16, 21 (noting that the class of 1984 has some of the lowest giving rates of all classes).
109. In 1988, the Henry Report found that almost all cases of sexual assault and alcohol abuse occurred in fraternity houses. Thus, the report recommended that fraternities and sororities become co-ed. Emily Wayrauch, *In and Out of Greek Life*, BOWDOIN ORIENT (Oct. 21, 2016), <https://bowdoinorient.com/bonus/article/11481> [<https://perma.cc/R6Q9-FAQA>]. The school required Greek organizations to become co-ed and later implemented a policy to expel students that failed to follow the policy. *Id.*
110. The school banned the use of campus facilities and resources for Greek organizations in 1984. Sophie Murguia, *Board Bans Off-Campus Fraternities*, AMHERST STUDENT (May 7, 2014), <https://amherststudent.amherst.edu/article/2014/05/07/board-bans-campus-fraternities.html> [<https://perma.cc/2S5Z-ARUB>]. However, unrecognized fraternities persisted off campus. In 2014, the school announced participation in such organizations would be considered violations of the Honor Code. *Id.* As discussed *infra* Part III, Harvard essentially adopted the same policies as Bowdoin and Amherst. The faculty committee’s report proposing the single-sex policy wrote of these schools’ policies: “It is unlikely that Harvard can improve on the policies of these peer institutions.” Hannah Natanson & Derek G. Xiao, *Banned?*, HARV. CRIMSON (Sept. 21, 2017), <https://www.thecrimson.com/article/2017/9/21/banned-scrutiny/> [<https://perma.cc/P2AW-GSYX>].
111. Greek organizations have been banned since 1962 and participation in such organizations will subject students to disciplinary action. *Fraternities*, in STUDENT HANDBOOK, WILLIAMS, <https://dean.williams.edu/student-handbook/fraternities/> [<https://perma.cc/5P9G-RC5M>].
112. As legal scholar Mark Bauer notes, “It is, however, ironic, that at some of the nation’s finest liberal arts colleges, inspiring students to confront and embrace knowledge, fraternities must meet in secret to avoid expulsion.”

arts colleges without feeling the impact of donations is not as easily transferrable to large state universities, where upwards of 30 to 40% of the undergraduate student body is involved in Greek Life.¹¹³

And third, despite recent editorials and public outcry, students still want to participate in Greek Life. A 2021 Gallup Poll found that affiliated members were significantly more likely to have had a positive college experience, secured a job prior to graduation, and report greater satisfaction with their post-graduate life when compared to their unaffiliated peers.¹¹⁴ Fraternity and sorority members are also three times more likely to take advantage of experiential learning opportunities while in college.¹¹⁵ Further, roughly 42% of Greek members reported that a member of their sorority or fraternity helped them secure a full-time job or internship, highlighting the value of the connections Greek organizations can provide.¹¹⁶ More so, some of America's most influential leaders are fraternity alumni: "15% of Fortune 100 chief executive officers, 44% of U.S. Presidents, and 31% of Supreme Court Justices."¹¹⁷ Until student interest dies down, schools will allow for social Greek Life organizations to stay on campus.

II. WHAT HAVE THE SUPREME COURT AND CONGRESS SAID ABOUT SINGLE-SEX ORGANIZATIONS?

Single-sex organizations pose an interesting question as to how to handle the intersectionality of the right to associate freely and the public interest in prohibiting sex-based discrimination. The Supreme Court has issued rulings that help us understand how the Court may come down on these issues. Further, Congress has passed legislation prohibiting discrimination based on sex via Title IX, but explicitly exempted Greek Life organizations.

Mark D. Bauer, *Freedom of Association for College Fraternities After Christian Legal Society and Citizens United*, STETSON U. COLL. OF L. LEGAL STUD. RSCH. PAPER SERIES, 2013-4, at 9 n.48.

113. See, e.g., *Campus Engagement*, TRANSYLVANIA UNIV., <https://www.transy.edu/campus/engagement/campus-engagement> [https://perma.cc/LA4S-N9GX] (last visited Mar. 8, 2021) ("[A]pproximately 42 percent of the student body is a member of a fraternity or sorority."); Lauren Browning, *The 20 Most Greek Colleges in the U.S.*, BUS. INSIDER (Apr. 1, 2015), <https://www.businessinsider.com/most-greek-colleges-in-the-us-2015-3> [https://perma.cc/WD75-JW2C].

114. GALLUP, FRATERNITIES AND SORORITIES: EXPERIENCES AND OUTCOMES IN COLLEGE, WORK AND LIFE 3-7 (2021).

115. *Id.* at 9.

116. *Id.* at 13.

117. Tran, *supra* note 27, at 522.

A. What the Supreme Court Has Said About the Freedom of Association

The Supreme Court first recognized the constitutionally protected right of association in 1958 in *NAACP v. Alabama*.¹¹⁸ In that case, the state of Alabama sought to enforce a requirement that the NAACP provide its membership list to the state.¹¹⁹ The Court, per Justice Harlan, declined to enforce the state's requirement and instead looked at the nexus between free speech and assembly. Justice Harlan noted that the freedom of speech and association could be discouraged either directly or indirectly by governmental interference.¹²⁰ Alabama failed to demonstrate a need for the membership list that would justify the potential harms the members may face, therefore making the demand unconstitutional.¹²¹ Of the right of association, Justice Harlan wrote: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."¹²²

When states passed anti-discrimination laws, the Supreme Court had to address how these laws may require private organizations to admit diverse individuals into their memberships. The first in this line of cases was *Roberts v. United States Jaycees*,¹²³ which involved an all-male Jaycees chapter in Minnesota.¹²⁴ The chapter voted to admit women as members, but the national organization responded by attempting to revoke the Minnesota charter. The Minnesota chapter filed a complaint with the Minnesota Department of Human Rights alleging that the Minnesota Human Rights Act required the group to admit women.¹²⁵

Justice Brennan, writing for the majority, noted that the freedom of association is dual in character. The first character, expressive association,¹²⁶ protects the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise

118. 357 U.S. 449 (1958).

119. *Id.* at 451–53.

120. *Id.* at 461.

121. *Id.* at 466.

122. *Id.* at 460 (citations omitted).

123. 468 U.S. 609 (1984).

124. A Jaycee is a member of a Junior Chamber of Commerce, a civic organization for business and community leaders. *Id.* at 612–14.

125. *Id.* at 614.

126. Expressive association is found in the First Amendment. *Id.* at 621–22.

of religion.”¹²⁷ The second character, intimate association,¹²⁸ ensures citizens that “choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”¹²⁹ The Court held that the Jaycees were not a sufficiently intimate group given that they are “large . . . and unselective.”¹³⁰ The Court also found that allowing women into the group would not make a substantial difference in the viewpoints of the organization.¹³¹ Accordingly, the Jaycees had to admit women under the Minnesota Human Rights Act, and requiring the organization to do so was not a violation of the freedom of association.¹³²

Under expressive association, the Supreme Court has held that anti-discrimination laws violate the First Amendment when they prevent organizations from presenting their message.¹³³ For example, in *Hurley v. Irish-American Gay Group*,¹³⁴ the South Boston Allied War Veterans Council was organizing a celebratory parade for St. Patrick’s Day and

127. *Id.* at 618.

128. Intimate association is also found in the Fourteenth Amendment. *See id.* at 617–18.

129. *Id.*

130. *Id.* at 620–21.

131. *Id.* at 627–28.

132. *Id.* at 615, 620–21; *see also* Bd. of Dirs. of Rotary Int’l. v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987) (holding that the organization does not have “the kind of intimate or private relation that warrants constitutional protection”).

133. Yet the right to present one group’s message is not without limits. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 552, 570 (1972) (holding that protestors did not have a right to hand out fliers in a private mall when the message does not relate to the mall because the First Amendment yields to private property); *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 769–70 (1994) (holding that limits on noise and implementation of a buffer zone outside an abortion clinic “burden[ed] no more speech than necessary” and protected the valid state interest in maintaining public access to the clinic and normal traffic flow); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 361 (1997) (holding that a fixed buffer zone around an abortion clinic was constitutional but a floating buffer zone that applied to patients entering or leaving the clinic was not). *But see* *Edwards v. South Carolina*, 372 U.S. 229, 230, 233–34, 238 (1963) (overturning criminal convictions of peaceful protestors who were demonstrating against segregation and ordered to disperse); *Nat’l Socialist Party v. Village of Skokie*, 432 U.S. 43, 43–44 (1977) (per curiam) (holding that an injunction preventing a Nazi march could not be denied without strict procedural safeguards which did not occur in this case).

134. 515 U.S. 557 (1995).

