Mandatory Student Fees: First Amendment Concerns and University Discretion

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*[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical*¹

*[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe*²

The freedom to associate or not to associate with any particular idea or group has firm roots in the first amendment. Similarly, the idea that the first amendment protects abhorrent speech has a long history. Recently, these two doctrines have come into play and, at times, into apparent conflict in debates over the constitutionality of mandatory student fees at public³ universities.

Universities levy fees on students in order to fund a variety of student groups and services ranging from athletics to student government to politically active student groups such as a student newspaper⁴ or a Public Interest Research Group ("PIRG").⁵ In general, students pay these fees with little thought as to how the fees will be used and most students, if not all, would not withhold the money used to fund school athletics and general services. How-

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¹ Thomas Jefferson, A Bill for Establishing Religious Freedom, in 2 The Papers of Thomas Jefferson 545 (1950).

² *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes dissenting).

³ Because of the state action doctrine, constitutional guarantees of human rights are effective only against action which is "fairly attributable to the State." *Lugar v. Edmunson Oil Co.*, 457 U.S. 922, 937 (1982). Since it is questionable whether private universities are subject to constitutional restraint, this Comment considers first amendment rights solely in the context of a state university.

⁴ See, e.g., *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983)(approximately 20 percent of student fees used to fund school newspaper).

⁵ See, e.g., *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985)(student fee assessed under neutral funding policy and used to fund the New Jersey PIRG, a political advocacy group).

ever, conflict has arisen over fees used to fund politically active or ideological organizations whose ideas are repugnant to some students.⁶ In protest, these students allege that the use of mandatory fees violates their freedoms of association and speech because it compels them to support ideas that they dislike.

In response, university officials, among others, contend that mandatory fees are necessary to ensure that all student groups may contribute to the total university exchange of ideas. The proponents of this theory contend that the university setting is designed to instill in students enlightened thought, and that the university's unique character supports its discretion to compel the payment of student fees.

This Comment analyzes the constitutional issues raised by the use of mandatory student fees to fund speech at public universities. Part I examines the interests of students and universities with respect to the use of such fees. Part II examines court decisions in this area. Part III looks to the nature of student fees and demonstrates that they are permissible exercises of university discretion. Parts IV and V discuss whether the Constitution *requires* a university, if it funds student organizations by mandatory fees, to fund all organizations equally, without regard to other students' objections to those organizations' viewpoints.

I. STUDENT AND UNIVERSITY INTERESTS

A. Students' Right Not to Associate

The student objectors' assertion that universities cannot compel them to fund organizations whose ideas they find repugnant relies on the first amendment freedom of association. Although the freedom to associate is not expressly set out in the first amendment, the Supreme Court has regarded it as implicit in the free-

⁶ See *Galda*, 772 F.2d 1060 (students objecting to use of special fee to fund political advocacy group); *Kania*, 702 F.2d 475 (students objecting to fee used to fund school newspaper voicing opinions with which they disagreed); *Arrington v. Taylor*, 380 F.Supp. 1348 (M.D.N.C. 1974)(students objecting to funding of student newspaper); *Veed v. Schwartzkopf*, 353 F.Supp. 149 (D.Neb. 1973) (objection to funding of student newspaper, student government association and speaker series); *Larson v. Board of Regents of University of Neb.*, 189 Neb. 688, 204 N.W.2d 568 (1973)(objection to funding of student newspaper, student association, and speaker group); *Good v. Associated Students of University of Washington*, 86 Wash.2d 94, 542 P.2d 762 (1975) (objection to funding of politically active student group); *Lace v. University of Vermont*, 131 Vt. 170, 303 A.2d 475 (1973) (objection to funding of speakers series, student newspaper, certain student government expenses, and certain films).

doms of speech, assembly, and petition.⁷ Although the freedom to associate is the more commonly touted right, it carries with it an equally important right not to associate.

An individual's right to refrain from associating with or expressing views with which she disagrees was best voiced by the Supreme Court in *Board of Education v. Barnette*.⁸ The Court stated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."⁹ In *Barnette*, the Court considered the constitutionality of a school board resolution requiring all students to salute and pledge allegiance to the United States flag.¹⁰ In reaching its conclusion that individuals should be free from compulsion "to declare a belief," the Supreme Court recognized that "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard."¹¹ The *Barnette* principle has gained general acceptance and has been applied by the Supreme Court in several other contexts.¹² Most recently,

⁷ The first amendment's core protection of the right to speak protects the right to associate oneself with *ideas*, since speech itself serves to associate its speaker with the ideas she espouses. The Court has further recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958) (holding that under the circumstances the state could not compel the NAACP to disclose its membership list because such disclosure would abridge the right of NAACP members to band together to promote their views). The Court thus has held that the first amendment protects the freedom to associate oneself with other *people* as a predicate to vindication of the right to speak.

⁸ 319 U.S. 624 (1943).

⁹ *Id.* at 642.

¹⁰ The West Virginia State Board of Education had required all pupils and teachers to participate in the salute, stating that refusal to do so would result in expulsion. 319 U.S. at 626. The objecting students were Jehovah's Witnesses whose religious beliefs forbade them from worshipping "any graven image" and who considered the flag to be an "image" within the meaning of this command. The Court held that the issue did not turn upon the religious views of the students. *Id.* at 634.

¹¹ *Id.* at 641. As with the right to associate, the right not to associate may apply both to ideas and other people. See note 7. The line of cases founded upon *Barnette* protects the right not to associate with an idea. On the freedom not to associate oneself with a group of other people, see *Elrod v. Burns*, 427 U.S. 347 (1976) (holding unconstitutional a patronage system which forced a city employed process server and a city employed bailiff to support and affiliate themselves with the Democratic Party in order to retain their jobs).

¹² See, e.g., *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986) (order that a utility must apportion space in its billing envelope between itself and rival citizens groups who wished to submit editorial notices violated utility's rights of expression and association); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state's requirement that license plate bear motto, "Live Free or Die," violated plaintiff's right not to associate with speech he considered repugnant); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (Florida "right to reply" statute forcing newspaper to allow equal space to a candidate to respond

this principle has been extended to forced payment of union "agency-shop" fees, parts of which are later used to fund expression of political or ideological views.¹³ In a line of cases extending from *Machinists v. Street*,¹⁴ through *Railway Clerks v. Allen*,¹⁵ to *Abood v. Detroit Board of Education*,¹⁶ the Court has considered whether unions may use portions of a mandatory agency-shop fee to fund political candidates or certain ideological views. In *Street* and *Allen*, the Court invalidated such expenditures on statutory rather than constitutional grounds¹⁷ but some justices voiced the opinion that it was constitutionally impermissible to allow such expenditures.¹⁸ Finally, in *Abood*, the Court addressed the constitutional issues that it previously had avoided.

