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University Regulation of Student Speech: Considering Content-Based Criteria Under Public Forum and Subsidy Doctrines

Elizabeth E. Gordon†

In 1972, the Supreme Court held that the First Amendment extends to universities and university students, but cautioned, however, that these rights must be applied "in light of the special characteristics of the school environment." These "special characteristics" allow universities to exercise a certain amount of discretion in making "educational" decisions. As a result, a university has a certain leeway to choose how best to pursue its unique educational mission. This Comment addresses the question of whether this limited discretion over educational choices allows a university to consider some content-based criteria in making decisions regarding student speech without violating the strict nondiscrimination standards of the First and Fourteenth Amendments.

Part I of this Comment discusses the two most relevant methods of analyzing university treatment of student speech: the forum doctrine and the subsidy doctrine. Part II presents two paradigms to illustrate the current state of the law pertaining to university recognition of student groups and university funding of student groups. The first paradigm, referred to as the recognition paradigm, explores what, if any, content-based criteria a university may

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1 "University" will refer in this Comment to public universities only, unless otherwise specified, due to the "state action doctrine." Constitutional guarantees of individual rights are effective only against action that is "fairly attributable to the state." Lugar v Edmondson Oil Co., 457 US 922, 937 (1982). The reasoning contained herein, however, should be useful when applied to private colleges and universities as well.

2 See Healy v James, 408 US 169, 180 (1972) ("[W]e note that state colleges and universities are not immune from the sweep of the First Amendment.").

3 Id at 180, citing with approval Tinker v Des Moines Community School Dist., 393 US 503, 507 (1969).


5 Under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech," US Const, Amend I. Under the Fourteenth Amendment, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." US Const, Amend XIV.

6 Recognition and funding cases are discussed because they are among the most common types of cases on the topic of university treatment of student speech. A related situa-
consider in deciding whether to extend official recognition\(^7\) to a student group. Similarly, the second paradigm, referred to as the funding paradigm, analyzes what, if any, content-based criteria a university may consider in deciding how to allocate funds among student groups.

This Comment concludes that a university may indeed consider educational content in making decisions regarding student speech without violating the Constitution. In the context of a public university, the forum doctrine's otherwise strict nondiscriminatory standard is relaxed in deference to the university's discretion in pursuing its unique educational mission. The relaxation of the forum doctrine, while evident in recognition cases, is most fully demonstrated in funding cases, where its content-based nondiscrimination standards become coextensive with the subsidy doctrine's normally less rigorous, viewpoint-based nondiscrimination standards. Universities, therefore, may legally exercise greater discretion in their treatment of student speech than is commonly thought.

I. DOCTRINES USED TO ANALYZE UNIVERSITY REGULATION OF STUDENT SPEECH

A. The Forum Doctrine\(^8\)

Courts have traditionally analyzed university regulation of student speech under the forum doctrine.\(^8\) The forum doctrine draws on the Free Speech Clause of the First Amendment to limit state authority to control speech in state-created public fora. As Professor Laurence Tribe writes:

\[ \text{[T]he public forum doctrine holds that restrictions on speech should be subject to higher scrutiny when, all other things being equal, that speech occurs in areas playing a vital role in communication—such as in those}\]

\(^7\) For greater elaboration of what official recognition includes, see note 47 and accompanying text.

\(^8\) The forum doctrine has been the subject of multiple scholarly articles, many pointing out its inconsistencies and lack of clarity. This Comment focuses narrowly on the forum doctrine in the context of public university regulation of student speech and will not address its other applications.

\(^9\) For more thorough discussions of the public forum doctrine, see Harry Kalven, Jr., The Concept of the Public Forum, 1965 S Ct Rev 1; Geoffrey R. Stone, Fora Americana, 1974 S Ct Rev 233; Comment, Public Forum Analysis After Perry, 54 Fordham L Rev 545 (1986).
places historically associated with First Amendment activities.¹⁰

Courts traditionally defined public fora as the physical sites where public communication was likely to take place,¹¹ but they have recently broadened the definition to focus on the manner of communication itself, not just its particular location.¹²

Once the state creates a public forum by establishing public channels of communication, it must take great care to regulate the expressive activity therein in a nondiscriminatory, content-neutral fashion to avoid violating the Free Speech and Assembly Clauses of the First Amendment.¹³ If the state, operating in a public forum such as a university, denies to one group the recognition it extends to others based solely on the content of that group's speech, courts will order the state to extend equal recognition to the excluded group.¹⁴ "Selective exclusions from a public forum may not be

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¹¹ The Court described public fora in Food Employees Union v Logan Valley Plaza, 391 US 308 (1968) as "streets, sidewalks, parks and other similar public places [which] are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." Id at 315.
¹² For example, in Cornelius v NAACP Legal Defense and Educational Fund, Inc., 473 US 788 (1985), a charitable fundraising drive among government employees was described as a forum, although the Court concluded that it was nonpublic. "[T]he extent to which the Government may limit access depends on whether the forum is public or nonpublic." Id at 797. This Comment is concerned only with public fora, since state universities are considered public or at least semi-public fora. In perhaps the most abstract description of fora, the First Circuit recently concluded that "fora are channels of communication." Student Gov't Ass'n v University of Massachusetts, 868 F2d 473, 476 (1st Cir 1989).
¹³ The Supreme Court expressly prohibited any content-based regulation of speech in a public forum in Police Dept. of Chicago v Mosley, 408 US 92 (1972). The Court held unconstitutional a city ordinance prohibiting picketing on a public way within 150 feet of a school, except for peaceful labor picketing. The Court objected to the regulation as follows:

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. . . . [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.