Evacuation Day, and the Council prohibited an LGBTQ group from marching alongside them in the parade.¹³⁵ The Supreme Court held that the state of Massachusetts could not require the parade organizers to allow LGBTQ members to participate in the parade.¹³⁶ The Court cautioned that the case would be very different if LGBTQ members were somehow prevented from viewing the parade.¹³⁷ But the LGBTQ group, “could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club’s existing members.”¹³⁸ Similarly in *Boy Scouts of America v. Dale*,¹³⁹ the Court held that a non-discrimination law did not require the Boy Scouts of America to admit an outwardly homosexual male.¹⁴⁰ The Court held that the organization engages in an expressive form of values, which include being “morally straight,” and the Court deferred to the organization’s view of what type of behavior would “impair its expression.”¹⁴¹

More recently, in 2010, the Supreme Court decided *Christian Legal Society Chapter of the University of California v. Martinez*.¹⁴² The University of California, Hastings College of the Law (“Hastings”) passed a non-discrimination policy that required recognized student organizations to “allow any student to participate, become a member, or seek leadership positions in the organization, regardless of [her] status or beliefs.”¹⁴³ The Christian Legal Society (“CLS”) applied for student-organization recognition on Hastings’s campus. The Society required members to vow in a Statement of Faith that sexual activity outside a marriage between one man and one woman is immoral, thus condemning same-sex relationships.¹⁴⁴ CLS refused to admit students who held religious convictions different from those in the Statement of Faith, and therefore Hastings refused to recognize CLS as a student group because it would discriminate against students based on their

135. *Id.* at 560–61.

136. *Id.* at 559.

137. *Id.* at 580–81.

138. *Id.* at 580–81.

139. 530 U.S. 640 (2000).

140. *Id.* at 644–45, 659.

141. *Id.* at 651, 653.

142. 561 U.S. 661 (2010).

143. *Id.* at 671 (quoting Petition for Writ of Certiorari at 9a, *Christian Legal Soc’y*, 561 U.S. 661 (2010) (No. 08-1371)).

144. *Id.* at 672.

beliefs.¹⁴⁵ The Court held that although CLS was permitted to hold these beliefs under the First Amendment, Hastings was not required to recognize the organization so long as it applied the non-discrimination policy equally to all organizations.¹⁴⁶ CLS argued that it did not exclude potential members based on sexual orientation, but based on the belief that homosexual conduct was not wrong. The Court rejected this argument, because this ban on conduct was also a ban on status.¹⁴⁷

Some legal scholars speculate that one footnote in the *Martinez* opinion may indicate how the Supreme Court may view a challenge to fraternities and sororities' single-sex status.¹⁴⁸ CLS argued that if universities could refuse to recognize a group based on membership makeup or beliefs, that those groups would not be able to survive or

145. *Id.* at 672–73.

146. *Id.* at 694–95, 697–98. *But see* Healy v. James, 408 U.S. 169, 183–84 (1972) (noting that when a political organization petitions a college for recognition, the burden is on the college to show why the organization should not be recognized). Public universities are not required to provide funding to its organizations, but if it chooses to do so it cannot condition funding on the group surrendering its right to expression. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 836–37 (1995) (holding that a university violated the First Amendment right to free speech when it prohibited the funding of student publications that assumed a position regarding “a deity or an ultimate reality”). The “all-comer’s” policy was not a violation of the doctrine set forth in *Rosenberger* because the policy was reasonable in light of the purpose served by the forum. *Martinez*, 561 U.S. at 690. For an in-depth examination of the *Martinez* opinion, see *The Supreme Court, 2009 Term—Leading Cases*, 124 Harv. L. Rev. 179, 249–59 (2010); *see also* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1924–27 (2006) (explaining more broadly the “no duty to subsidize” principle).

147. *Martinez*, 561 U.S. at 689; *see also* Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 270 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”). It is important to note that the *Martinez* opinion “did not make much new law” or change drastically the judicial landscape of the freedom of association. Lyle Denniston, *Analysis: A Fatal Stipulation*, SCOTUS-BLOG (June 28, 2010, 11:35 PM), <https://www.scotusblog.com/2010/06/analysis-a-fatal-stipulation/> [<https://perma.cc/XK2J-LBJF>]. Justice Ginsburg, who wrote the majority opinion, made clear that the case actually hinged on a joint stipulation CLS agreed to at the district-court level that Hastings’ policy was an “all-comer’s policy” meaning that “recognition was available to any student group at Hastings Law that allowed any student to take part in that group, including rising to leadership.” *Id.* Justice Ginsburg denied CLS’s “unseemly attempt to escape from the stipulation.” *Id.* (quoting *Martinez*, 561 U.S. at 678 (2010)).

148. *See, e.g.*, Lauren V. Nottoli, *Legal Rights of Fraternities and Sororities as Single-Sex Organizations*, LEXOLOGY (June 7, 2018), <https://lexology.com/library/detail.aspx?g=8304d6bf-84d2-fdfa-98da-a0a59460f29c> [<https://perma.cc/S4JG-GF77>].

grow their membership.¹⁴⁹ The Court disagreed with the argument that an unrecognized group could not survive at the school, and instead argued that an unrecognized fraternity or social club may be still be able to grow in membership.¹⁵⁰ As Constitutional law scholar Eugene Volokh wrote, “[e]ven content-neutral restrictions are unconstitutional when they fail to leave open ample alternative channels for speech.”¹⁵¹ These “alternative channels” can be as minimal as allowing unrecognized groups “some ability to meet on campus or at least very near campus.”¹⁵²

Additionally, two Court of Appeals cases undermine the ability of fraternities to assert their right to freely associate in response to threats by colleges and universities to remove them from campuses.¹⁵³ In both *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*¹⁵⁴ and *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York*,¹⁵⁵ universities refused to recognize a fraternity because of violations of school policies. The fraternities sued, arguing that the failure to recognize the groups constituted a freedom of association

149. *Martinez*, 561 U.S. at 691–93, 691 n.21 (2010); Nottoli, *supra* note 148.

150. *Id.* at 691 & n.21.

151. Volokh, *supra* note 146, at 1935 (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994)).

152. *Id.* & n.65 (citing *Christian Legal Soc’y v. Walker*, 453 F.3d 853 (7th Cir. 2005)) (noting that the Seventh Circuit reversed a denial of a preliminary injunction for potential First Amendment violation when a university denied a Christian group official recognition, but that the court noted that the university’s rules allow the unrecognized student groups to still meet on campus).

153. Tran, *supra* note 27, at 542. The Supreme Court has held that it is not unconstitutional for states to prohibit Greek Life at public universities. *See Waugh v. Bd. of Trs. of Univ. of Miss.*, 237 U.S. 589 (1915). The *Waugh* case is very similar to the Harvard case discussed *infra* Part III. A state statute in Mississippi prohibited a variety of organizations, including fraternities and sororities, at state-funded universities. *Waugh*, 237 U.S. at 591. In response, the University of Mississippi, a public university, required students to pledge not to join any secret societies. *Id.* at 592. An applicant refused to sign and was denied admission. *Id.* at 592–93. Of the statute, the Court said: “It is to be remembered that the University was established by the State, and is under the control of the State, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions.” *Id.* at 596–97. Although *Waugh* has never explicitly been overturned, it relied on a rights-versus-privileges theory of colleges and universities which courts no longer follow. Bauer, *supra* note 112 at 29–30.

154. 229 F.3d 435 (3d Cir. 2000).

155. 502 F.3d 136 (2d Cir. 2007).

violation. However, both the Third and Second Circuits found that the fraternities were not secluded or intimate enough to justify protection. The Third Circuit found that the fraternity did not pursue the ideals of its national organization and was therefore not entitled to First Amendment protection.¹⁵⁶ The Second Circuit similarly found that the fraternity lacked exclusivity given that it consistently involved nonmembers in “crucial aspects of its existence” and was therefore not entitled to protection.¹⁵⁷ As one legal scholar noted of the two cases: “In each case, courts found that the fraternity at issue failed to warrant protection as intimate and expressive associations, suggesting that the current state of fraternities requires serious evaluation to survive future challenges to their associational rights.”¹⁵⁸

There is also minimal literature on how colleges and universities may limit students’ freedom to associate based on their public or private status. Though the relationship between students and private colleges and universities is generally considered a contractual one,¹⁵⁹ some law scholars argue that restrictions on associational rights may be considered “unconscionable.”¹⁶⁰ However, for purposes of this Comment, it is worth noting that private schools have significantly more leeway to regulate student activities than public schools do under the current case law.

*B. Congress Passed Title IX and Exempted Greek Life
from Its Requirements*

In addition to the freedom of association, Congress has also granted fraternities and sororities protection under Title IX. Title IX prohibits federally funded schools from discriminating against students on the basis of sex.¹⁶¹ Congress’ purpose was to “achieve sex equality in educational institutions that receive federal financial assistance.”¹⁶²

156. *Id.* at 444.

157. *Id.* For a more detailed description of the two cases, see Tran, *supra* note 27, at n325 & n.326.

158. Tran, *supra* note 27, at 542–43. *But see* Bauer, *supra* note 112, at 282–87 (criticizing both cases as departures from ordinary constitutional jurisprudence).

159. *See, e.g.*, Doe v. Amherst Coll., 238 F. Supp. 3d 195, 215 (D. Mass. 2017); A.E. v. Hamilton Coll., 104 N.Y.S.3d 445, 446 (N.Y. App. Div. 2019); Doe v. Coll. of Wooster, 243 F. Supp. 3d 875, 888 (N.D. Ohio 2017); Tran v. State Sys. of Higher Educ., 986 A.2d 179, 183 (Pa. Commw. Ct. 2009); Centre Coll. v. Trzop, 127 S.W.3d 562, 568 (Ky. 2003); Swanson v. Wesley Coll., Inc., 402 A.2d 401, 403 (Del. Super. Ct. 1979).

