AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Gay Alliance of Students v. Matthews, 544 F.2d 162** (4th Cir., 1976)

*The Gay Alliance of Students (GAS) was formed in the fall of 1974 at the Virginia Commonwealth University (VCU) to “develop a supportive community among individuals who believe in the right of self-determination with regard to sexual orientation,” hold educational and social events, and advocate for gay rights. The members of the group applied to the Dean of Student Affairs to have GAS recognized as an official student group, which would give it access to the student directory, use of university facilities, use of campus media, and eligibility for VCU funding. Unusually, the application was forwarded to the Board of Visitors, the governing body of VCU, which rejected the application for group recognition.*

*The student sued the university in federal district court arguing that the refusal to grant recognition was a violation of their constitutional rights to free speech and association. The district court found that the denial of group recognition as such was not a constitutional violation, but the denial of access to university benefits was and ordered that the university allow the students access to facilities, media and directory. On appeal, the circuit court held that the denial of group recognition of the Gay Alliance of Students on the same basis as other student groups was a constitutional violation.*

JUDGE WINTER.

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At the outset, we state what this case is not. There is neither claim nor evidence that GAS as such engages in unlawful activities. So far as this record establishes, it is, at most, a "pro-homosexual" political organization advocating a liberalization of legal restrictions against the practice of homosexuality and one seeking, by the educational and informational process, to generate understanding and acceptance of individuals whose sexual orientation is wholly or partly homosexual.

GAS correctly posits its claim to registration upon the first amendment associational rights of its members. *Healy v. James* (1972) makes clear that, in the context of the scope of protection which the first amendment affords to associational rights on a state-supported college campus, "the Constitution's protection is not limited to direct interference with fundamental rights." . . .

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One of VCU's reasons for denying the application was that granting recognition to GAS would increase the number of students who would join the organization. The premise of the argument is that registration of GAS would indicate VCU approval of GAS's aims and objectives and thus serve as an encouragement to students to join who might otherwise be disinterested in becoming members. . . . [W]e held in *National Socialist White People's Party v. Ringers* (4 Cir. 1973) that when, under the compulsion of the first amendment, the state provides state-supported facilities to groups having discriminatory membership policies, state approval or support of those policies is not thereby forthcoming. We think that principle applicable here.

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Another reason assigned by VCU for denying registration is that some students would suffer detriment thereby. As expressed in VCU's brief, "affiliation of individuals with homosexual activist organizations may have adverse consequences to some individuals involved." We are not impressed by this purported reason. The very essence of the first amendment is that each individual makes his own decision as to whether joining an organization would be harmful to him, and whether any countervailing benefits outweigh the potential harm. We are aware that in recent years colleges and universities increasingly are voluntarily surrendering the role of *parens patriae* of their students which they formerly occupied. But even if not surrendered voluntarily, the state and its agents are forbidden from usurping the students' right to choose. In this respect, the governing bodies of schools have no greater authority than do other state officials. *Tinker v. Des Moines School District* (1969). . . . VCU may not hinder the exercise of first amendment rights simply because it feels that exposure to a given group's ideas may be somehow harmful to certain students.

VCU also relies on the proposition that "[a]s a matter of logic, the existence of GAS as a recognized campus organization would increase the opportunity for homosexual contacts" as a justification for denying recognition.

The meaning of the phrase "increase the opportunity for homosexual contacts" is not entirely clear. If the University is attempting to prevent homosexuals from meeting one another to discuss their common problems and possible solutions to those problems, then its purpose is clearly inimical to basic first amendment values. Individuals of whatever sexual persuasion have the fundamental right to meet, discuss current problems, and to advocate changes in the *status quo,* so long as there is no "incitement to imminent lawless action."

If, on the other hand, VCU's concern is with a possible rise in the incidence of actual homosexual conduct between students, then a different problem is presented. We have little doubt that the University could constitutionally regulate such conduct. *Gay Students Organization of the University of New Hampshire v. Bonner* (1st Cir., 1974). Additionally, it may regulate any conduct (homosexual or otherwise) which "materially and substantially disrupt[s] the work and discipline of the school.” But denial of registration is overkill.

"[T]he critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." There is no evidence that GAS is an organization devoted to carrying out illegal, specifically proscribed sexual practices. While Virginia law proscribes the practice of certain forms of homosexuality, Virginia law does not make it a crime to *be* a homosexual. Indeed, a statute criminalizing such status and prescribing punishment therefor would be invalid.

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For the foregoing reasons, we conclude that so long as VCU maintains a program of registration of student organizations, its refusal to register GAS on the same terms and conditions as those applied to other student organizations violated the first and fourteenth amendments. . . .

*Reversed* in part.

CHIEF JUDGE MARKEY, concurring.

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It may be useful to add that the case points up the futility of the association-registering process at state-supported institutions of higher education. If continued, it must be conducted in conformance with the First Amendment.

Consistent with the present decision, associations advocating any idea, any change in the law or policy of the general society, are as fully entitled to registration as is the plaintiff. Thus, associations devoted to peaceful advocacy of decriminalization or social acceptance of sadism, euthanasia, masochism, murder, genocide, segregation, master-race theories, gambling, voodoo, and the abolishment of all higher education, to list a few, must be granted registration, upon proper application and indicated compliance with reasonable regulations, if VCU continues to "register" associations.

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It is of no moment, in First Amendment jurisprudence, that ideas advocated by an association may to some or most of us be abhorrent, even sickening. The stifling of advocacy is even more abhorrent, even more sickening. It rings the death knell of a free society. Once used to stifle "the thought that we hate," in Holmes' phrase, it can stifle ideas we love. It signals a lack of faith in people, in its supposition that they are unable to choose in the marketplace of ideas.

[U]niversities have been abandoning the role of *parens patriae.* Education without values is moribund. Nonetheless, having apparently decided that student associations devoted to advocacy of political, social, legal and other objectives are part of higher education and useful in preparation for later life, the universities must leave the exposition and inculcation of moral and ethical values to parents, the Church, university classes in ethics, the inspiring example of ethical university teachers and administrators, and student associations devoted to advocacy of those values. It cannot inculcate values by unlawfully impeding the exercise of a fundamental value, the right to speak.