408 US at 95-96. See also Carey v Brown, 447 US 455, 461-63 (1980).
¹⁴ In Healy, 408 US 169, the Supreme Court ordered a state-supported college to recognize a student group which had been denied recognition because the college president disagreed with the left-wing political views the group espoused. Also, in Widmar, 454 US 263, a state university that made its facilities generally available for the activities of registered student groups was ordered to make its facilities similarly available to a registered student group seeking to engage in religious worship and discussion.
based on content alone, and may not be justified by reference to content alone."¹⁸ If the state denies all groups official recognition, likely resulting in denial of access to facilities for group purposes, this denial would be sufficiently nondiscriminatory to be constitutional.¹⁹ But when the state creates a public forum by allowing access and recognition to some, it may not then exclude others based on the content of their speech.²⁰ Some universities have deliberately chosen to avoid the discrimination problem by not recognizing or supporting any student groups.²¹ This is one extreme solution that satisfies the burden of nondiscriminatory treatment of speech.

Although the state may not regulate speech in a public forum based upon content, it may place reasonable time, place or manner restrictions on that speech.²² These restrictions, however, must be drawn very narrowly. Furthermore, time, place or manner restrictions are subject to close judicial scrutiny to ensure that they are not abused so as to camouflage restrictions on speech itself.²³ The Supreme Court upholds such restrictions only if they "are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."²⁴ For example, a university may not forbid all leaflet distri-

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¹⁸ Mosley, 408 US at 96.

¹⁹ See Comment, Mandatory Student Fees: First Amendment Concerns and University Discretion, 55 U Chi L Rev 363, 369 (1988). See also Tribe, § 12-4 n 5 (cited in note 10) who suggests "[a] better solution might well be to require ideological activities . . . to be financed from voluntary contributions . . ." Although Tribe's comment comes in the context of compelled funding of labor union activities by their members, it is equally applicable here.


Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place" (emphasis added).


²² "We have continually recognized that reasonable ‘time, place and manner’ regulations . . . may be necessary to further significant governmental interests." Mosley, 408 US at 98, citing Cox v New Hampshire, 312 US 569, 575-76 (1941); Poulos v New Hampshire, 345 US 395, 398 (1953); Cox v Louisiana, 379 US 559 (1965); Adderley v Florida, 385 US 39, 46-48 (1966).


bution in order to prevent littering, because narrower, less drastic methods exist to combat the actual littering without severely curtailing expressive activity.\textsuperscript{22}

Because public universities function in part as important centers of communication, they constitute public fora, although there remains some debate as to degree. The Supreme Court stated in \textit{Widmar v Vincent} that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."\textsuperscript{23} Some courts argue that due to its educational mission and primary duty to its students, as opposed to the public at large, a university is only a limited purpose or semi-public forum. A semi-public forum might logically be held to a lower level of scrutiny than a full traditional forum in discriminating among forms of speech.\textsuperscript{24} Under either categorization, however, this Comment argues that a university is entitled to greater discretion in its regulation of speech than a more generalized public forum, such as a park, because of the university's unique educational mission.\textsuperscript{25}

\section*{B. The Subsidy Doctrine}

The second approach to analyzing university regulation of student speech is the subsidy doctrine. The forum doctrine and the subsidy doctrine each derive from a distinct premise. The forum doctrine presumes a state duty to recognize all speech equally. The subsidy doctrine, by contrast, presumes that the state is not obligated to subsidize First Amendment rights. The central theme of the subsidy analysis is stated in \textit{Harris v McRae}: "[A]lthough government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need

\begin{itemize}
\item \textsuperscript{22} See \textit{Schneider v State}, 308 US 147 (1939), which bars a city, as a branch of the state, from prohibiting distribution of leaflets.
\item \textsuperscript{24} The \textit{Perry} Court divided fora into three categories: traditional public fora, limited purpose public fora, and nonpublic fora. The right of the state to limit expressive activity is "sharply circumscribed" in traditional public fora, less circumscribed in the limited purpose fora, and least restricted in nonpublic fora. See \textit{Perry}, 460 US at 45-47. Although \textit{Perry} held that school mail facilities were nonpublic fora, the court suggested that "university meeting facilities" would constitute limited purpose public fora, and so belong in \textit{Perry}'s second category. Id at 45, citing \textit{Widmar}, 454 US 263. See Tribe, § 12-24 at 987 (cited in note 10), for a similar analysis of the \textit{Perry} dicta.
\item \textsuperscript{25} While this Comment seeks to avoid entering directly into a debate over the categorization of public universities as full public or semi-public fora, this analysis supports the latter view.
\end{itemize}
not remove those not of its own creation." This echoes the Court's previous rejection of the notion "that First Amendment rights are somehow not fully realized unless they are subsidized by the State." The subsidy cases provide a strong argument against mandatory funding of all student speech. In a situation analogous to the student group funding setting, the Supreme Court held in *Regan v Taxation with Representation* ("TWR") that an organization seeking funding from the federal government does not have an absolute right to receive funding simply because the government funds other organizations. In *TWR*, a nonprofit corporation, organized to promote public interest in federal taxation, argued that a provision of the Internal Revenue Code violated the First Amendment by limiting the tax payers' ability to deduct contributions made to organizations which engage in substantial lobbying efforts. The Court upheld the Internal Revenue Code provision by distinguishing between penalizing an organization based on its activities and refusing to subsidize activities with public funds. The *TWR* Court concluded that "Congress is not required by the First Amendment to subsidize lobbying," and reaffirmed its reasoning in *Cammarano*, stating that "[t]his Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right." The *TWR* Court added two caveats to its ruling. First, the state may refuse to subsidize speech only if in so doing it does not infringe upon that freedom. This suggests that the state should