160. Bauer, *supra* note 112, at 255 n.47.

161. 20 U.S.C. § 1681 (2018).

162. Tran, *supra* note 27, at 523.

Schools that violate Title IX can be sued in private action, or the federal government can discontinue funding or decide monetary damages.¹⁶³ Although fraternities were not exempted from Title IX when it was initially passed, Congress added the exemption in 1974 when there was an administrative push to enforce Title IX against fraternities and sororities.¹⁶⁴ The amendment states in relevant part: “[Title IX] shall not apply to membership practices—(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education”¹⁶⁵

Title IX does not govern the operations of fraternities the same way it governs university operations. Congress binds the university to Title IX, not the individual organizations themselves.¹⁶⁶ Title IX does not require fraternities to remain single-sex to benefit from the Title IX exemption.¹⁶⁷ Instead, the language of the Title IX amendment is more broad and generalized.¹⁶⁸ As legal scholar Stevie Tran notes, “by explicitly refusing to impose liability on universities that recognize such fraternities, Title IX indirectly ‘allows’ fraternities to remain single-sex. However, Title IX’s statutory language is not that narrow and ‘grants’ fraternities significantly more than that.”¹⁶⁹

Due to the Greek Life exemption, Title IX’s biggest impact on Greek Life actually comes through the college or university’s sexual-assault investigations. How Title IX encourages universities to act against many of Greek Life’s off-campus troubles largely depends on the President of the United States. The Obama administration, via its “Dear Colleagues” letter, promulgated guidance that indicated that colleges and universities may be responsible for investigating off-campus reports of sexual harassment.¹⁷⁰ The letter provides: “Because students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus.”¹⁷¹ Although this guidance was rescinded by the Trump

163. *Id.* at 524.

164. *Id.* at 524–25.

165. 20 U.S.C. § 1681(a)(6)(A).

166. Tran, *supra* note 27, at 525–26.

167. *Id.* at 526.

168. 20 U.S.C. § 1681(a)(6)(A).

169. Tran, *supra* note 27, at 526.

170. Russlyn Ali, *Dear Colleague Letter*, U.S. DEP’T OF EDUC. (Apr. 4, 2011), <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html> [<https://perma.cc/D2WW-ENZ2>].

171. *Id.*

administration,¹⁷² President Joe Biden, Obama's former Vice President, pledged during his campaign to promulgate similar guidance.¹⁷³ In March of 2021, he signed an executive order directing the Department of Education's Office for Civil Rights to conduct a comprehensive review of current Title IX regulation.¹⁷⁴ How a school is expected to handle off campus misconduct by students has an impact on fraternities and social clubs. Many social events held by Greek members occur off campus, and therefore the school's reach is important in future regulation.¹⁷⁵

There is a pending Title IX case that could impact colleges' and universities' responsibilities under Title IX as it relates to Greek Life. In 2019, Louisiana State University was sued by the parents of Max Gruver, a fraternity pledge who was killed during a hazing event.¹⁷⁶ The family alleged that LSU knew fraternities participated in dangerous hazing and had a policy of general inaction when compared to "strong corrective action taken in response to sorority violations."¹⁷⁷ The Gruvers argue that this policy was discriminatory and put Greek males at a greater risk of "serious injury or death by hazing" in violation of Title IX.¹⁷⁸ In May of 2020, the Fifth Circuit, on interlocutory appeal, denied LSU's motion to dismiss on the basis of immunity.¹⁷⁹ In 2019, in another high-profile Title IX case, three female students at Yale who were sexually assaulted at off-campus fraternity parties sued the school under Title IX for a policy of indifference when it comes to sexual misconduct from its unrecognized fraternities.¹⁸⁰ Although the case was

172. Kimberly Hefling & Caitlin Emma, *Obama-era School Sexual Assault Policy Rescinded*, POLITICO (Sept. 22, 2017, 10:46 AM), <https://www.politico.com/story/2017/09/22/obama-era-school-sexual-assault-policy-rescinded-243016> [<https://perma.cc/PW9P-ZQG6>].

173. Bianca Quilantan, *Biden Vows 'Quick End' to DeVos' Sexual Misconduct Rule*, POLITICO (May 7, 2020, 9:33 PM), <https://www.politico.com/news/2020/05/06/biden-vows-a-quick-end-to-devos-sexual-misconduct-rule-241715> [<https://perma.cc/MT7K-7TPY>].

174. Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 8, 2021).

175. See Cooper, *supra* note 48, at 372 & n.95, 407.

176. *Gruver v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, *ex rel.* Louisiana, 401 F. Supp. 3d 742, 745 (M.D. La. 2019) (holding that a state that agrees to receive Title IX federal funding waives sovereign immunity).

177. *Id.* at 762.

178. *Id.*

179. *Gruver v. La. Bd. of Supervisors for the La. State Univ. Agric. & Mech. Coll.*, 959 F.3d 178 (5th Cir. 2020).

180. *McNeil v. Yale Univ.*, 436 F. Supp. 3d 489, 499, 510 (D. Conn. 2020).

dismissed in January of 2020 on the basis of the Title IX exemption,¹⁸¹ the lawsuit still illustrates the ongoing tension between Title IX, college administrators, and Greek Life.

III. HARVARD DECIDES TO PUNISH STUDENTS WHO PARTICIPATE IN SINGLE-SEX ORGANIZATIONS

In May of 2016, Harvard announced a new Policy that the university claimed was aimed at curbing sex-discrimination among student organizations.¹⁸² The Policy prevents members of single-sex organizations from holding leadership positions in recognized student organizations, becoming varsity captains, or receiving College endorsement for prestigious fellowships.¹⁸³ So although the Policy does not outright ban students from participating in single-sex organizations, it severely punishes them for doing so. President Drew G. Faust wrote of the Policy:

The policy does not discipline or punish the students; it instead recognizes that students who serve as leaders of our community should exemplify the characteristics of non-discrimination and inclusivity that are so important to our campus. Ultimately, students have the freedom to decide which is more important to them: membership in a gender-discriminatory organization or access to those privileges and resources. The process of making those types of judgments, the struggle of defining oneself, one's identity, and one's responsibilities to a broader community, is a valuable part of the personal growth and self-exploration we seek for our undergraduates.¹⁸⁴

But, as the national chapter of Delta Gamma countered on social media, "While Harvard's sanctions claim to support women's right to make their own decisions, these sanctions actually force women to choose between the opportunity to have supportive, empowering women-only spaces and external leadership opportunities."¹⁸⁵

181. *Id.* at 539.

182. Drew Gilpin Faust, *Unrecognized Single-Gender Social Organizations*, HARV. UNIV. (Dec. 5, 2017), <https://www.harvard.edu/president/news/2017/unrecognized-single-gender-social-organizations> [<https://perma.cc/B9H7-D5KM>].

183. *Id.*

184. *Id.*

185. Michael E. Xie, *Sororities Support Harvard Chapters' Defiance of Sanctions*, HARV. CRIMSON (Jan. 24, 2018), <https://www.thecrimson.com/article/2018/1/24/nationwide-sororities-support-harvard-chapters/> [<https://perma.cc/2BAK-XNFF>].

Almost immediately after Harvard announced the Policy, individual students and single-sex organizations voiced their opposition to the Policy. Harry R. Lewis, former Dean of Harvard College and a current faculty member, filed a faculty motion to strike down the sanctions.¹⁸⁶ Lewis's motion failed by a vote of 90 in favor and 130 in opposition.¹⁸⁷ Three all-male social clubs, Fly Club, A.D. Club, and Porcellian Club, and three local chapters of national fraternities, Sigma Chi, Sigma Alpha Epsilon, and Delta Kappa Epsilon, formed what is known as the Cambridge Coalition.¹⁸⁸ Similarly, the North American Interfraternity Conference, the National Panhellenic Conference, and the Fraternity and Sorority Political Action Committee formed the Fraternal Government Relations Commission.¹⁸⁹ Both groups lobbied for Congress to pass the PROSPER Act, which was introduced in 2017 and aimed to amend the Higher Education Act of 1965.¹⁹⁰ The amendment sought to prevent colleges and universities from punishing students for being members of single-sex organizations.¹⁹¹ The bill failed to garner the support of House members and was never really considered.¹⁹²

Aside from formal opposition, the Harvard Policy faced serious backlash on social media from Greek Life members across the country. Sorority women from across the country posted photos of their Greek Life experience using the hashtag “#HearHerHarvard” and “#WithoutMySorority” to show the positive impact an all-female organization had on their college experience. The “#HearHerHarvard” tag has over 1,900 posts on Instagram.¹⁹³ Harvard women marched on campus fighting the Policy.¹⁹⁴ Women opposing the Policy claimed that Harvard really only consulted with the all-male groups and not the all-

186. Caroline S. Engelmayer & Michael E. Xie, *Social Groups Sue Harvard Over Sanctions*, HARV. CRIMSON (Dec. 3, 2018), <https://www.thecrimson.com/article/2018/12/3/social-groups-sue-over-sanctions/> [<https://perma.cc/AY9J-EC3H>].

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* (citing H.R. 4508, 115th Cong. § 119 (2017)).

191. H.R. 4508.

192. Engelmayer & Xie, *supra* note 186.

193. *#HearHerHarvard*, INSTAGRAM, <https://www.instagram.com/explore/tags/hearherharvard/?hl=en> [<https://perma.cc/L9K3-PQDK>] (last visited Feb. 11, 2021).