As with the previous cases, the controversy in *Abood* centered on the expenditure of agency-shop fees for political purposes. The plaintiffs refused to pay these fees, claiming that they were used for political, ideological, and religious activities unrelated to the union's position as collective bargaining agent. According to the plaintiffs, such expenditures violated their freedom not to associate by compelling them to support views they found distasteful.¹⁹ The Court agreed and ruled that the union's expenditures on political activities unrelated to its position as exclusive bargaining representative must be funded by contributions voluntarily paid by employees. The Court refused to countenance what it deemed "compulsory subsidization of ideological activity."²⁰

to criticism violated constitutional guarantees of freedom of speech and association).

¹³ An agency shop is a "union-security device whereby, in order to continue employment, any nonunion member employee is required to pay to the Union sums equivalent to those paid by union members. . . ." Black's Law Dictionary 58 (5th ed. 1979).

¹⁴ 367 U.S. 740 (1961).

¹⁵ 373 U.S. 113 (1963).

¹⁶ 431 U.S. 209 (1977).

¹⁷ In *Street* and *Allen*, the Court did not address the constitutional issues because it construed the Railway Labor Act, 45 U.S.C. §152, Eleventh (1982) to deny the union authority to make expenditures to support political or ideological views against an agency-shop member's objections. *Street*, 367 U.S. at 770; *Allen*, 373 U.S. at 118.

¹⁸ See, e.g., *Street*, 367 U.S. at 791 (Black dissenting) (in authorizing application of the union-shop contract to employees who object to the union's use of dues for political purposes, Railway Labor Act violates objectors' freedom to associate).

¹⁹ 431 U.S. at 213. The exact nature of the activities and the dissenting employees' objections were not described in detail. *Id.* at 213 n.3.

²⁰ *Id.* at 237. The Court equated compelled financial support for a particular view with prohibitions on support for ideological activity:

The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be

The Court limited its bar on compulsory funding to those expenditures that were not germane to the union's collective bargaining role.²¹ The principle that can be drawn from *Abood* is not that unions are forbidden to use mandatory dues to fund political speech; rather, unions may not use mandatory dues to fund political speech substantially unrelated to the union's core purpose.²² Presumably then, if the union were to use its dues to help fund an organization that lobbied on behalf of union members, the expenditures would not offend the first amendment.

Students objecting to the use of mandatory fees as a means of funding political and ideological student organizations sometimes rely on the *Abood* decision to support their claims.²³ As members of the university requiring the payment of student fees to fund speech, these students contend that they are in a position similar to the members of an agency-shop; consequently, they call for protection against associational infringements in a manner similar to the *Abood* case. They argue that a university's mission is educational; as such, fees levied upon students should be used only to support organizations compatible with that mission. Funds used to support political or ideological speech violate the *Abood* test because the university does not use those funds for purposes germane to the university's stated function.

B. University Interest In the Free Exchange of Ideas

Universities argue that they have a significant interest in man-

shaped by his mind and his conscience rather than coerced by the State. Id. at 234-35 (footnotes omitted).

²¹ Id. at 225-26 ("insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment . . . [previous] decisions of this Court appear to require validation of the agency-shop agreement before us"). Justice Douglas earlier had suggested this theory in his concurring opinion in *Street*, 367 U.S. at 778 ("As long as . . . [the union leaders] act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy."). The Court in *Abood* recognized that its decision would create difficult line drawing problems between "collective-bargaining activities" and "ideological activities unrelated to collective bargaining." 431 U.S. at 236.

²² See Laurence H. Tribe, *American Constitutional Law* § 12-4 n.5 (1978) ("The decision in *Abood* did not uphold any right of a non-member to withhold contributions from the cost of communicative activities with which the non-member disagrees, so long as such activities are germane to the union's duties as collective bargaining representative.").

²³ In only two cases have students relied directly on the *Abood* decision. See *Galda*, 772 F.2d at 1063; *Kania*, 702 F.2d at 478. However, in pre-*Abood* cases, students relied on *Abood*'s precursors, *Street* and *Allen*, or on identical theories. See generally *Arrington*, 380 F.Supp. 1348; *Veed*, 353 F.Supp. 1149; *Good*, 542 P.2d 762; *Larson*, 204 N.W.2d 568.

dating student fees. The university atmosphere, school officials claim, is peculiarly "the marketplace of ideas."²⁴ By using fees to fund student groups, the university ensures that a variety of groups will participate in the overall exchange of ideas. In creating this marketplace, the university fulfills its duty "to provide that atmosphere which is most conducive to speculation, experiment and creation."²⁵

The concept of the marketplace of ideas stems from basic first amendment tenets. Theoretically, this marketplace facilitates society's search for truth.²⁶ Historically, the university was founded on principles of reason and freedom of thought; thus, many have reasoned that the promotion of the marketplace of ideas is especially important in the university environment. Allan Bloom aptly describes this conception:

[The university exists] for the sake of democracy and for the sake of preserving the freedom of the mind . . . for some individuals within it. The successful university is the proof that a society can be devoted to the well-being of all, without stunting human potential or imprisoning the mind to the goals of the regime.²⁷

Thus, the university's purpose is to enlighten students as to opposing views so that they might learn ultimate truths.

Exposure to conflicting views is not only educative generally; it also imbues in students a capacity for tolerance. In *The Tolerant Society*, Lee Bollinger argues that the institution of free speech is coercive because it enforces a tolerance in people by compelling them to confront abhorrent speech and their impulse to suppress it; it forces them to exercise self-control.²⁸ Such teachings of toler-

²⁴ *Healy v. James*, 408 U.S. 169, 180 (1972).

²⁵ *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter concurring), quoting Statement of the Conference of Senior Scholars from University of Cape Town and University of Wittersrand, *The Open Universities in South Africa* 10-12.

²⁶ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes dissenting) ("the best test of truth is the power of the thought to get itself accepted in the competition of the market").

²⁷ Allan Bloom, *The Closing of the American Mind* 252 (1987) ("American Mind").