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**Footnotes:**


27 *Cammarano v United States*, 358 US 498, 515 (1959) (Douglas concurring). In *Cammarano*, the Supreme Court upheld legislation that disallowed a business deduction for federal income tax of sums spent for lobbying activities, concluding such a deduction was not constitutionally mandated, and was "not 'aimed at the suppression of dangerous ideas.'" Id at 513, citing *Speiser v Randall*, 357 US 513, 519 (1958).

28 The following cases are often referred to as "the subsidy cases": *Speiser*, 357 US 513 (state has burden of proof under due process for denial of tax exemption based on individual's speech); *Cammarano*, 358 US 498 (income tax deductions not required for funds expended on lobbying); *Maher v Roe*, 432 US 464 (1977) (state may refuse to fund abortions that are not medically necessary); *Harris*, 448 US 297 (states not obligated to fund medically necessary abortions for which federal reimbursement is unavailable); *Regan v Taxation With Representation*, 461 US 540 (federal government may deny tax exempt status for groups who lobby).


30 Id at 541-42.

31 26 USC § 501(c)(3) (1982).

32 461 US at 546.

33 Id at 545. See also *Cammarano*, 358 US 498.

34 *TWR*, 461 US at 553 (Blackmun concurring).
distinguish between less effective expression of speech due to budgetary constraints, such as less lobbying by TWR and actual suppression of speech, such as forbidding TWR to lobby, which would infringe on its right to free speech. Second, the state may refuse to subsidize free speech only if it is not discriminating against a certain viewpoint. For example, the state may not refuse to fund TWR's lobbying if its purpose is to prevent the expression of TWR's particular stance on tax issues. In TWR, the content of TWR's speech is the lobbying; the viewpoint of TWR's speech is the position for which they are lobbying. The rationale behind the TWR caveats has long been present in First Amendment scholarship, but was not previously delineated in this context.

The distinction between content and viewpoint is subtle, but very important. Court opinions often use the words interchangeably, a practice that has bred confusion. "Viewpoint" is perhaps best understood as a subset of "content." The following example illustrates the difference between the two, and its importance in First Amendment jurisprudence. University A chooses not to fund any political student group. All University A political student groups are denied funding based on the political content of their speech. University A's policy will likely survive Constitutional scrutiny because it treats all political groups equally; Fascists, Republicans, Democrats, Socialists, Communists, and Anarchists alike are all barred from university funding. Meanwhile, University B refuses to fund any political group that advocates the overthrow of the current government. University B's policy allows funding of centrist political groups, but bans funding of groups on the far right and far left of the political spectrum. University B's policy will not survive Constitutional scrutiny because it treats political student groups unequally, discriminating among their individual political viewpoints.

A content-based speech regulation is more acceptable to the First Amendment than a viewpoint-based speech regulation because it is broader. Although a broader regulation affects more
speech, it affects all speech within a certain category equally, so that the threat of state promotion of one view over another is minimized. In contrast, a viewpoint-based regulation affects a narrower category of speech, but is more objectionable to the First Amendment because it expresses a state bias. In the above example, University B’s rule implements a state preference for status quo political speech.

Careful scrutiny of seemingly content-based regulation is required to ensure that it is not, in fact, viewpoint-based. In Gay and Lesbian Student Ass’n v Gohn, (“GLSA”), the student senate passed a rule that prohibited funding for any group organized around sexual preference. Although neutral on its face, the rule is substantively discriminatory because the Gay and Lesbian Student Association was the only such group on campus. The rule was objectionable because, although content-based on its face, its deliberate effect was viewpoint-based.

The subsidy doctrine’s prohibition of viewpoint discrimination, the “subset”, places fewer restrictions on government regulation than the forum doctrine’s prohibition of content discrimination, the “full set”. In TWR, the Supreme Court upheld legislation that denied TWR a tax preference based on the content of its speech (lobbying). If that legislation had denied TWR a tax preference based on the particular viewpoint expressed through lobbying—against federal tax laws—while allowing a tax preference for similar lobbying groups based on their viewpoint—in support of federal tax laws—the legislation would have been disallowed for unconstitutionally discriminating against TWR’s particular viewpoint. Thus, the subsidy doctrine allows content-based discrimination but not viewpoint discrimination.

The forum doctrine, in contrast, allows neither content-based discrimination nor viewpoint-based discrimination. For example, in Widmar v Vincent, a state university was not allowed to deny a student group access to school facilities based on the religious content of the group’s speech. Under the forum doctrine, the university would not be able to discriminate against that group based on its pro-religion or anti-religion viewpoint. Thus, while the subsidy doctrine prohibits only viewpoint discrimination, the forum doc-

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*850 F2d 361 (8th Cir 1988).*

*Id at 364.*

*The rule was subsequently vetoed by the student government president, who objected to it as discriminatory. Id.*

*454 US 263 (1981).*
trine prohibits both content-based and viewpoint-based discrimination.