194. Xie, *supra* note 186.

female groups.¹⁹⁵ Some women expressed frustration because, although they wanted the school to step in and put an end to sexual assault, all-female groups were not the cause of the prevalence of sexual assault on campus.¹⁹⁶

Despite the backlash, after eighteen months of debate, Harvard finalized and implemented the Policy. The Policy was set to apply to the Class of 2021 and all subsequent classes. In addition to this finalized Policy, the committee released a preliminary recommendation to eliminate all exclusive social groups for the Class of 2022 and beyond.¹⁹⁷

Some social groups changed their membership policies since Harvard announced its new single-sex group Policy: the Bee Club, the Delphic Club, the Oak Club, the Sabliere Society, the Seneca, Alpha Epsilon Pi, and Kappa Sigma are now co-ed.¹⁹⁸ The final clubs the Oak Club, the Sablière Society, and the Seneca, announced plans to adopt gender-neutral membership policies.¹⁹⁹ When Alpha Epsilon Pi and Kappa Sigma went co-ed, they subsequently were forced to disaffiliate from their national chapters.²⁰⁰ But not all the organizations decided to change their membership policies. Some decided to sue Harvard over its Policy, launching an attack in both federal and state court.

Kappa Alpha Theta, Kappa Kappa Gamma, Sigma Chi, Sigma Alpha Epsilon, and three Harvard male students filed a complaint in federal court alleging that the Policy interfered with the students' right to be free of sex discrimination and to associate freely, as guaranteed by Title IX and the U.S. Constitution.²⁰¹ Specifically, the lawsuit alleged that Harvard's Policy was associational discrimination, discrimination on the basis of sex stereotypes, and *per se* sex discrimination.²⁰² Additionally, the plaintiffs claimed Harvard's Policy violated the Equal Protection Clause of the Fourteenth Amendment via the

195. C. Ramsey Fahs, *Hundreds of Women Protest Harvard Sanctions*, HARV. CRIMSON (May 10, 2016), <https://www.thecrimson.com/article/2016/5/10/women-oppose-sanctions/> [https://perma.cc/P4QP-JWFT].

196. *Id.*

197. Jeremy Bauer-Wolf, *Hard Line on Social Groups*, INSIDE HIGHER ED (July 13, 2017), <https://www.insidehighered.com/news/2017/07/13/harvard-faculty-committee-recommends-greek-other-clubs-be-eliminated> [https://perma.cc/7Z4K-TZWN].

198. Graham W. Bishai, *Kappa Sigma to Become Gender Neutral*, HARV. CRIMSON (Sept. 3, 2017), <https://www.thecrimson.com/article/2017/9/3/kappa-sigma-coed/> [https://perma.cc/XFK7-4SR3].

199. *Id.*

200. *Id.*

201. Complaint at 1, *Kappa Alpha Theta Fraternity, Inc. v. Harvard Univ.*, 397 F. Supp. 3d 97 (D. Mass. 2018) (No. 1:18-cv-12485-NMG).

202. *Id.* at 9.

Massachusetts Civil Rights Act because “it denies Harvard students’ right to be free from sex discrimination without an exceedingly persuasive justification.”²⁰³ As the complaint pointed out, “[c]ourts apply Title VII case law to Title IX cases ‘by analogy.’”²⁰⁴

Harvard filed a motion to dismiss and argued that the Greek organizations did not have standing to sue.²⁰⁵ The district court partially agreed, finding that the organizations that no longer had chapters at Harvard did not have standing, but that the chapters that remained could proceed with the lawsuit.²⁰⁶ The judge also reasoned, drawing analogy to *Zarda v. Altitude Express* and *Hively v. Ivy Tech Community College*, that it was undeniable that the Policy discriminates on the basis of sex.²⁰⁷ Accordingly, the district court denied Harvard’s motion to dismiss.²⁰⁸

Alpha Phi and Delta Gamma sued in Massachusetts state court, asserting interference with students’ rights to free association and equal treatment based on sex, both of which are protected by the Massachusetts Constitution.²⁰⁹ The lawsuit also alleged violations of the Massachusetts Civil Rights Act.²¹⁰ A state-court judge denied Harvard’s motion to dismiss the sororities’ legal challenge.²¹¹ The court found that under the Massachusetts Civil Rights Act, organizations had standing to sue on behalf of their members.²¹² Further, the court found there was evidence sufficient to proceed with the sororities’ claims of associational discrimination, discrimination on the basis of sex stereotypes, and *per se* sex discrimination.²¹³

203. *Id.* at 11.

204. *Id.* at 8 (quoting *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995)).

205. *Kappa Alpha Theta*, 397 F. Supp. 3d at 102–03.

206. *Id.* at 105.

207. *Id.* at 108 (discussing *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc)).

208. *Id.* at 109.

209. Complaint at 2, *Alpha Phi Int’l Fraternity, Inc. v. President & Fellows of Harvard Coll.*, No. SUCV201803729E, 2020 WL 741544 (Mass. Super. Ct. Jan. 14, 2020).

210. *Id.* at 32–33.

211. *Alpha Phi Int’l*, 2020 WL 741544, at *1.

212. *Id.* at *5.

213. *Id.* at *5–6.

IV. THE *BOSTOCK* OPINION CALLS INTO QUESTION HARVARD'S POLICY

Bostock v. Clayton County was a landmark civil-rights case decided in June of 2020. The Supreme Court held that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees because of their sexual orientation or gender identity.²¹⁴ Clayton County fired plaintiff Gerald Bostock from his job as a child advocate after he joined a gay softball league and encouraged other coworkers to join.²¹⁵ The County's proffered reason was for conduct unbecoming after performing an audit on the money Bostock was responsible for overseeing; Bostock claimed this reasoning was pretextual.²¹⁶ The district court dismissed Bostock's case on the basis of *Evans v. Georgia Regional Hospital*²¹⁷ and the Eleventh Circuit affirmed on the same grounds.²¹⁸ The Eleventh Circuit's decision directly contradicted the Second Circuit's opinion in *Zarda v. Altitude Express*²¹⁹ and the Seventh Circuit's opinion in *Hively v. Ivy Tech Community College*.²²⁰

Bostock petitioned the Supreme Court for review, and the Court granted certiorari and combined the case with *Zarda*.²²¹ In *Zarda*, a skydiving instructor told a female customer who was nervous about being strapped to another male that he was gay in an attempt to calm

214. 140 S. Ct. 1731, 1737 (2020). Many legal scholars applaud *Bostock* for its protections of the LGBTQ community. It is praised for its similarities in importance to *Obergefell v. Hodges*, however it is important to note that *Bostock* arose as a Title VII statutory-interpretation question, whereas *Obergefell* was a question of constitutional law. See *Obergefell v. Hodges* 576 U.S. 644, 678, 681 (2015) (holding that the Fourteenth Amendment protects the fundamental right to same-sex marriage).

215. *Bostock*, 140 S. Ct. at 1737–38.

216. *Id.* at 1738.

217. 850 F.3d 1248 (11th Cir. 2017).

218. *Bostock v. Clayton Cnty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018). “This circuit has previously held that ‘discharge for homosexuality is *not* prohibited by Title VII.’” *Id.* at 964 (quoting *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam)). “And we recently confirmed that *Blum* remains binding precedent in this circuit.” *Id.* (citing *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1256 (11th Cir. 2017)). “In *Evans*, we specifically rejected the argument that Supreme Court precedent in *Oncale v. Sundowner Offshore Servs.* and *Price Waterhouse v. Hopkins* supported a cause of action for sexual orientation discrimination under Title VII.” *Id.* at 964–65 (citations omitted).

219. 883 F.3d 100 (2d Cir. 2018) (en banc).

220. 853 F.3d 339 (7th Cir. 2017) (en banc).

221. *Bostock v. Clayton Cnty.*, 139 S. Ct. 1599 (2019).

her nerves.²²² The customer's boyfriend complained to the company, and the company fired Zarda for what it claimed was "inappropriate[] touching."²²³ Initially, the three-judge panel for the Second Circuit held that sexual orientation was not covered by Title VII.²²⁴ But in a rehearing en banc,²²⁵ the Second Circuit reversed the earlier decision in a 10-3 vote, reasoning that "sexual orientation is a function of sex" and therefore protected under Title VII.²²⁶ Altitude Express petitioned the Supreme Court for certiorari, and the Court granted cert. in April of 2019.²²⁷

Another case from the Sixth Circuit, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*,²²⁸ was also considered with *Bostock* and *Zarda*. That case presented the slightly different question as to whether Title VII protected transgender individuals. Aimee Stephens, a transgender woman, was presenting as a male at the funeral home where she worked.²²⁹ Per the employee manual, female employees had a distinct dress code from male employees.²³⁰ She informed her manager that she would be transitioning to female and would change her dress attire for work accordingly.²³¹ The funeral home fired Stephens, so she filed a complaint with the EEOC, which brought the case against the employer.²³² The district court ruled in favor of the funeral home, finding that transgender persons were not a protected class within the meaning of Title VII.²³³ The Sixth Circuit reversed, holding that "discrimination on the basis of transgender and transitioning status violates Title VII."²³⁴ The Supreme Court granted

222. *Zarda*, 883 F.3d at 108.