²⁸ See Lee C. Bollinger, *The Tolerant Society* 126-31, 143 (1986). Bollinger explains the significance of the tolerant mind this way:

[T]he impulse [of intolerance] threatens all behavior. Everyone who is perceived as being different, as having different values or beliefs or an interest in a different way of life, is a potential victim of an excess of this impulse. Besides members of religious groups, the most common victims of such intolerance are those of different races or nationalities. . . . [T]he basic operation of a self-governing political society . . . [involves] a willingness to compromise and a willingness even to accept total defeat. . . .

ance not only are desirable, but also may be essential because "of the dependence of a free society on free universities."²⁹

According to school officials, the university promotes the marketplace of ideas not only in the classroom but also by creating a forum of widely divergent student groups.³⁰ Student fees used to fund such groups creates a forum of "uninhibited, robust, and wide-open" expression.³¹ Student participation in student organization speech activities, moreover, is itself an important learning experience. Consequently, universities feel that any incidental limitation on student dissenters' rights is justified.

C. The Possibility of Alternative Systems

One could accommodate the student objections by using a different funding system. For example, rather than funding all qualified student organizations, a university could subsidize none of these groups. All student organizations would be funded through voluntary donations. Some commentators favor this system³² and a few universities use it.³³ Similarly, a university could use a refund system that would allow a student to indicate that she did not wish to support a particular group, thereby enabling her to obtain a refund.³⁴

While these alternatives accommodate the dissenting students,

[Tolerance thus] bears a special relevance to the actual functioning of a democratic system of government.

Id. at 111, 117-18.

²⁹ *Sweezy*, 354 U.S. at 262 (Frankfurter concurring). See also *Sweezy*, 354 U.S. at 250 (majority opinion) ("essentiality of freedom in the community of American universities is almost self-evident"); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned"). Bloom notes that "the . . . universities are the core of liberal democracy, its foundation, the repository of its animating principles. . . . The free university exists only in liberal democracy, and liberal democracies exist only where there are free universities." Bloom, *American Mind* at 259 (cited in note 27).

³⁰ See, e.g., *Veed*, 353 F.Supp. at 152 (university officials argued that extracurricular groups were as much a part of the educational process as were classroom teachings).

³¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³² See Tribe, *American Constitutional Law* § 12-4 n.5 (cited in note 22). In speaking of mandatory fees in the *Abood* context, Professor Tribe suggests that "[a] better solution might well be to require ideological activities . . . to be financed from voluntary contributions. . . ."

³³ Approximately 10 percent of universities do not appropriate money to student groups either from mandatory fees or directly from their budget. David L. Meabon, Robert E. Alexander and Katherine E. Hunter, *Student Activity Fees* 20-33 (1979).

³⁴ *Abood* is often cited as supporting this proposition. See, e.g., *Association of Capitol Powerhouse v. Division of Building*, 89 Wash.2d 177, 570 P.2d 1042, 1049 (1977). See also Galda, 772 F.2d 1060, for a discussion of refund systems in the university context.

they do not fully take into account the universities' interests. At first, this may seem untrue. Certainly, all student groups still have the right³⁵ and the ability³⁶ to speak on campus regardless of whether they are funded. Therefore, it may seem that accommodation of the student dissenters does not infringe upon the universities' interest in creating a forum for the expression of ideas.³⁷

While the failure to compel fees for these student groups ensures that student free association rights are not infringed, the university's educative goals certainly are not promoted to their fullest when funding of such groups is not present. Lack of funding will reduce the diversity of views expressed, the total quantity of speech which can be funded, and the opportunity for students to participate in student organization speech activities. Moreover, a university's goal to instill in students an active capacity for tolerance is undermined when it creates a system where private biases are allowed to determine who in the forum shall be given the added advantage of monetary support.³⁸

In sum, universities often feel that they must mandate student fees if they are to meet their educative goals. That the universities' goals are legitimate is unquestioned. Rather, the issue is whether a

³⁵ *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969), upheld the right of public school students to wear black armbands to protest United States policy in Vietnam. The Court stated that "[i]t can hardly be said that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." These rights were expressly extended to university students in *Healy v. James*, 408 U.S. 169, 180 (1972), where the Supreme Court held invalid a university's refusal to allow a group to organize on campus on the ground that the group's stated views were abhorrent to the university. See also *Widmar v. Vincent*, 454 U.S. 263 (1981). For a more extended discussion of these rights, see Part III.A.

³⁶ This proposition is arguable. Considering the average student's lack of funds, it seems less likely that groups receiving no university financial support will be able to associate and speak effectively. See, e.g., *Arrington*, 380 F.Supp. at 1358 (withdrawal of funds from student newspaper would impair exchange of ideas).

³⁷ One commentator claims that because there is no actual clash between the two interests, the argument leans heavily in favor of protecting the students' associational concerns. See Note, "Fee Speech": First Amendment Limitations on Student Fee Expenditures, 20 *Cal.West.L.Rev.* 279, 285 (1984).

³⁸ The system in which private biases are allowed to determine funding decisions conveys a message to students that although the university purports to teach them tolerance, it is willing to deny the benefits of funding to those groups that students deem intolerable. Allowing students to decline participation in funding also creates a "free rider" problem—unless the university reallocates the contested funds to non-speech activities rather than refunding them to the students. An individual student has little incentive to contribute to funding a forum for free expression if she receives the benefits of the forum regardless of whether she contributes. The Court in *Abood* found this incentive problem an important reason to allow an agency-shop union to engage in speech related to collective bargaining even where some of its members disagreed. See *Abood*, 431 U.S. at 222.

university can promote these goals to their fullest by using compelled student fees. Consequently, the adequacy of alternative funding mechanisms will not be considered further in this Comment. Parts II and III of this Comment instead focus on the constitutional permissibility of mandatory fees.

II. A SURVEY OF COURT DECISIONS ON THE PERMISSIBILITY OF STUDENT FEES

Several courts have heard claims challenging the constitutionality of student fees. Almost unanimously³⁹ these courts have held such fees permissible. However, courts have approached this issue differently and many have ruled in favor of the universities without adequately analyzing the issues involved in these cases.

Some courts have ruled that a university may assess mandatory fees because the university setting is a "forum" created for the expression of widely divergent opinions.⁴⁰ These courts reason that the objecting students are not being forced to associate with one particular idea because their fees are being used to fund several opinions.⁴¹ However, different courts have defined the scope of this forum differently.

In *Lace v. University of Vermont*⁴² the Vermont Supreme Court applied the forum approach to school activities as a whole.

³⁹ Only one court has ruled that an assessment was unconstitutional. See *Galda*, 772 F.2d at 1068. However, the *Galda* case can be distinguished from the other mandatory fee cases since it involved a fee mandated specifically for one group, the New Jersey PIRG. *Id.* at 1061. In addition, this group was unusual in that it was a state-wide organization independent from the university. As the *Galda* court recognized, these facts are not present in fee cases where a single fee is assessed and later distributed to several student groups. *Id.* at 1064.