The core difference between the two doctrines is the level of scrutiny that the state's actions must undergo in terms of being nondiscriminatory. Under the forum doctrine, the state's actions as regulator of public speech in a public forum are subject to a standard of "absolute neutrality." Under the subsidy doctrine, a state's decision not to subsidize free speech is acceptable so long as it does not violate the two caveats set forth in TWR: it must not infringe upon freedom of speech and it must not enforce a viewpoint discrimination.

The subsidy and forum doctrines usually apply to separate situations; subsidy cases involve government allocation of scarce resources, while forum cases involve issues of free speech in public fora. The two overlap, however, in the context of university funding of student speech. This overlap suggests that in the funding context, universities may make content-based decisions if they do not violate the two TWR caveats. In GLSA, the Eighth Circuit held that university discretion is narrowly limited to situations where the university's motive for its action is acceptable. This Comment suggests that one legitimate motive for denial of funds is concern that a group's speech lacks educational content. In this narrow range, when their motives concern educational content, universities should enjoy the same discretion in their funding decisions as the TWR Court gave to Congress.

II. PARADIGMATIC RECOGNITION AND FUNDING SITUATIONS: HOW THE FORUM AND SUBSIDY DOCTRINES APPLY IN PRACTICE

This part analyzes what content-based criteria the university may consider in deciding whether to recognize or fund student groups. The analysis examines two hypothetical paradigms. The first hypothetical is a recognition paradigm. Courts have generally applied the forum doctrine to recognition cases. The second hypothetical is a funding paradigm. Courts have applied either the fo-
rum doctrine or subsidy reasoning to funding cases, with substantially the same result.

A. The Recognition Paradigm

In the first hypothetical, a student group seeks official recognition from University X. Assume University X has established a forum by making a practice of recognizing student organizations. Assume also that such recognition includes the right to conduct group meetings in campus facilities, the right to use campus bulletin boards, and special student group use of the school newspaper. All of these rights may loosely be described as involving access to existing school resources, since none of these require a specific allocation of additional university funds to the group. Assume further that the group has made proper application for this recognition in the manner prescribed by University X. The question is whether there are any constitutionally acceptable reasons for University X to deny recognition to the student group.

First, University X must justify any such exclusion by demonstrating that the exclusion is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. University X may not exclude the student group based solely on a desire not to support religious speech. In Widmar, the Court held that state interest in complying with the Establishment Clause may be characterized as compelling. But it further held, however, that an “equal access” policy inclusive of “religious” groups would be compatible with that Clause. Thus, because recognizing religious groups along with other student groups does not violate the

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46 The first paradigm is based on Healy v James, 408 US 169 (1972), which is typical of cases brought by students who have been denied official recognition by their university.

47 These are typical benefits of recognition, see Healy, 408 US 169. See also Gay and Lesbian Students Ass'n v Gohn, 656 F Supp 1045 (W D Ark 1987), for a similar list of benefits.

48 In Healy, the Court noted that student groups may be required to comply fully with reasonable application procedures, including full disclosure of the group’s purpose.


50 The Court in Widmar reasoned that because the university forum recognized a broad range of expression, both secular and religious, the primary effect of the forum would not be the advancement of religion. Furthermore, the student handbook already noted that the university’s name would not be identified in any way with the opinions of any organization or its members. Thus, the Court concluded that recognition of the religious group would not in itself violate the Establishment Clause. The Court went on to conclude that the state’s interest in achieving greater separation of church and state than is already ensured under the Establishment Clause is not sufficiently compelling to justify content-based discrimination against the religious speech of the group in question. 454 US at 275-76.
Establishment Clause, University X may not rely on an Establishment Clause defense for refusing to recognize a religious group.

University X similarly may not exclude the student group solely on a desire not to support a political viewpoint. In Healy, the Court held that disagreement with the political position espoused by a student group is insufficient justification for that group's exclusion.61

Finally, University X may not exclude a student group from recognition and its associated privileges62 based on the sexual preference of the group's members.63

University X may, however, exclude the student group if the group's activities infringe upon "reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."64 Here, courts have repeatedly left open the door to constitutional exclusion based on a loosely defined "content-based" distinction. Here too, the Supreme Court has suggested that a university may constitutionally distinguish among student groups without resorting to randomizing efforts, such as a lottery, or a complete lack of support for all student groups. The Court leaves this door open because of what it perceives to be the uniqueness of the university mission:

A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.65

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62 Recognition may include the right to use campus facilities for communication, being listed in university publications, and the right to apply for, not the right to receive, financial aid. Gay and Lesbian Students Ass'n v Gohn, 850 F2d 361; 362 (8th Cir 1988).
63 See Healy, 408 US 169; GLSA, 850 F2d 361; Gay Lib v University of Missouri, 558 F2d 848 (8th Cir 1977); Gay Alliance of Students v Matthews, 544 F2d 162 (4th Cir 1976); Gay Students Organization v Bonner, 509 F2d 652 (1st Cir 1974).
64 Healy, 408 US at 189. Accord Tinker v Des Moines Community School Dist., holding student actions may be prohibited if they "materially and substantially disrupt the work and discipline of the school." 393 US 503, 513 (1969), and suggesting the power to prohibit student actions is not limited to criminal actions. Accord Widmar v Vincent, "we affirm the continuing validity of cases, e.g. Healy v James that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education." 454 US 253, 277 (1981) (citation omitted). Note further that this same reasoning suggests that recognition, once extended, may be repealed if students fail to respect campus rules. See Healy, 408 US at 194.
65 Widmar, 454 US at 268 n 5.
Assuming that any regulations University X places upon student groups are reasonable, and that the purpose of the regulations is consistent with University X's mission to educate its student body, University X may decline to recognize a student group that has indicated, perhaps by past performance or express declaration, that it will violate university regulations.57

University X may also enforce compliance with rules that might not be considered reasonable in other public fora, thus allowing the University greater discretion in regulating public speech than other state actors in other fora. Then Associate Justice Rehnquist seized upon this reasoning in his Healy concurrence, asserting that "[t]he government as employer or school administrator may impose upon employees and students reasonable regulations that would be impermissible if imposed by the government upon all citizens."58

Given that a university has some discretion to recognize student groups, the question becomes how much discretion. The answer appears to be very little: only that which can be justified by the need for reasonable rules consistent with the educational mission. These reasonable rules apparently may exceed the scope of mere time, place or manner restrictions. This answer, while speculative because the issue has not been litigated in federal court, is plainly consistent with the Court's language in Healy and Widmar.

B. The Funding Paradigm

In the second hypothetical, a student group seeks funding from University X. The pivotal difference between the recognition and funding situations is that while recognition is not a scarce resource, funding is.59 When the Supreme Court expanded the right

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56 Note that the Students for Democratic Society, held to have been unjustly denied recognition in Healy, did not expressly threaten to break campus rules. The group merely refused to speculate on their future behavior, and had no past history on that campus. Healy, 408 US at 173-75.

57 One might argue that the language in Healy was simply meant to be a time, place or manner regulation, keeping within the strict confines of the forum doctrine. A broader reading, however, seems more consistent with the subsequent "unique educational mission" language in Widmar. Since a university has some discretion to prescribe what constitutes an education, it consequently maintains discretion in deciding what substantially interferes with the opportunity of other students to obtain an education. Such discretion is inconsistent with mere time, place and manner rules. See Saia v New York, 334 US 558, 562 (1948).

58 Healy, 408 US at 203 (Rehnquist concurring).

59 The availability of funding was a key factor in the Eighth Circuit's decision in GLSA, 850 F2d 361. The GLSA court seemed to agree with the District Court that "resource constraints necessarily impose some limit," id at 366, but concluded that because excess funds
to recognition in *Healy*, it specifically declined to decide whether a student group has a right to funding.\(^6\) Meanwhile, the Fourth Circuit held: "There is no affirmative commandment upon the University to activate [a student group's] exercise of First Amendment guarantees; the only commandment is not to infringe [upon] their enjoyment."\(^6\) Since the Supreme Court has yet to rule directly on the situation in the funding paradigm, one must argue by analogy from three Court of Appeals cases that raise the issue.

In the first case, *Galda v Rutgers*,\(^6\) the Third Circuit used the forum doctrine to analyze university discretion in funding student organizations. In the second case, *Student Gov't Ass'n v University of Massachusetts*,\(^3\) the First Circuit used subsidy analysis to analyze a similar situation. These two courts applied different analyses but reached a similar conclusion: a university does not have to fund all recognized student groups. In the third case, *Gay and Lesbian Students Ass'n v Gohn*,\(^4\) the Eighth Circuit did not expressly apply forum or subsidy analysis, but concluded that a university may not deny funding to a student group for viewpoint-based reasons, especially when sufficient student activity funds are available.

1. **Funding under the forum doctrine.**

*Galda* questioned the constitutionality of a university's imposing mandatory student fees to fund the New Jersey Public Interest Research Group ("NJ PIRG"). The *Galda* court held that a university may compel students to pay mandatory fees to fund only those forms of student speech that have a primarily educational function, and that accommodate diverse ideological viewpoints.

The *Galda* court attempted to find a practical, legal limit to the strict nondiscrimination requirements of the forum doctrine.

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\(^6\) It is unclear . . . whether recognition also carries with it a right to seek funds from the student budget. . . . The first District Court opinion . . . states flatly that '[r]ecognition does not thereby entitle an organization to college financial support.' . . . [R]ecognition only entitles a group to apply for funds . . . [W]e do not consider possible funding as an associational aspect of nonrecognition . . . ." *Healy v James*, 408 US 169, 182 n 8 (1972) (citation omitted).


\(^5\) 868 F2d 473 (1st Cir 1989).

\(^4\) 850 F2d 361.
Students sued, contending that the mandatory fee\textsuperscript{66} imposed on
them for the purpose of supporting an organization whose political
views\textsuperscript{68} they opposed was an infringement on their First Amend-
ment rights, particularly their freedom of association.\textsuperscript{67} In \textit{Galda},
NJ PIRG was recognized by, and received funds from, Rutgers; students sued to exclude NJ PIRG from the university forum. The
court held that "because the educational component is only inci-
dental to the organization's ideological objectives, the educational
benefits are not adequate to overcome the constitutional objec-
tions."\textsuperscript{68} Plaintiffs showed NJ PIRG had insufficient educational
value to justify infringing upon their associational rights by forcing
them to fund it.