223. *Id.* at 108–09.

224. *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017).

225. *Zarda*, 883 F.3d at 108.

226. *Id.* at 112–13.

227. *Altitude Express v. Zarda*, 139 S. Ct. 1599 (2019).

228. 140 S. Ct. 1731 (2020).

229. *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560, 567 (6th Cir. 2018).

230. *Id.* at 568.

231. *Id.* at 568–69.

232. *Id.* at 569.

233. *EEOC v. R.G. & G.R. Harris Funeral Homes*, 100 F. Supp. 3d 594 (E.D. Mich. 2015).

234. *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 574–75 (relying heavily on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). In *Price Waterhouse*, the Supreme Court in a plurality decision held that employers could not make employment decisions based on a failure to conform to sex-stereotypes. 490 U.S. at 235–37, 251. The Sixth Circuit held that although the funeral

the funeral home's petition for certiorari and consolidated the case with *Bostock* and *Zarda*.²³⁵

On June 15, 2020,²³⁶ the Court ruled in a six to three decision on all three cases that discrimination on the basis of sexual orientation or gender identity runs afoul of Title VII as discrimination "because of sex."²³⁷ Justice Gorsuch, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan comprised the majority while Justices Alito, Thomas, and Kavanaugh dissented.²³⁸ The opinion was penned by Justice Neil Gorsuch, a self-described "originalist,"²³⁹ which came as a surprise to many given his judicial philosophy.²⁴⁰ However, his opinion clearly shows that this was a textual interpretation case and the analysis was rooted in definitions and traditional canons of construction.²⁴¹

home could have a gender specific dress code, it was impermissible for the funeral home to fire the plaintiff because she did not conform to female stereotypes. *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 574.

235. *R.G. & G.R. Harris Funeral Homes v. EEOC*, 139 S. Ct. 1599 (2019).
236. Sadly, at the time the *Bostock* opinion was released, both Mr. Zarda and Ms. Stephens had passed away and their estates were handling the remainder of the lawsuit, serving as a reminder of just how long this line of cases has been litigated. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020).
237. *Id.*
238. *Id.* at 1754 (Alito, J., dissenting); *id.* at 1822 (Kavanaugh, J., dissenting).
239. See Ed Pilkington, *Originalism: Neil Gorsuch's Constitutional Philosophy Explained*, *GUARDIAN* (Feb. 2, 2017, 6:00 PM), <https://www.theguardian.com/law/2017/feb/02/originalism-constitution-supreme-court-neil-gorsuch> [<https://perma.cc/7K7G-DXZJ>].
240. Erwin Chemerinsky, *Chemerinsky: Gorsuch Wrote His "Most Important Opinion" in SCOTUS Ruling Protecting LGBTQ Workers*, *ABA J.* (July 1, 2020, 8:00 AM), <https://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-just-wrote-his-most-important-opinion> [<https://perma.cc/6QY8-ZAXR>]. Some believe that this signals that Chief Justice Roberts originally planned to dissent in the case, and only joined the majority after reading Justice Gorsuch's circulated draft opinion. See Ed Whelan, *Did the Chief Assign Bostock to Gorsuch? Probably Not*, *NAT'L REV.* (July 13, 2020, 11:41 AM), <https://www.nationalreview.com/bench-memos/did-the-chief-assign-bostock-to-gorsuch-probably-not/> [<https://perma.cc/8JRF-SN39>]. Some speculate that Justice Ginsburg, who would have been the most senior judge on the majority side, assigned the opinion to Justice Gorsuch. *Id.* Otherwise, it seems likely that the Chief Justice would have assigned such a landmark case opinion to himself. *Id.*
241. Hunter Poindexter, *A Textualist's Dream: Reviewing Justice Gorsuch's Opinion in Bostock v. Clayton County*, *CIN. L. REV.* (June 23, 2020), <https://uclawreview.org/2020/06/23/a-textualists-dream-reviewing-justice-gorsuchs-opinion-in-bostock-v-clayton-county/> [<https://perma.cc/HF8T-KP85>]. Pamela Karlan, counsel for *Bostock* and *Zarda*, argued that Title VII's language encompassed sexual orientation. *Id.*

Justice Gorsuch first analyzed the “ordinary public meaning” of the text of Title VII when it was enacted in 1964.²⁴² Applying the traditional view of “but-for” causation, the Court should “change one [factor] at a time and see if the outcome changes.”²⁴³ Applying this to the Title VII “because of sex” clause, the Court reasoned, “[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision.”²⁴⁴ This determination of Title VII’s meaning led Justice Gorsuch to further write, “[a]n individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”²⁴⁵ The Court said that the case before them was very different than previous cases “where Title VII has nothing to say,” because, as presented in these cases, “homosexuality and transgender status are inextricably bound up with sex.”²⁴⁶

Going beyond the plain text of the statute, the Court then explained that their previous cases could produce the same conclusion. First, the Court examined its decision in *Phillips v. Martin Marietta Corp.*,²⁴⁷ in which a company refused to hire women with young children but hired men with young children.²⁴⁸ Though there were multiple factors at play in the employer’s decision—both the sex of the prospective employees and their status as mother or father—the Court held that because sex was a partial reason for the hiring decision, that decision violated Title VII.²⁴⁹ Second, the Court looked to its opinion in *Los Angeles Dept. of Water and Power v. Manhart*,²⁵⁰ in which an employer required women to make greater pension fund contributions than men, because women as a class tend to live longer than men.²⁵¹ The Court also found this to be a violation of Title VII because it harmed individual women because of their sex.²⁵² And third, the Court

242. *Bostock*, 140 S. Ct. at 1738.

243. *Id.* at 1739.

244. *Id.* at 1741.

245. *Id.*

246. *Id.* at 1742.

247. 400 U.S. 542 (1971) (per curiam).

248. *Bostock*, 140 S. Ct. at 1743 (citing *Phillips*, 400 U.S. 542).

249. *Id.*

250. 435 U.S. 702 (1978).

251. *Bostock*, 140 S. Ct. at 1743 (citing *Manhart*, 435 U.S. 702).

252. *Manhart*, 435 U.S. at 711.

examined *Oncale v. Sundowner Offshore Services, Inc.*,²⁵³ where a male oil worker was subjected to sexual harassment by his male coworkers.²⁵⁴ The Court held that although the sexual harassment was coming from members of the same sex as the plaintiff, the plaintiff would not have been subjected to that level of harassment were he a female.²⁵⁵ Accordingly, he was discriminated against “because of sex.” The Court summarized three major takeaways from this line of cases: 1) the employer’s motivations for a policy are irrelevant; 2) the sex of the individual only needs to be part of the reason for an employment action; and 3) it is not enough to show that the employer treats males and females comparatively as groups.²⁵⁶

Justice Gorsuch also addressed concerns that the decision may set a sweeping precedent that would extend well beyond Title VII: “[T]hey say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.”²⁵⁷ The opinion also responded to concerns with the impact Title VII compliance may have on an employer’s ability to freely practice their religion. The Court pointed out that Congress has included a religious organization exemption in the Title VII statute²⁵⁸ and passed the Religious Freedom Restoration Act of 1993,²⁵⁹ which prohibits the federal government from substantially burdening a person’s exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest.²⁶⁰ Overall, Justice Gorsuch reminded the public that the finite answers to how Title VII and religious freedoms interact are questions for other cases that would and should not be answered in *Bostock*.²⁶¹

Justices Alito, Thomas, and Kavanaugh dissented. Justice Alito, joined by Justice Thomas, argued that the meaning of the word “sex”

253. 523 U.S. 75 (1998).

254. *Bostock*, 140 S. Ct. at 1743 (citing *Oncale*, 523 U.S. 75).

255. *Oncale*, 523 U.S. at 80.

256. *Bostock*, 140 S. Ct. at 1744.

257. *Id.* at 1753.

258. 42 U.S.C. § 2000e-1(a) (2018).

259. 42 U.S.C. § 2000bb-2000bb-4 (2018).

260. *Bostock*, 140 S. Ct. at 1754 (referring to this statute as a “super statute” which may supersede Title VII).

261. *See id.* at 1754.

in 1964 did not include sexual orientation or transgender status.²⁶² Accordingly, Justice Alito wrote, “[t]here is only one word for what the Court has done today: legislation.”²⁶³ Justice Kavanaugh dissented on similar grounds, arguing that under the separation of powers, Congress should have amended Title VII and not relied on the Court to do so. He wrote, “the Court today cashiers an ongoing legislative process, at a time when a new law to prohibit sexual orientation discrimination was probably close at hand.”²⁶⁴ He went on to acknowledge the victory this case was for the LGBTQ community, but reiterated that the Court was the wrong venue. “Notwithstanding my concern about the Court’s transgression of the Constitution’s separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. . . . Under the Constitution’s separation of powers, however, I believe that it was Congress’s role, not this Court’s, to amend Title VII.”²⁶⁵

The impact of *Bostock* remains to be seen, though many legal scholars praise the decision as “the correct decision.”²⁶⁶ Though the Court refused to address how it would handle cases concerning other laws that prohibit sex-based discrimination—such as Title IX and the Fair Housing Act—that has not prevented scholars from speculating. As indicated in Gorsuch’s opinion there is much uncertainty as to what this decision means for religious freedoms.²⁶⁷ Some circuits have already

262. *Id.* at 1756 (Alito, J., dissenting).