The differences between *Galda* and the other fee cases and the complexities involved are too numerous to be dealt with here. For commentary on *Galda's* relationship to the other fee cases see Note, 20 Cal.West.L.Rev. 279 (cited in note 37); Recent Developments, Constitutional Law: The First Amendment and Compulsory Funding of Political Advocacy — *Galda v. Rutgers*, 9 Harv.J.L. & Pub.Pol'y 731 (1986); Charles Thomas Steele Jr., Mandatory Student Fees at Public Universities: Bringing the First Amendment Within the Campus Gate, 13 J.Col. & Uni.L. 353 (1987).

⁴⁰ See, e.g., *Kania*, 702 F.2d at 480; *Veed*, 353 F.Supp. at 153; *Good*, 542 P.2d at 768-9; *Larson*, 204 N.W.2d at 570-1; *Lace*, 303 A.2d at 479.

⁴¹ Generally, student fees are assessed at the beginning of each school term in one lump sum. These assessments are then placed into a fee pool that is distributed in accordance with neutral criteria (e.g., a certain dollar amount per member) to qualified student organizations. See, e.g., *Lace*, 303 A.2d at 476; *Larson*, 204 N.W.2d at 570; *Veed*, 353 F.Supp. at 150. Thus, the courts feel that a student is not being forced to associate herself with any individual ideology; rather she is merely contributing to a monetary pool for all qualified organizations.

⁴² 131 Vt. 170, 303 A.2d 475 (1973).

Ruling that "student association funds provide the monetary platform for various and divergent student organizations to inject a spectrum of ideas into the campus community," the court found that the assessed fees did not constitute a compelled association.⁴³ The fact that the fees were used to fund many different groups was, for the court, a sufficient answer to the complaining students' first amendment attack on mandatory student fees.

The court in *Larson v. Board of Regents*⁴⁴ took a somewhat different approach. In *Larson*, certain students objected to the use of their fees to fund a student newspaper and a visiting speakers program. The court rejected the students' claims under a forum analysis; however, its definition of a forum was much more limited than that in *Lace*. "We do not question the right of the university to furnish partial support for a campus newspaper from the student fees, but such a newspaper should not be allowed to become a vehicle for expressing a single political point of view."⁴⁵ In contrast to the reasoning in *Lace*, the *Larson* court's approach suggests that each individual organization must provide a forum for diverse views. Thus, groups with a particular political bent or advocacy groups such as a PIRG are susceptible to student attacks under this ruling.

Arrington v. Taylor,⁴⁶ unlike the above examples, turned on associational concerns rather than on the forum concept. As in most cases, the controversy arose over the use of student fees to fund school newspapers; certain students objected to the predominantly liberal views espoused by the paper. While recognizing that the paper was a forum for diverse viewpoints, the court concentrated mainly on the students' claim that the use of mandatory student fees to fund the paper violated the students' right not to associate.⁴⁷ Ultimately, the court rejected the students' conten-

⁴³ Id. at 479. Other courts have agreed with this analysis. The *Kania* and *Veed* courts applied the forum analysis to student activities as a whole. However, in each case, other factors also played a large part in the decision. In *Veed*, the court also focussed on university discretion, stating that the university "must retain the freedom and flexibility to put before their students a broad range of ideas in a variety of contexts." 353 F.Supp. at 153. The *Kania* court ruled that "funding by mandatory student fees is the least restrictive means of accomplishing an important part of the University's central purpose, the education of its students." 702 F.2d at 480.

⁴⁴ 189 Neb. 688, 204 N.W.2d 568 (1973). See also *Good*, 542 P.2d at 769 (expressly approving the *Larson* court's approach).

⁴⁵ 204 N.W.2d at 571. The court expressed a similar view regarding the speaker program. Id.

⁴⁶ 380 F.Supp. 1348 (M.D.N.C. 1974).

⁴⁷ In analyzing the associational concerns, the court relied upon *Lathrop v. Donahue*, 367 U.S. 820 (1961), the then-existing precedent regarding compelled fees and negative asso-

tions, ruling that because the newspaper did not speak on behalf of the entire student body, no ideas could be attributed to the objecting students and, therefore, the university had not compelled the students to associate with the ideas published in the student newspaper.⁴⁸

Although courts applying these differing analyses have rejected student contributors' first amendment objections to mandatory student fees, the disparity in the different courts' approaches indicates that first amendment doctrine in this area is unsettled. Here, cases involving similar situations result in conflicting decisions depending upon the approach used by the courts. Part III examines the constitutional permissibility of mandatory fees under current Supreme Court doctrine and suggests a uniform approach to the fee question.

III. MANDATORY STUDENT FEES ARE PERMISSIBLE

This section first demonstrates that the Supreme Court's decision in *Abood* does not preclude mandatory fees. This discussion then examines three important Supreme Court decisions and shows that, under their framework, student fees are permissible.

A. *Abood*: Limitations on the Labor Union Analogy

Arguing that the *Abood* "reasonably related to the organizations' core purpose" test applies, students claim that the university can mandate fees only for those organizations compatible with the university's educational mission. Thus, those student groups with a political bent cannot be funded. The student dissenters who rely on *Abood*, however, fail to recognize either the obvious differences between a labor union and a university or the permissibility of mandatory fees under *Abood* even if such an analogy is accepted.

The *Abood* Court held that a union could not require members of a collective bargaining unit to pay agency-shop fees where the union used the fees to fund speech not related to the union's function as the unit's exclusive bargaining representative and where some members found that speech repugnant. The student fees scenario differs from the *Abood* model because the universities use mandatory student fees to fund a forum of ideas, not a particu-

ciational rights. Although the court in *Lathrop* did not actually resolve the associational issues, several concurring justices attempted to answer this question. The *Arrington* court relied especially on Justice Harlan's opinion. *Id.* at 849.

⁴⁸ 380 F.Supp. at 1362-63.

lar ideology or a group of students that functions as the exclusive mouthpiece of the student body. Some lower courts considering the student fee issue have noted this distinction when ruling against student dissenters.⁴⁹

The union situation differs from the university setting in a second way as well: the justifications for mandating fees in the union situation are not the same as the justifications for mandating fees in the student fee situation. Universities mandate student fees in order to promote a first amendment value, the free exchange of ideas. Labor law, by contrast, requires each of the members of a collective bargaining unit to pay labor dues in order to facilitate labor peace.⁵⁰ In the university setting, first amendment interests exist on both sides of the argument—both the student dissenters and the universities argue that first amendment interests support their respective positions on the mandatory fee issue. Consequently, the problem of balancing these interests is unlike that in the union situation, where the first amendment associational interest outweighs the less compelling labor interest.