\textit{Galda} is important because it demonstrates a successful meth-
odology for taking advantage of the discretionary exception to
which the Supreme Court had only alluded in the recognition
cases. \textit{Galda} gives state actors such as University X a framework
in which to approach allocation decisions. This framework func-
tions as follows.

First, student groups enjoy a presumption of inclusion within
the forum.\textsuperscript{69} To rebut the initial presumption, the student plain-
tiffs in \textit{Galda} successfully argued that NJ PIRG had only an inci-

\begin{itemize}
\item\textsuperscript{66} Each student was assessed $3.50 per semester which went directly to NJ PIRG. After
payment, the student could request a refund, but the court found the refund system inade-
quate since payment was required first, and the refunds took up to a year to arrive. \textit{Galda},
772 F2d at 1062.

\item\textsuperscript{68} In \textit{Galda}, students objected to being assessed mandatory student fees which were
given directly to NJ PIRG. PIRG is politically nonpartisan, but participates in state legisla-
tive matters and actively engages in research, lobbying and advocacy for social change.
PIRG has lobbied for the Equal Rights Amendment, a nuclear weapons freeze, and a num-
ber of other consumer and environmental issues. Id at 1061.

\item\textsuperscript{67} Note that the \textit{Galda} court relied heavily on the reasoning in \textit{Abood v Detroit Bd. of
Educ.}, which held that a person may not be legally compelled "to contribute to the support
of an ideological cause he may oppose . . ." 431 US 209, 235 (1977). The Court in \textit{Abood}
ruled that a union may not use mandatory dues required of teachers by law to fund political
speech substantially unrelated to the union's core purpose or mission.

\item\textsuperscript{69} \textit{Galda}, 772 F2d at 1061.

\item\textsuperscript{68} While \textit{Galda} does not expressly allocate the burden of proof, it notes that "consider-
able deference' should be accorded the university's judgment." Id at 1064, citing \textit{Galda v
Bloustein}, 686 F2d 159 (3d Cir 1982) ("\textit{Galda I}'"). Upon first reading this deference may
appear to give a preliminary presumption to the university decision itself in exercise of its
discretion, but this reading is inconsistent with \textit{Healy}, in which the university was expressly
given the burden of proof upon exclusion of a student group.

\textit{Gay and Lesbian Students Ass'n v Gohn} goes further to suggest a presumption of an
equal right to funding as other groups if all technical funding requirements are met and
funds are available. 850 F2d 361 (8th Cir 1988).
\end{itemize}
dental relation to the university’s educational mission †0 and thus overcame the initial presumption for inclusion. †1

Second, once the presumption for inclusion is rebutted, the court must balance the conflicting interests presented. †2 In Galda, once the students presented a prima facie case for exclusion, the court “left open the possibility that the University might demonstrate a compelling state interest [justifying inclusion] by establishing the importance of [NJ PIRG’s ‘contribution to the university forum.’ †3 In the fee context, “[t]he University shoulders a heavy burden to justify its determination to levy the assessment.” †4 The court sought arguments for inclusion based on the educational value of NJ PIRG’s speech.

The educational value of speech is, of course, difficult to isolate and quantify. †5 Galda is unique in that the court overruled the university’s assessment of NJ PIRG as a high value educational contributor to its forum. The court found grounds to do so because of the semi-independent and primarily political nature of NJ PIRG. A court is unlikely to overrule a university’s evaluation of the educational content of a group composed strictly of students

†0 The Galda court stated “In order to ‘overcome the presumptive validity of the university’s judgment’ [that an organization should be included within the forum], plaintiffs must establish that [the organization] . . . [has] only an incidental educational component.” Galda, 772 F2d at 1064-65, citing Galda I, 686 F2d at 166.

†1 Galda, 772 F2d at 1066-68. In GLSA, 850 F2d 361, the Eighth Circuit overruled the University of Arkansas’s denial of funding to the Gay and Lesbian Students Association. The GLSA alleged that it was denied funds because of its viewpoint, in violation of the First Amendment. The facts clearly supported GLSA’s claim that the university’s motive for denying funds was viewpoint-based. Evidence of this included transcripts of the debate over the funding request, as well as an attempt to pass a rule prohibiting funding to all groups organized around sexual preference—of which GLSA was the only one.

The Eighth Circuit in GLSA rejected the University of Arkansas’s argument that the funding denial was based on the GLSA’s lack of educational content, not because such an argument would fail, but because the lack of educational content rationale had never previously been advanced before the university got to court, while viewpoint-based objections clearly were. GLSA, 830 F2d at 367. Thus, the GLSA court did not deny that a university may base a funding exclusion on lack of educational content, an argument the Galda court accepted, it simply rejected that argument because it did not fit with the facts of GLSA.

†2 “[T]he university is free to counter the plaintiff’s showing or to otherwise demonstrate a compelling state interest by establishing the importance of the challenged group’s contribution to the university forum.” Galda, 772 F2d at 1064.

†3 Id at 1066, quoting Galda I.

†4 Id. See also Eisele v Burns 427 US 347, 363 (1976); Buckley v Valeo, 424 US 1, 25 (1976).