263. *Id.* at 1754.

264. *Id.* at 1836 (Kavanaugh, J., dissenting).

265. *Id.* at 1837.

266. *Duke Law Faculty React to Landmark Supreme Court Decision in Bostock v. Clayton County, Ga.*, DUKE L. (June 17, 2020), <https://law.duke.edu/news/duke-law-faculty-react-landmark-supreme-court-decision-bostock-v-clayton-county-ga/> [<https://perma.cc/U9WR-V5PX>].

267. The Supreme Court has allowed the government to impose substantial burdens on the exercise of religion, so long as the applicable law is neutral applied equally to all. *See* *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990) (holding that a state could deny a citizen unemployment benefits for using an illicit substance for religious purposes). Recently in 2021, *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020), the Court held that Philadelphia’s refusal to contract with Catholic Social Services because of their prohibition on single-sex couples violated the first amendment. For a more complete analysis of what *Bostock* may mean for religious freedoms, see Alexander Dushku & R. Shawn Gunnarson, *Symposium: LGBT Rights and Religious Freedom—Finding a Better Way*, SCOTUSBLOG (June 17, 2020, 9:19 AM), <https://www.scotusblog.com/2020/06/symposium-lgbt-rights-and-religious-freedom-finding-a-better-way/> [<https://perma.cc/5J79-YYAE>].

begun to apply *Bostock* to Title IX cases.²⁶⁸ Some legal observers also believe that Gorsuch's opinion may have laid the groundwork for an attack on affirmative action.²⁶⁹ Although purely speculative at this point, these concerns for future cases is a true indication of the importance *Bostock* will have on American jurisprudence moving forward.

V. A RACE TO FILE: PLAINTIFFS IN THE HARVARD CASE FILED FOR A PRELIMINARY INJUNCTION

Two weeks following the *Bostock* decision, plaintiffs in the federal case against Harvard moved for a preliminary injunction to prevent Harvard from enforcing the single-sex Policy.²⁷⁰ Applying *Bostock* to the Harvard Policy, the plaintiffs argued that Harvard considered sex in their Policy:

[U]nder a straightforward application of the Supreme Court's Title VII decision in *Bostock*, Harvard's Sanctions Policy violates Title IX. Harvard cannot determine whether a student has violated the Policy without reference to that student's sex. Under the Policy's explicit terms and by its natural operation, "sex plays an essential but-for role."²⁷¹

Accordingly, the plaintiffs argued that they were highly likely to succeed in their lawsuit and deserved a preliminary injunction.

268. The Fourth Circuit applied *Bostock* in a case involving a transgender male who was refused access to his high school's male restrooms. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir 2020). The Fourth Circuit held that under *Bostock*, the plaintiff was denied access "on the basis of sex." *Id.* at 616–17. Similarly, the Eleventh Circuit in *Adams v. School Board of St. Johns County* used *Bostock* to invalidate a similar bathroom policy the district had in place. 968 F.3d 1286, 1304–05 (11th Cir. 2020). While *Grimm* and *Adams* focus on discriminatory bathroom policies, it is likely that courts will apply *Bostock* to other areas of Title IX as these issues percolate through the courts.

269. Cass R. Sunstein, *Gorsuch Paves Way for Attack on Affirmative Action*, BLOOMBERG (June 17, 2020, 11:00 AM), <https://www.bloomberg.com/opinion/articles/2020-06-17/gorsuch-gay-rights-opinion-targets-affirmative-action> [<https://perma.cc/2ZRG-9ED3>].

270. Plaintiffs' Motion for Preliminary or Permanent Injunction at 1, *Kappa Alpha Theta Fraternity, Inc. v. Harvard Univ.*, 397 F. Supp. 3d 97 (D. Mass. 2019) (No. 18-cv-12485).

271. Plaintiff's Memorandum in Support of Motion for Preliminary or Permanent Injunction at 9, *Kappa Alpha Theta*, 397 F. Supp. 3d 97 (No. 18-cv-12485) (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1748 (2020)).

First, the plaintiffs argued that they were likely to succeed on their claims that Harvard's Policy was *per se* sex discrimination and associational sex discrimination. In their motion, the plaintiffs wrote:

The Court explained that “[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex,” and “[i]t doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision.” “So long as the plaintiff’s sex was one but-for cause of the defendant’s decision, that is enough to trigger the law.” “If the employer intentionally relies in part on an individual employee’s sex when deciding to discharge the employee—put differently, if changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred.”²⁷²

The plaintiffs also noted that “[t]he Supreme Court further held that a defendant ‘cannot escape liability by demonstrating that it treats males and females comparably as groups.’”²⁷³ Thus, the plaintiffs argued that because *Bostock* is controlling, and because the First Circuit has always used Title VII cases to analyze Title IX cases, the Harvard Policy is clearly sex discrimination.²⁷⁴ Any other reasons that Harvard could give, as pointed out by *Bostock*, are irrelevant because sex is still a factor.

Next, the plaintiffs sought to show that the Policy was a clear form of sex stereotyping and evinced anti-male bias.²⁷⁵ An employer can violate Title VII by acting because of stereotypes about how a person of a particular gender should be or act. The plaintiffs pointed to internal emails and memos produced through the discovery phase.²⁷⁶ One memorandum, written by Dean Rakesh Khurana, made men out to be predators and problematic members of society, writing:

The many well-documented behaviors that the Final Clubs frequently evince (e.g., the exclusion and objectification of women, discrimination, law-breaking, violating Cambridge’s noise ordinances, lack of transparency, hazing, and a culture that encourages suppression of personal accountability as well as dangerous drinking and non-consensual sexual behavior) impact the broader community and therefore their impact is not limited to their members. The all male Final Clubs, insofar as they are

272. *Id.* at 8 (quoting *Bostock*, 140 S. Ct. at 1735, 1739, 1741) (citations omitted).

273. *Id.* (quoting *Bostock*, 140 S. Ct. at 1744).

274. *Id.* at 9 (citing *Kappa Alpha Theta*, 397 F. Supp. 3d at 106).

275. *Id.* at 10.

276. *Id.* at 11–13.

steeped in these behaviors, many of which are now rooted in their culture, jeopardize safety and undermine the optimal intellectual and social environment for Harvard Students.²⁷⁷

In an email from President Drew Faust, the Harvard President expressed concern about all-male finals clubs. She wrote, “[t]hat such settings, with their reinforcement of male privilege, social exclusivity and uncontrolled drinking have become environments that yield disproportionate numbers of sexual assaults is the product of the hierarchical, gendered assumptions that form the very basis for the clubs’ existence.”²⁷⁸ Accordingly, the plaintiffs argued that the proffered reasons Harvard promulgated the Policy—to promote equality among students—was in fact an impermissible form of sex stereotyping and anti-male bias²⁷⁹: “Through the Sanctions Policy, Harvard wanted to eliminate men’s organizations *because* they are men’s organizations, and to change the behavior of its male and female students based on the administration’s perceptions about those students’ essential qualities as men and women. That is sex-stereotyping and anti-male bias, plain and simple.”²⁸⁰

The same day that the plaintiffs filed for an injunction, the President of Harvard, Lawrence C. Bacow sent a letter to the campus community announcing that the university would no longer seek to enforce the Policy. In announcing the rescission of the Policy, the President explained:

The court reasoned that the policy applies to men but not women who seek to join all-male social organizations and applies to women but not men who seek to join all-female social organizations, and that this constitutes sex discrimination under federal law. In reaching this view, Judge Gorton relied heavily on the reasoning in one of the appellate decisions (*Zarda v. Altitude Express*) that was affirmed by the Supreme Court. It now seems clear that Judge Gorton would ultimately grant judgment in the

277. Declaration of R, Stanton Jones in Support of Plaintiffs’ Motion for Preliminary Injunction or Permanent Injunction at Ex. 4, *Kappa Alpha Theta*, 397 F. Supp. 3d 97 (No. 18-cv-12485); Plaintiff’s Memorandum in Support, *supra* note 271, at 12 (quoting Declaration of R, Stanton Jones, *supra*, at Ex. 4).

278. Declaration of R, Stanton Jones, *supra* note 277, at Ex. 6; Plaintiff’s Memorandum in Support, *supra* note 271, at 12–13 (quoting Declaration of R, Stanton Jones, *supra* note 277, at Ex. 6.).

279. Plaintiff’s Memorandum in Support, *supra* note 271, at 15.

280. *Id.*

plaintiffs' favor in the pending lawsuit and that Harvard would be legally barred from further enforcing the policy.²⁸¹

The letter went on to announce that the University would not try to rewrite the Policy.²⁸² But the school encouraged students to find ways in which they could make the campus more inclusive.²⁸³ Although Harvard's interpretation of *Bostock's* effect on a single-sex organization ban is telling, it is not a court decision and is not binding on any other universities. The question of how *Bostock* will impact how colleges deal with Greek Life moving forward has yet to be seen.