Even if the imperfect analogy between the union and the university is accepted, the *Abood* test itself does not support the student objectors' attack on mandatory student fees. The Court in *Abood* ruled that a union cannot fund political speech substantially unrelated to the union's core purpose through mandatory dues. It did not say that no political speech could be funded. If one applies this test in the university setting and assumes that the core purpose of the university is educative (as the student dissenters assert), the argument against mandatory fees fails.

One cannot say that the political and controversial ideas that the dissenters dislike are noneducational. Many recognize that such ideas are educative.⁵¹ Indeed, controversy and dissension are central to the university model. Certainly this idea was at the core of one lower court's decision:

When a student enrolls at a university he or she enters [*sic*]

⁴⁹ See, e.g., *Kania*, 702 F.2d at 480 (Unlike *Abood*, the school newspaper did not enhance the power of only one group to further its political goals; rather, it increased the overall exchange of opinions and ideas on campus.). See also *Lace*, 303 A.2d at 479 (relying on the *Street* decision which preceded *Abood*).

⁵⁰ See *Kania*, 702 F.2d at 479 (*Abood* Court concerned with labor relations in the public sector, not with the peculiar setting of a student newspaper in a public university).

⁵¹ See, e.g., *Lace*, 303 A.2d at 480 ("fact that certain ideas are controversial . . . does not automatically make them non-educational"). See also *Board of Education v. Pico*, 457 U.S. 853, 890 (1982) (Burger dissenting) (educational and political decisions are necessarily intermixed).

an academic community—a world which allows the teaching, advocacy and dissemination of an infinite range of ideas, theories and beliefs. They may be controversial or traditional, radical or conformist. But the university is the arena in which accepted, discounted—even repugnant—beliefs, opinions and ideas challenge each other.⁵²

In addition, student participation in student organization speech activities is itself an important educational experience.

Decisions regarding educational value generally are left to educators and are given great deference by the courts⁵³ unless such decisions are clearly unconstitutional.⁵⁴ Therefore, if a university “adopt[s] as a part of [its] educational process”⁵⁵ a program that promotes the exchange of political or controversial ideas through extracurricular student organizations, it is difficult to say that such a program violates the *Abood* test.

B. *PruneYard*, *Buckley*, and *Lee*: A Uniform Approach to Compelled Fees

1. *The PruneYard Analogy—Associational Concerns In the Forum Context.* While most decisions in this area have acknowledged that the forum interests outweigh the associational interests, few have used a principled basis to make such decisions. No court has expressly considered the analysis articulated in *PruneYard Shopping Center v. Robins*,⁵⁶ where the Supreme Court ruled that forcing a shopping center owner to allow distribution of leaflets on his property did not violate his right not to associate.⁵⁷ Significantly, *PruneYard* involved both forum and associational concerns and therefore is a powerful analogy to the mandatory fee cases.

In *PruneYard*, the Court considered whether the state could prevent the owner of a large shopping center from excluding cer-

⁵² Good, 542 P.2d at 768-69.

⁵³ Several Supreme Court cases have recognized that decisions of this kind “should be made by academicians, not by federal judges.” *Widmar*, 454 U.S. at 278-79 (Stevens concurring). See also *Healy*, 408 U.S. at 180 (recognizing “the need for affirming the comprehensive authority of . . . school officials”), quoting *Tinker*, 393 U.S. at 507. Such discretion is also inherent in the constitutional dimensions of academic freedom. See note 29.

⁵⁴ See *Healy*, 408 U.S. at 180; *Widmar*, 454 U.S. at 278-79 (Stevens concurring). For example, the university cannot constitutionally practice viewpoint discrimination. Part V of this Comment will demonstrate that where viewpoint discrimination is involved, university discretion is severely limited.

⁵⁵ *Veed*, 353 F.Supp. at 152.

⁵⁶ 447 U.S. 74 (1980).

⁵⁷ While decisions before 1980 could not rely on the *PruneYard* case, subsequent decisions in *Kania*, 710 F.2d 475, and *Galda*, 772 F.2d 1060, did not mention *PruneYard*.

tain speakers from his shopping center grounds. The owner had opened the shopping center to the public in order to encourage patronage of the center's commercial establishments. The owner barred visitors or tenants from engaging in publicly expressive activities that were not directly related to the shopping center's commercial purpose and enforced this policy in a nondiscriminatory manner. Pursuant to this policy, the shopping center's security agents forced certain high school students, soliciting support for their campaign to oppose a United Nations resolution against Zionism, to leave the PruneYard's premises.⁵⁸

The Court accepted the California Supreme Court's determination that the California Constitution protected "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned."⁵⁹ The owner contended that, as interpreted, this provision of the California Constitution violated his first amendment right not to associate because it forced him to use his property as a forum for the speech of others.⁶⁰ The Supreme Court recognized that the right involved was like that in *Barnette*—the right not to associate with a particular idea. Yet the Court rejected the owner's contention, citing three reasons why *PruneYard* was distinguishable from other negative association cases:

Most important, the shopping center by choice of its owner is not limited to the personal use of the appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by the members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellant's property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs. . . .⁶¹

Because of these factors, the Court held that the connection between the owner and the speakers was so attenuated that recogni-

⁵⁸ 447 U.S. at 77.

⁵⁹ Id. at 78, quoting *Robins v. PruneYard Shopping Center*, 23 Cal.3d 899, 910, 592 P.2d 341, 347 (1979).

⁶⁰ Id. at 85.

⁶¹ Id. at 87.

tion of the protestors' right to speak and petition in the complex did not force the owner to associate himself with a particular belief.

The *PruneYard* analysis is particularly helpful in analyzing students' associational concerns in the mandatory student fee context. First, the university atmosphere is similar to that of the shopping center in *PruneYard*. Both are forums used by widely divergent groups of people. By creating a forum in which all students are free to speak, the university has likened itself to a shopping complex "open to the public to come and go as they please." Under such conditions, it is unlikely that anyone would attribute a particular group's speech to any one student.

In *PruneYard*, the danger of attribution of ideas was much greater because the public was aware that one person was responsible for the shopping center forum: the owner. However, in the university situation, people do not attribute certain ideas to individual students because of the unique public character of the university. No one owns the university forum; the ideas that emanate from it can be attributed only to those groups proposing such ideas. Due to the low risk of attribution in the university fee context, the student dissenters in the student fee context are more analogous to the shopping center owner in *PruneYard* than the union members in *Abood* where the union was the sole mouthpiece of its agency-shop members.⁶²

Similarly, the second factor in *PruneYard* applies in the student fee context. The state does not dictate a particular message when a university creates a forum for the exchange of ideas. That would run counter to a university's goals of education, diversity, and tolerance. Rather, the university creates a forum for the dissemination of *all* ideas. As such, the students cannot claim that they are being forced to associate with *particular* ideas.