†5 Id at 1062-63. Indeed, this definitional problem is one reason the courts prefer to defer to university expertise in educational matters.
whose activities focused solely on the university itself. By seizing on the lack of educational content of NJ PIRG as a basis for exclusion, however, the Galda court uses the door left open in Healy and Widmar that supports a narrow, content-based exercise of discretion in regulating student speech based on the university's unique educational function. Galda holds that University X may be able to exclude a student group from its forum based on that group's lack of educational content.

The analysis in the funding context appears consistent with that in the recognition context. In both paradigms, University X faces a high standard of scrutiny and burden of proof in order to exclude the student group. The difference in the funding paradigm appears to be that the allowable exercise of discretion has been further developed out of necessity; since funds are a scarce resource, their allocation is more likely to be questioned by the group that has to pay.

2. Funding under the subsidy doctrine.

Whereas Galda analyzed university discretion in funding student groups under the forum doctrine, Student Gov't Ass'n v University of Massachusetts analyzed such discretion using the subsidy doctrine. Student Gov't Ass'n was the first decision to apply subsidy reasoning expressly to university funding of student groups, pinpointing the line between illegally imposing a discriminatory penalty, such as denying recognition and legally withholding an optional subsidy, such as funding. The Student Gov't Ass'n court relied upon the Supreme Court's subsidy cases to reach its conclusion that the University of Massachusetts was not obligated to continue funding the litigation activities of its Legal Services Office ("LSO"). Student Gov't Ass'n is useful for the funding

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76 The GLSA result supports this conclusion. The GLSA can be distinguished from NJ PIRG in Galda, because the GLSA focused its activities on the campus and student body, while NJ PIRG focused on political lobbying off of the campus.

77 Note, however, that the decision in Galda shows that university discretion to evaluate educational content of student groups is not complete; the courts will overrule a university's estimation of educational value if it cannot be proven accurate. Such activism by the courts is rare, however, and seems only to have occurred in Galda because another First Amendment right, the students' freedom of association, was at stake. In sum, a university may exercise some discretion in making funding decisions based upon its estimation of a group's educational content, but must be able to justify its conclusions if called to do so in court.

78 868 F2d 473 (1st Cir 1989).

80 The court cites the "subsidy cases" in reaching its holding in Student Gov't Ass'n. See note 28.
paradigm because the plaintiff relied on the forum doctrine for its argument, and because the First Circuit resorted to strained reasoning to conclude that the LSO was not a forum.

The University of Massachusetts ceased funding the litigation activities of its LSO, which represented students, but continued to fund the LSO’s other legal services, including counseling. Three students then sued the University for allegedly violating their First Amendment right to speak freely. The First Circuit followed the reasoning of TWR and concluded that the University of Massachusetts had no obligation to subsidize student speech by continuing to fund the LSO’s litigation activity.

Student Gov’t Ass’n held that the LSO neither constituted nor was part of a forum, obviating any need to apply the forum doctrine. The court declared that the university’s support of the LSO constituted a speech subsidy and thus was not required under the Constitution. The court allowed the University to discontinue that part of the LSO’s funding used for litigation.

Following the TWR framework, the Student Gov’t Ass’n court began by asserting the conclusion reached in Cammarano v United States that the state does not violate a student’s First Amendment rights if it refuses to subsidize student activities which are protected by the First Amendment. Next, the court demonstrated the University’s compliance with the two TWR caveats. By stopping LSO funding, the University did not infringe upon the students’ right to litigate and obtain legal counsel. Counseling remained available through the LSO, and students were in no way penalized if they chose to litigate independently.

Also, the First Circuit held that the University’s actions were constitutional because litigation funding was not stopped for the purpose of discriminating against any one viewpoint. The stop-funding order affected all student litigation equally, regardless of

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81 868 F2d at 476.
82 The Student Gov’t Ass’n court is not alone in having trouble distinguishing between forum doctrine and the subsidy cases in the student funding context. Comment, 55 U Chi L Rev at 382-88 (cited in note 16), notes that a discussion of the constitutionality of mandatory student fees and university funding of student groups requires reference to both the forum and subsidy cases.
85 Student Gov’t Ass’n, 868 F2d at 479.
86 Id.
87 Id.
The subject of the litigation. Accordingly, the effect was considered sufficiently viewpoint-neutral to withstand constitutional scrutiny. Thus, the court in \textit{Student Gov't Ass'n} used the subsidy doctrine to allow the University of Massachusetts to consider content-based criteria but not viewpoint-based criteria in making a funding decision.

The Eighth Circuit in \textit{GLSA} expressly declined to apply subsidy analysis to a student funding case in the way the First Circuit did. The Eighth Circuit did not decide that subsidy analysis was inapplicable per se, but merely declined to apply it because the facts of \textit{GLSA} showed viewpoint discrimination that neither forum nor subsidy analysis would condone. In \textit{GLSA}, a Gay and Lesbian Students Association was denied university funding. The record showed that the debate over the funding request had focused on GLSA's viewpoint, that some voters "freely admitted they voted against the group because of its views," and that "University officials were feeling pressure from state legislators not to fund the GLSA or to allow in any way the dissemination of opinions tolerant towards homosexuals." The \textit{GLSA} court did, however, agree with the subsidy cases in principle. It went on to echo the content/viewpoint distinction in its own words: "Conduct may be prohibited or regulated within broad limits. But government may not discriminate against people because it dislikes their ideas." \textit{GLSA} thus leaves open the possibility of a successful subsidy-based argument for denial of funds in cases such as \textit{Galda}, in which viewpoint discrimination is not apparent.