VI. NOW WHAT? WHAT COLLEGES AND UNIVERSITIES CAN DO TO REGULATE EXISTING GREEK LIFE ORGANIZATIONS ON THEIR CAMPUSES

The *Bostock* decision does not completely take away colleges' and universities' ability to restrict the Greek Life system and social clubs—but it does limit the ways in which they can. Each potential restriction brings with it benefits and downsides that colleges and universities must weigh in making their decision. This section is only intended to illustrate that *Bostock* still leaves colleges and universities many options by which to regulate Greek Life—the options available to colleges and universities are much more extensive than this Comment will explore.

A. Colleges and Universities Could Force All Greek Life Organizations to Become Unrecognized Student Groups

One overly simplistic option would be for colleges and universities to separate themselves from Greek organizations and make them all unrecognized student groups. There is some thought that doing so may limit a school's liability should a student be harmed at one of these

281. Bacow, *supra* note 12 (referencing *Kappa Alpha Theta*, 397 F. Supp. 3d at 108). The university subsequently settled both the federal and state lawsuits. *Students Win as Rights Affirmed with Conclusion of Harvard Suits*, STAND UP TO HARV.: UPDATE ON LAWSUITS (Nov. 5, 2020), <https://www.standuptoharvard.org/lawsuit-update/> [<https://perma.cc/74CY-FL7A>]; Parties' Joint Notice of Settlement and Request to Hold Pending Dispositive Motions in Abeyance at 1, *Kappa Alpha Theta*, 397 F. Supp. 3d 97 (No. 18-cv-12485). President Drew Faust stepped down as President in 2018. *Drew Gilpin Faust*, HARV. UNIV., <https://www.harvard.edu/about-harvard/harvard-glance/history-presidency/drew-gilpin-faust> [<https://perma.cc/DK2Y-GV99>] (last visited Jan. 5, 2021).

282. Bacow, *supra* note 12.

283. *Id.*

organization's off-campus parties.²⁸⁴ But this solution is not without its potential consequences, and is not the idealistic solution that many administrators may hope it is.

Some colleges and universities may feel that the best way to limit their liability as it relates to Greek organizations is to disassociate themselves and force the organizations to become unrecognized student groups. Historically, colleges and universities have been subject to the *in loco parentis* doctrine, where colleges and universities were seen as pseudo-parents of the student.²⁸⁵ Courts were unwilling to question many of the restrictions colleges and universities placed on students.²⁸⁶ But the Third Circuit abandoned this doctrine in higher education in favor of a new “no duty” relationship in *Bradshaw v. Rawlings*.²⁸⁷ In that case, a student consumed school-supplied alcohol at a picnic and then crashed into a parked car on his way back to campus. The Third Circuit held that a custodial relationship between the school and its students was not consistent with the objectives of higher education and the school should not be responsible for its adult students' conduct.²⁸⁸

But the no-duty doctrine is not limitless. Many states have enacted anti-hazing statutes that require colleges and universities to adopt anti-hazing policies.²⁸⁹ Failure to enact and enforce such policies could expose colleges and universities to liability.²⁹⁰ Similarly, colleges and universities can be liable under Title IX for the sexual abuse or harassment of a student if the school acted with deliberate indiff-

284. *See generally* Elizabeth A. Marcuccio & Joseph P. McCollum, *Hazing on College Campuses: Who is Liable?*, 26 NE. J. LEGAL STUD. 26, 31–33 (2011) (describing relevant case law).

285. *Id.* at 31.

286. *Id.*

287. 612 F.2d 135, 143 (3d Cir. 1979).

288. *Id.* at 140; *see also* *Rabel v. Ill. Wesleyan Univ.*, 514 N.E.2d 552, 560–61 (Ill. App. Ct. 1987) (holding that when one student assaulted and physically injured another, the student handbook did not make the school liable by creating a custodial relationship—“[i]t would be unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility for assuring their safety and the safety of others”). For a more in-depth discussion of both cases, *see* Marcuccio & McCollum, *supra* note 284, at 33.

289. Marcuccio & McCollum, *supra* note 284, at 33.

290. *Id.*; *see* *Furek v. Univ. of Del.*, 594 A.2d 506, 522 (Del. 1991) (holding that when a university owned a fraternity house and leased it to the chapter, the school had a duty to protect students from the danger of hazing through the appropriate control of fraternity-member activity). *But see* *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 312–13 (Idaho 1999) (holding that a university had no duty to protect students even though the university “had a policy against underage drinking and exercised some influence over the behavior of sorority residents”).

erence.²⁹¹ Though deliberate indifference is a high bar to meet, if a college or university is aware that unrecognized Greek organizations or social clubs are still active and chooses to ignore it, this could be enough to establish deliberate indifference. Additional pending Title IX cases will only further define colleges' and universities' responsibilities to regulate student behavior both on and off campus.²⁹²

It is highly likely that Greek and other single-sex organizations will continue to operate despite no longer being recognized by a college or university. A look at colleges and universities that have already banned Greek Life serve as a perfect case study. For example, Colby College, whose Greek Life ban was previously discussed,²⁹³ has garnered widespread criticism for allowing a double standard to permeate on its campus for over thirty years.²⁹⁴ The school banned Greek organizations back in 1984, but a private investigation in 2019 revealed that underground fraternities and other secret societies were thriving.²⁹⁵ The school advertised itself as a campus without Greek Life, yet to get the most advantages that the campus had to offer, many students felt the need to join these secret societies—a fact that school administrators called “unfair and deeply troubling.”²⁹⁶

The Harvard decision highlights the difficulty schools have in regulating student activity, particularly once an organization is no longer affiliated with the school. Schools cannot prevent or punish students from joining single-sex organizations because such policies would be discriminatory based on sex.²⁹⁷ Some schools simply warn students of the dangers of Greek Life in an attempt to disclaim their liability.²⁹⁸ Some colleges may attempt to prohibit students from joining

291. *See Davis ex rel. Lashonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645–46 (1999) (“[T]he district was directly liable for its *own* failure to act.”); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91 (1998) (applying a deliberate-indifference standard to find a school district liable under Title IX).

292. *See supra* Part II-B.

293. *See supra* note 108 and accompanying text.

294. Quintana, *supra* note 108.

295. *Phelps v. President & Tr. of Colby Coll.*, 595 A.2d 403, 404 (Me. 1991); Quintana, *supra* note 108.

296. Quintana, *supra* note 108.

297. Again, the Harvard Policy is not binding on any colleges or universities. *Bostock* still does not prevent private colleges and universities from banning single-sex organizations. But it does limit a school's ability to *punish* students who still choose to participate in such organizations. *See supra* Part V.

298. *See Fraternity and Sorority Life*, UNIV. BUFF., <https://www.buffalo.edu/studentlife/life-on-campus/clubs-and-activities/search/fraternity-and-sorority-life.html> [<https://perma.cc/K3AB-KZVF>] (“Affiliation with these [un-

unrecognized organizations all together. Although courts have been reluctant to extend to Greek organizations the full protection of freedom of association,²⁹⁹ many legal scholars speculate that such protection is warranted.³⁰⁰ Even in the case of private colleges and universities where a student honor code may require students to agree not to join Greek organizations, some legal scholars argue these contractual agreements may be unconscionable because they force students to forfeit their right to freely associate.³⁰¹

B. Keeping Greek Life on Campus Allows Colleges and Universities to Exert Greater Control on Greek Organizations

Many colleges and universities conclude that it is best to recognize Greek organizations on campus so that the school may exert a greater amount of control on their practices. This, it would seem, would limit the likelihood of student harm and therefore school liability. There are many different ways schools can exercise control over recognized student groups—to examine each one is simply beyond the purview of this Comment. Instead, this Comment will briefly examine the two major ways colleges and universities can regulate Greek Life despite the recent *Bostock* opinion: only allowing non-residential Greek Life and regulating rush.

recognized Greek chapters] is a violation of the UB Student Code of Conduct. It puts students at risk for suspension and/or expulsion from the University. The University at Buffalo does not advise nor control the actions of these off-campus groups. Typically, the instances of hazing are high for these groups as well.”)

299. *See* *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 442 (3d Cir. 2000) (concluding that the chapter was not selective in who it admits); *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 147 (2d Cir. 2007) (holding that recruitment practices of the chapter were not selective enough to warrant protection).

300. *See* Bauer, *supra* note 112, at 286–89 (arguing that the courts in these cases conflated certain factors and that the decisions were “puzzling”); John D. Inazu, *The Unsettling ‘Well-Settled’ Law of Freedom of Association*, 43 CONN. L. REV. 149, 154 (2010) (arguing that this line of cases signals a demise in associational protections); Nancy S. Horton, *Traditional Single-Sex Fraternities on College Campuses: Will They Survive in the 1990s?*, 18 J. COLL. & U.L. 419, 444–45 (1992) (arguing that fraternities engage in more protected activities than the Rotary or Jaycees Club).

301. *See* Bauer, *supra* note 112, at 255 n.47; *see also id.* at 254–55 n.45 (citing various cases where the courts have noted that private universities may be serving a public function). *But see* Horton, *supra* note 300, at 427–28 (noting that private schools are usually free to contract around constitutional rights).