Finally, like the shopping center owner in *PruneYard*, the students can expressly disavow any connection with the distasteful ideas. Arguably, this point is less powerful here than in the *PruneYard* situation. It might be harder, for example, for individ-

⁶² See text accompanying note 49. In *Pacific Gas & Electric*, 475 U.S. 1 (1986), the Supreme Court held unconstitutional a public utility commission's order requiring a utility to place a third party newsletter in its billing envelope. The Court noted that *PruneYard* did not raise a "concern that access to [the complex] might affect the shopping center owner's exercise of his own right to speak. . . ." This distinction applies in the university fee context as well. The Court reasoned that, unlike the billing envelope at issue in *Pacific Gas & Elec.*, *PruneYard* involved an area that was "almost by definition, peculiarly public in nature." *Id.* at 12 n.8.

ual students than for the shopping center owner to post signs that others can see—the shopping center owner can, for example, place signs at the entrances to his complex.⁶³ Because the other *PruneYard* factors weigh heavily against the students, however, courts should treat the students' argument in the present context like the position of the shopping center owner in *PruneYard*. Under the *PruneYard* analysis, mandatory student fees do not violate student objectors' right not to associate since the connection between the students' funds and a particular belief is not firm enough to constitute compelled association.

2. *The Buckley Analogy—First Amendment Rights in the Compelled Funding Context.* Although *PruneYard* provides a good example of an individual compelled to provide a forum for free expression, the shopping center owner in that case did not have to fund the speech to which he objected. Pointing to the heightened scrutiny given to funding in *Abood*, one still might argue that *Abood* rather than *PruneYard* is the stronger analogy to the mandatory student fee case and therefore that courts should invalidate forced contribution to ideological groups as an unconstitutionally compelled affirmation of belief. That claim, however, overemphasizes the coincidence that both *Abood* and the mandatory student fee case involve funding. Two arguments indicate that courts should not read *Abood* as requiring that courts strike down mandatory student fees. First, in *Buckley v. Valeo*,⁶⁴ the Court upheld a provision of the Federal Election Campaign Act providing for public financing of election campaigns; thus, *Buckley* is closely analogous to university student fee financing of speech. Second, *PruneYard*, while not explicitly dealing with the funding issue, implicitly concluded that the state could compel property owners to fund a forum for free expression.

Buckley v. Valeo upheld a scheme of Congressional financing of election campaigns created "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising."⁶⁵ Plaintiffs argued that this scheme involved a "compulsion upon individuals to finance the dissemination of ideas with which they disagree." The Court had little patience for this claim, holding in a single sentence that "[t]he

⁶³ A university might lessen this concern by requiring the organization to indicate that all students do not share its views.

⁶⁴ 424 U.S. 1 (1976).

⁶⁵ 424 U.S. at 91.

scheme involved[d] no compulsion.”⁶⁶ According to the Court, Congress’ public financing scheme was an effort “not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people.”⁶⁷ *Buckley* thus establishes the principle that the government may tax its citizenry and use the funds to subsidize a forum for free expression, as long as it does so in a way that does not invidiously discriminate among speakers and viewpoints.⁶⁸

PruneYard can also be read to establish this principle. In concluding that the state law upheld in *PruneYard* was not an unconstitutional taking, the Court conceded that “one of the essential sticks in the bundle of property rights is the right to exclude others.”⁶⁹ Like the taxpayers in *Buckley*, therefore, the shopping center owner in *PruneYard* effectively surrendered a property right in order to support views with which he disagreed. Arguably, the situation in *PruneYard* differs from the payment of fees in both *Buckley* and the mandatory student fee context. Although the shopping center owner had to lend his property to support ideas with which he disagreed, he did not actually lose any of his property.⁷⁰ But should this distinction make a difference? The important issue in *PruneYard* was not whether the state had taken the shopping center owner’s property, but whether the state had violated the shopping center owner’s first amendment rights by forcing him to make his property available for the propagation of views with which he disagreed. In holding that the state had not violated the shopping center owner’s right not to associate, the Court in *PruneYard* did not rely on the fact that the value of his property was hardly diminished by his support of the forum.⁷¹

3. A balancing test. *PruneYard* and *Buckley* suggest that

⁶⁶ Id. at 91 n.124. The Court could have relied on the voluntariness of the taxpayer checkoff to the election financing fund to conclude that there was “no compulsion.” The Court made clear, however, that its conclusion would have been the same had the election financing been appropriated by Congress out of general revenues. “The . . . check-off is simply the means by which Congress determines the amount of its appropriation.” Id.

⁶⁷ Id. at 92-93.

⁶⁸ The Court carefully scrutinized the fairness of the method by which the funds would be distributed to major, minor and new political parties. Id. at 93-108. See also *Pacific Gas & Electric*, 475 U.S. at 25 (Marshall concurring) (mandated funding unconstitutional because it “burden[ed] the speech of one party in order to enhance the speech of another”).

⁶⁹ 447 U.S. at 82.

⁷⁰ Id. at 83. The *PruneYard* Court concluded that the right to speak upheld in that case did not “unreasonably impair the value or use of the[] property as a shopping center.”

⁷¹ See text quoted at note 61.

mandated student fees do not constitute compelled association and therefore do not implicate students' right not to associate. Other Supreme Court precedent, moreover, suggests that mandated fees may be constitutional *even if* the fees burden the right not to associate. According to this precedent, such burdens are constitutional as long as the strength of the government interest outweighs the burden.

In *United States v. Lee*,⁷² the Supreme Court ruled that the imposition of taxes on a member of the Old Order Amish did not violate his free exercise rights under the first amendment. The appellee, a farmer and carpenter, had failed to file quarterly social security tax returns required of employers and had failed to withhold tax from his employees. The IRS assessed the employer for his unpaid employment taxes.⁷³ The employer contended that the imposition of taxes or receipt of benefits violated Amish religious beliefs and that compulsory participation in the social security system violated the free exercise clause.⁷⁴

In rejecting this argument, the Court recognized that the Amish faith and the obligations of a national security system were in conflict but held that "[n]ot all burdens on religion are unconstitutional. . . . Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."⁷⁵ In light of a broader public interest, forcing the Amish to contribute to an entity that they abhorred did not violate their religious rights.⁷⁶

⁷² 455 U.S. 252 (1982).