\begin{footnotes}
\textsuperscript{a} The court noted that "the withdrawal of the subsidy is not framed in an invidiously discriminatory manner that is designed to suppress dangerous ideas. The . . . order applies to all litigation . . . not just litigation advocating liberal or conservative causes. . . . Nor is there any indication that the Board's . . . order was aimed at the suppression of student suits against either third parties or the University." Id at 479-80 (emphasis in original) (citations omitted).
\textsuperscript{b} \textit{Student Gov't Ass'n}, 868 F2d at 482.
\textsuperscript{c} 850 F2d 361 (8th Cir 1988).
\textsuperscript{d} The \textit{GLSA} court concluded that "[b]ecause we believe the record is replete with evidence that the Senate's action was based on viewpoint discrimination, we reverse." Id at 366. The court acknowledged the University of Arkansas's subsidy arguments, but found them inadequate in the face of clear viewpoint-based discrimination. Id. To support its conclusion that viewpoint discrimination is not allowed in funding cases, the Eighth Circuit cited Justice Rehnquist's caveat in \textit{TWR} that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim' at the suppression of dangerous ideas." Id at 367, citing \textit{TWR}, 461 US at 548 (citations omitted).
\textsuperscript{e} 850 F2d at 367.
\textsuperscript{f} Id.
\textsuperscript{g} Id at 366.
\textsuperscript{h} Id at 368.
\end{footnotes}
3. **Different means to the same end.**

As discussed above, the forum and subsidy analyses are compatible in the context of university support of student speech because of the discretion allowed universities in recognition of their unique educational mission. The availability of this discretion can be said to lower slightly the level of scrutiny to which university funding decisions are subject when compared to those of more traditional public forums designed to benefit the public at large.

*Galda* shows a court working within the confines of the forum doctrine to limit university funding obligations, while *Student Gov't Ass'n* shows a court applying the subsidy doctrine to achieve a similar result. University X could cite either or both arguments to support a decision not to fund a student group.

A counter argument is that

*Widmar* and *Healy* can be read to indicate that a university may not exclude certain groups from university funding because of what those groups intend to say. Just as the first amendment prohibits selective exclusions from the use of the forum's facilities, it also prohibits selective exclusions from the funding process because many student groups need university funds to compete effectively in the marketplace of ideas.96

However, this argument conflicts with the subsidy reasoning in *McRae, Cammarano*, and their progeny (including *TWR*) that the state need not subsidize First Amendment rights. This counter argument faces obvious practical limitations as well. University coffers are not bottomless, and costs accrued are largely passed on to students in the form of increased tuition and mandatory fees. Many students can ill afford compelled funding of others' speech. Furthermore, if a university is required to fund all student groups, the resulting dilution in its funds may result in each group receiving a meaningless small amount of funds. Finally, the suggestion that the courts can and should command a university to fund all student groups runs contrary to the Supreme Court's history of granting limited discretion to educational institutions to manage their own educational matters.97

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96 Comment, 55 U Chi L Rev at 385 (cited in note 16).
97 For example, broad discretion within the confines of the First Amendment is routinely accorded local school officials on curricular decisions and daily management of school affairs. For a more detailed discussion of curricular discretion, see *Board of Educ. v Pico*, 457 US 853 (1982).
CONCLUSION

Despite its status as a public forum, a university may consider some content-based criteria in regulating student speech. University officials enjoy greater autonomy than regulators of a general function forum in deciding what speech they will support. Just how much discretion courts will grant university decisions regulating student speech is unclear, but the cases discussed herein suggest some narrow parameters. In a situation such as the recognition paradigm, it is clear that a university may not deny a student organization the right to recognition and its associated privileges without demonstrating a compelling state interest, such as the enforcement of reasonable campus rules compatible with its educational mission. This leaves a university only limited discretion in choosing which rules best suit its educational mission.

In a situation such as the funding paradigm, however, university discretion to consider content-based criteria increases. When allocating scarce resources, university content-based discrimination standards under the forum doctrine relax to the extent that they overlap and become coextensive with the subsidy doctrine’s less rigorous, nondiscrimination viewpoint standards. This allows a university to consider content-based criteria in making funding decisions that it may not consider in making recognition decisions. Similarly, the Supreme Court generally recognizes that, to some extent, state funding decisions necessarily rest on the subject matter of the request. 8

The question of how the state may distribute scarce resources in a nondiscriminatory manner consistent with the First Amendment is raised constantly, from the funding decisions of the National Endowment for the Arts to the university funding decisions. The reasoning of the subsidy doctrine reinforces the conclusion that a narrowly limited exercise of discretion, consistent with a university’s unique educational mission, allows university officials to consider educational, content-based criteria in making funding decisions without violating the First and Fourteenth Amendments.

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8 In Buckley v Valeo, 424 US 1 (1976), the Supreme Court entertained an analogous discussion on public funding of the arts and suggested that a funding decision can rest on the artistic value of the subject matter itself. Furthermore, in Maher v Roe, 432 US 464 (1977), the Court held that withholding state funds from abortion related services did not violate the proposed recipient organization’s right to free speech and did not constitute objectionable content-based discrimination.