1. Forcing Greek Chapters to Become Non-Residential

One of the more controversial options is for colleges and universities to permit only non-residential Greek Life at their institutions. This would require all students to live on campus and purchase campus meal plans, which would allow the school to assert greater oversight over the fraternities' activities. The effect of this would be to prevent students from living off-campus in Greek housing and getting their meals through Greek chapters. Although some courts have affirmed a school's right to have a policy that requires first- and second-year students to live on campus,³⁰² there is a question as to whether extending these policies for all four years of a student's college career may be an unfair monopoly in violation of the Sherman Act.³⁰³

This issue came to light in the spring of 1995 when Hamilton College announced a new policy requiring that *all* students live at, and purchase meal plans from, the college.³⁰⁴ Fraternities at the school sued, arguing that the policy created a monopoly on the housing market that Greek houses have traditionally provided to students.³⁰⁵ The district court ultimately ruled in favor of the school, essentially holding that any housing constraints "flow from [students'] implied contract with Hamilton to comply with its rules" and are thus not the consequence of an illegal monopoly.³⁰⁶

In a related case, *Hack v. President & Fellows of Yale College*,³⁰⁷ the Second Circuit dismissed a complaint where student plaintiffs made antitrust arguments when required to live in student housing.³⁰⁸ The district court observed that the "plaintiffs could have opted to attend a different college or university if they were not satisfied with Yale's housing policy."³⁰⁹ A similar case involving fraternities that sued Colgate University for suddenly implementing a similar policy seemingly ignored the inability for current students to choose a different

302. Jeremy Rovinsky, *Monopoly—University Edition: The Case for Student Housing Independence*, 2013 BYU EDUC. & L.J. 45, 48–55 (first discussing *Rader v. Johnson*, 924 F. Supp. 1540 (D. Neb. 1996); and then discussing *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81 (2d Cir. 2000)).

303. Mark D. Bauer, *Small Liberal Arts Colleges, Fraternities, and Antitrust: Rethinking Hamilton College*, 53 CATH. U.L. REV. 347, 409 (2004).

304. *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 106 F. Supp. 2d 406, 407 (N.D.N.Y. 2000).

305. *Id.*

306. *Id.* at 413.

307. 16 F. Supp. 2d 183 (D. Conn. 1998), *aff'd*, 237 F.3d 81, 91 (2d Cir. 2000).

308. 237 F.3d at 83.

309. *Hack*, 16 F. Supp. at 197.

college,³¹⁰ with the court instead reasoning: “Here, Colgate has exercised . . . its ‘parietal’ rights in creating a residential policy that is part of a Colgate education. As such, the court holds, as a matter of law, that Colgate’s residential policy is an effect of the exercise of its lawful and appropriate parietal rights.”³¹¹

Though the cases seem to support a school’s on-campus living requirements, they seemingly contradict current Supreme Court precedent. In *Eastman Kodak Co. v. Image Technical Services, Inc.*,³¹² the Court held that primary and secondary markets are distinct, and the secondary market is just as subject to antitrust as the primary market.³¹³ It would appear, then, that fraternities with interests in residential property may be able to receive protection to changes in university housing policies. There is much debate in the legal community regarding whether these housing cases were properly decided, given the binding precedent set forth in *Eastman Kodak*.³¹⁴

2. Regulating When Students Can Rush

Another means that schools can regulate Greek Life is through the oversight of rush. There are a few ways in which schools can regulate when students rush: based on the time in the semester and based on the potential new member’s class year.

First, schools often limit the rush or the recruitment period to specific weeks during the semester.³¹⁵ The reasoning for limiting the time period is simple: It allows for all students involved, including

310. *Delta Kappa Epsilon (DKE) Alumni Corp. v. Colgate Univ.*, 492 F. Supp. 2d 106, 108 (N.D.N.Y. 2007).

311. *Id.* (citation omitted); see also Jared S. Sunshine, *Antitrust Precedent & Anti-Fraternity Sentiment: Revisiting Hamilton College*, 39 CAMPBELL L. REV. 59, 87–91 (2017) (comparing *Hack* and *Delta Kappa Epsilon (DKE) Alumni Corp.*).

312. 504 U.S. 451 (1992).

313. *Id.* at 470–71. The facts of the case do not relate even remotely to college residences, but they are useful in understanding the holding. Kodak sold patented repair parts for its printers and copiers, and independent service organizations decided to make their own repairs. Kodak would no longer sell its parts to those organizations to limit the organizations’ ability to service Kodak machines. The independent service organizations sued, claiming this was an antitrust violation. *Id.* at 455–56.

314. See Sunshine, *supra* note 311, at 87; Bauer, *Small Liberal Arts Colleges*, *supra* note 303, at 403–04.

315. See, e.g., *Fraternity and Sorority Recruitment*, CASE W. RSRV. UNIV., <https://community.case.edu/greeklife/recruitment/> [<https://perma.cc/9N UQ-9ULJ>]; *Panhellenic Recruitment*, UNIV. OF ALA., <https://ofsl.sa.ua.edu/prospective-students/join/panhellenic-recruitment/> [<https://perma.cc/D N8Q-UBFX>]; *Rush, Recruitment, and Intake*, UCLA, <https://fsl.ucla.edu/Rush-Recruitment-Intake> [<https://perma.cc/M7LW-HXDX>].

potential new members and current active members, to only need to focus on recruitment and rush for a short period of time throughout the semester—the rest of the time can be spent on their studies. It also allows for schools to ensure that each student has the same opportunity to meet members of different chapters.

Second, schools often regulate when students can rush during their college career. Some schools require students to wait until second semester of their freshman year,³¹⁶ others until their sophomore year,³¹⁷ and some do so by a credit system.³¹⁸ Some schools require a minimum GPA as well.³¹⁹ These types of rules are often looked upon favorably, as they allow for students to get adjusted to college life, learn about the different chapters, and decide what they want out of campus life before being forced to make a decision.³²⁰ However, it cannot be overlooked that these types of regulations serve as a restriction on the right to freely associate.³²¹

As mentioned above, this is not an exhaustive list on the restrictions that schools can impose on Greek Life. The list, however, illustrates that even though schools may not be permitted to punish students for joining single-sex organizations under *Bostock*, there are still tried-and-tested means by which the school can exert control over single-sex organization activity.

316. See, e.g., *Fraternity and Sorority Recruitment*, *supra* note 315 (noting women are not eligible for membership in a sorority until second semester of their freshman year).

317. See, e.g., *Statement on Fraternities and Sororities*, PRINCETON UNIV., <https://odus.princeton.edu/community-standards/statement-fraternities-and-sororities> [<https://perma.cc/HN4Y-87SG>] (prohibiting students from being considered for membership in unrecognized Greek organizations until their sophomore year).

318. See, e.g., *Fraternity and Sorority Life*, *supra* note 298 (requiring the student to have taken at least 12 credits before going through recruitment).

319. See, e.g., *id.* (requiring at least a 2.5 GPA for membership in a fraternity or sorority).

320. See, e.g., Caroline Kutzman, Opinion, *Greek Life Recruitment Should Be a Spring Activity*, OBSERVER (Nov. 22, 2019), <https://observer.case.edu/kutzman-greek-life-recruitment-should-be-a-spring-activity/> [<https://perma.cc/8AYD-KC83>].

321. See Bauer, *supra* note 112, at 301.

CONCLUSION

As the situation at Harvard proves, regulating unrecognized student groups will likely prove difficult for schools moving forward. Harvard's approach, punishing students who are members of single-sex organizations, seemingly runs afoul of *Bostock*. And the approach of other small liberal arts colleges, punishing students who are members of unrecognized Greek organizations, seemingly runs afoul of the freedom to associate. Accordingly, colleges and universities are left with a Sophie's choice: do they recognize Greek organizations on their campuses in order to exert a greater amount of oversight, or do they attempt to limit their liability and ban the organizations from campus and risk the organizations continuing to meet without any form of oversight?

Keeping Greek Life as a recognized part of campus life is beneficial in many ways to the university. First, colleges and universities can regulate housing on their campus, which allows them to closely monitor underage drinking and other behavior.³²² Colleges and universities can also regulate the recruitment process to ensure there is no discrimination and the process is done fairly. The complaint with Greek Life organizations is their overall elitism, coupled with underage drinking and sexual assaults. Given the two options of having these organizations move underground versus keeping them as recognized organizations that the school can exercise control over, it is understandable why schools have chosen to keep their Greek Life systems despite a recent string of scandals.

What *Bostock* does tell us though, is that it is unlikely that schools can punish students for their participation in a single-sex organization. Although plaintiffs in the Harvard case brought their case under four different theories (*per se*, freedom of association, gender stereotyping, and anti-male bias), and the court was never forced to rule on which theory the Harvard Policy violated, if any at all, legal counsel for universities all over the country will likely read Harvard's decision to settle the case to mean that they cannot promulgate a similar policy.

The ultimate impact *Bostock* will have on statutory interpretation of Title IX remains to be seen. *Bostock* decided one very narrow issue as it relates to Title VII. How this will apply to Fair Housing, Title IX, and other statutes with anti-discrimination provisions will eventually be answered as cases percolate through the courts. Even how the decision will impact Greek Life and other single-sex organizations remains to be seen. Yet Harvard's interpretation of *Bostock* is instructive. Any college that attempts to punish students for participation in single-sex organizations likely discriminates "because of sex" in violation of *Bostock's* central holding. Accordingly, college campuses will have to

322. *Id.* at 265.

be more creative in how they regulate the wealthy and powerful Greek organizations and social clubs on their campuses.

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