⁷³ Id. at 254.

⁷⁴ Id. at 257. The Amish are religiously opposed to the national social security system because they believe it sinful not to provide for their own needy and elderly. Id. at 255.

⁷⁵ Id. at 257, 260.

⁷⁶ The balancing test established by *Lee* seems to mandate that state action "burdening" constitutionally protected liberties satisfy a strict scrutiny test. The *Lee* Court held that "[t]he state may justify a limitation on religious liberty [only] by showing that it is essential to accomplish an overriding government interest." 455 U.S. at 257-58. Despite such language, *Lee*, like many other decisions, is more sensibly understood as adopting a balancing approach which weighs the *extent* of the burden placed on constitutionally protected liberty against the *strength* of the government interest and the *degree* to which that interest may be satisfied through means which place less of a burden on the liberty interest.

While the Court has formally adopted a multi-tier system of judicial review, "deviation from th[is] system has become so common as to render constitutional adjudication a desultory affair." Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St.L.J. 161, 183 (1984) (discussing cases in which the Court departed from the multi-tier system). Under its emerging jurisprudence, the Court would more readily strike down state action placing a great burden on the right not to associate than state action incidentally burdening this right. Id. at 177-81. Indeed, analysis of the

Although *Lee* dealt with conflict between broad social policy and religious rights, its rationale can be extended to free speech rights.⁷⁷ Courts have held that the "[g]overnment may abridge incidentally individual rights of free speech and association when engaged in furthering the constitutional goal of 'uninhibited, robust, and wide-spread' expression."⁷⁸ Certainly, the universities' creation of a forum for the dissemination of ideas furthers this first amendment ideal. Courts, weighing the potential detriment to this forum in the absence of mandatory student funding against the tenuous link between individual students and the ideas expressed by funding recipients, should conclude that mandatory student fees do not offend the first amendment.

4. *The PruneYard, Buckley, and Lee Framework.* The combination of the *PruneYard*, *Buckley*, and *Lee* decisions provides a principled and uniform framework for analyzing student fee cases. First, one looks to the analogy in *PruneYard* and *Buckley* to determine the extent that student fees infringe, if at all, upon the objecting students' right not to associate. Second, if one determines that there is an infringement, the *Lee* case indicates that mandatory student fees are not necessarily objectionable. Instead, at this second stage in the inquiry, a court should find that mandatory student fees violate dissenting students' first amendment rights only if the infringement on the students' rights not to associate outweighs the government's interest in causing the infringement.

Applying this framework, courts should permit universities to compel payment of student fees. As *PruneYard* and *Buckley* indicate, mandatory student fees do not infringe upon the students' first amendment rights. Even if the fees did implicate the first amendment, the strong interest in producing educated and toler-

weight of the interest infringed appears to reenter the Court's reasoning in *Lee* when it addresses the matter of accommodation: "The Court has long recognized that [a] balance must be struck between the value of the comprehensive social security system . . . and the consequences of allowing religiously based exemptions." 455 U.S. at 259.

For opinions questioning the multi-tier system in the equal protection area, see *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall dissenting) (supporting a weighing of interests); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 478 (1985) (Marshall, Brennan, and Blackmun concurring in part and dissenting in part) (same); *id.* at 451 (Stevens and Burger concurring) ("cases reflect a continuum of judgmental responses" rather than distinct tiers).

⁷⁷ For an argument in favor of applying the *Lee* analogy in student fee cases see Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L.Rev. 3, 46-49 (1983).

⁷⁸ *Kania*, 702 F.2d at 480, quoting *New York Times Co. v. Sullivan*, 376 U.S. at 270. *Kania* cited *Buckley v. Valeo* as authority for this proposition. 702 F.2d at 480.

ant students outweighs any slight infringement on students' right to associate. A harder question is whether a university, once it has decided to use mandatory fees to fund student groups, must fund all qualified groups or whether it has discretion in funding such groups.

IV. MANDATORY FUNDING AND UNIVERSITY DISCRETION

Two legal doctrines are involved when one considers the issue of whether the university must fund all student groups with its mandatory student fees. First, one must consider the first amendment public forum doctrine in the university setting. Second, one must look to the Supreme Court's "subsidy" decisions.

A. The University and the Public Forum Doctrine

A recurring theme of this Comment holds that the university is a forum for the dissemination of ideas. By ruling that the university is a "public forum," the Supreme Court has held that this characterization of the university atmosphere has constitutional implications. Since state universities are state controlled institutions built with state money on state property, one might think that the state has absolute authority to control what speech takes place there. The Court has held, however, that even on public property the state has limited authority to regulate speech.

The public forum doctrine delineates the limits of this authority.⁷⁹ Public fora include those that are traditionally such fora, such as parks and streets,⁸⁰ and those that the state has opened to the public's first amendment activities, such as a school board meeting or a university.⁸¹ If public property is deemed a public

⁷⁹ For a history of the public forum doctrine, see Geoffrey R. Stone, *Fora Americana*, 1974 Sup.Ct.Rev. 233.

⁸⁰ This concept was first expressed by Justice Roberts in *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939):

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege . . . to use the streets and parks for communication . . . may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied.

⁸¹ See *Healy v. James*, 408 U.S. 169 (1972)(university); *Madison Sch. Dist. v. Wisconsin Emp. Rel. Commn.*, 429 U.S. 167 (1976) (school board meeting). The state is not required to keep these nontraditional fora open; but as long as it does so, it is bound by those standards that apply in traditional public fora. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983).

forum, the full force of first amendment freedoms apply: "the government may . . . enforce a content-based exclusion . . . [only if the exclusion] is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end."⁸² If public property is deemed not to be a public forum, the state has greater power to regulate the speech that takes place there. While content-based regulation is permissible if it serves to preserve the property for "its intended purposes," the government still may not suppress speech simply "because public officials oppose the speaker's view."⁸³ Viewpoint discrimination thus is not permitted even in areas that are not public fora.⁸⁴

Two landmark cases indicate that a university is a public forum. In *Healy v. James*⁸⁵ and *Widmar v. Vincent*,⁸⁶ the Supreme Court recognized that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum."⁸⁷ The plaintiffs in *Healy* were a group of students wishing to organize and register as a university organization a local chapter of the Students for a Democratic Society (SDS), a group known at the national level as having extreme radical views. The president of the university refused to allow the group to organize on campus due to its reputation and because he found its views abhorrent.⁸⁸ The Court ruled that this decision violated the organization's

⁸² *Id.* at 45. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), illustrates this principle. The Court invalidated a Chicago ordinance that prohibited picketing within 150 feet of a school building while the school was in session, except for "peaceful picketing of any school involved in a labor dispute." Under a stringent standard of review, the Court held this content-based regulation to be an impermissible distinction between labor picketing and other peaceful picketing.

⁸³ *Perry*, 460 U.S. at 46.

⁸⁴ *Greer v. Spock*, 424 U.S. 828 (1976), illustrates this principle. The Court held that Fort Dix, a federal military reservation devoted primarily to basic training for newly inducted Army personnel, was not a public forum. The government consequently could ban all speeches and demonstrations of a partisan political nature in order to further the purpose of the military installation. The Court upheld this ban, however, only after satisfying itself that "the military authorities [in no way] discriminated . . . based upon . . . political views." 424 U.S. at 838-39. See also *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 806 (1985) ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."). For a case widening the scope of first amendment freedoms in nonpublic forums beyond the prohibition of viewpoint discrimination, see *Airport Com'rs of Los Angeles v. Jews for Jesus*, 482 U.S. —, 107 S.Ct. 2568 (1987) (applying overbreadth doctrine).

⁸⁵ 408 U.S. 169 (1972).

⁸⁶ 454 U.S. 263 (1981).

⁸⁷ *Id.* at 267 n.5. See also *Healy*, 408 U.S. at 180 ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'").

⁸⁸ *Id.* at 178, 187.

members' right to associate.⁸⁹ In holding that the president's disagreement with the group's views was insufficient reason to warrant exclusion from the university forum, the Court reiterated the view that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."⁹⁰

Similarly, in *Widmar*, the Court rejected a university's attempt to exclude a student religious organization from the university forum. The university's stated policy was to encourage student activities, and it regularly made available its facilities for meetings of registered student groups.⁹¹ However, the university refused to provide facilities for the group in question because of the group's religious nature.⁹² In holding such an exclusion invalid, the Court reasoned that having created a forum generally open to student groups, the university's attempt to enforce a content-based exclusion violated the fundamental principle that state regulation of speech should be content-neutral.⁹³ To justify such an exclusion, the university had to show that its action was necessary to serve a compelling state interest and that it was narrowly drawn to achieve that end.⁹⁴ The university failed that test.⁹⁵

Both *Widmar* and *Healy* demonstrate that a university is a public forum; consequently, any exclusion must be closely scrutinized. However, neither case held that no regulations may be placed on a university forum. Although a university is a public forum, first amendment rights must be applied "in light of the special characteristics of the school environment."⁹⁶ Consequently,

⁸⁹ "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. . . . [This right] has long been held to be implicit in the freedoms of speech, assembly, and petition." *Id.* at 181. See note 7.

⁹⁰ *Id.* at 180, quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

⁹¹ 454 U.S. at 265.

⁹² The group, Cornerstone, was an evangelical Christian organization which had previously held meetings on campus. A typical meeting included hymns, prayer, Bible study, and discussion of religious views and experiences. *Id.* at 265 n.2.

⁹³ *Id.* at 277.

⁹⁴ *Id.* at 269-70.

⁹⁵ The Court did not agree with the university's assertion that allowing the religious group to use campus facilities violated the establishment clause, thus creating a compelling state interest. The argument advanced by the university and rejected by the Court maintained that an equal access policy would have the primary effect of advancing religion. The Court reasoned that such a policy would not "confer an imprimatur of state approval" on religion and did not advance a compelling state interest. *Id.* at 274.

⁹⁶ *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969). Recently, the Supreme Court used this principle to limit high school students' first amendment rights. In *Hazelwood School District v. Kuhlmeier*, 108 S.Ct. 562 (1988), the Court ruled that high school officials can censor articles in a curriculum-based student newspaper if such censorship is "reasonably related to legitimate pedagogical concerns." *Id.* at 571. However, the

both the *Widmar* and *Healy* Courts felt that a university had authority to impose reasonable regulations compatible with its educational mission on the use of its campus facilities.⁹⁷ Such regulations, however, do not allow a university to exclude discriminatorily speech from the forum.

Widmar and *Healy* stand for the proposition that a university cannot prevent a student group from using the university forum based on the content of the groups' expected speech. Arguably then, *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 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. For example, if a university chooses not to fund a student group because other students object to that group's ideas, it violates the first amendment.

While this argument is appealing to those who feel that all student groups should have an equal chance to participate in the forum, Supreme Court doctrine does not clearly resolve this issue in favor of compelled funding. Allowing groups to exercise their first amendment rights in the forum and funding such groups involve two slightly different lines of inquiry under Supreme Court precedent.

B. Student First Amendment Rights and the Subsidy Cases

Where a university selectively excludes a student group from university funding because other students object to that group's views, the argument that this practice violates the student organization's first amendment rights depends on whether the organization's members have a *right to receive funding*. *Healy* and *Widmar* stand for the general proposition that a university cannot deny student organizations access to the forum; whether students

Court expressly reserved the question of whether such censorship would be legitimate at the university level. *Id.* at 571 n.7.

⁹⁷ *Widmar*, 454 U.S. at 268 n.5 ("A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings."); *Healy*, 408 U.S. at 189.

also have a right to school funds was not decided.⁹⁸ However, several Supreme Court decisions suggest that student organizations do not have an absolute right to receive equal university funding.

In *Regan v. Taxation With Representation*,⁹⁹ the Supreme Court held that an organization seeking funding from the federal government does not have an absolute right to receive funding just because the government funds other organizations. Taxation With Representation (TWR) was a nonprofit corporation organized to promote the public interest in the area of federal taxation.¹⁰⁰ TWR challenged § 501(c)(3) of the Internal Revenue Code¹⁰¹ which provided that contributions to an otherwise tax-exempt organization were not tax deductible if the organization was involved in substantial lobbying efforts. The organization claimed that this provision imposed an "unconstitutional condition" on the receipt of tax deductible contributions, relying on the earlier Supreme Court decision of *Speiser v. Randall*.¹⁰² The plaintiffs also attacked the statute on equal protection grounds where it permitted certain deductions for contributions to veterans' organizations that engaged in lobbying but did not allow contributors to deduct donations to other non-profit lobby organizations.¹⁰³

Addressing the first amendment challenge, the *Taxation* Court distinguished *Speiser* on the ground that TWR was not being penalized because of its intention to lobby; rather Congress was merely refusing to fund the lobbying with public monies.¹⁰⁴ The Court reasoned that "Congress is not required by the First Amendment to subsidize lobbying," rejecting the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State."¹⁰⁵ The Court held that organizations do

⁹⁸ The Court in *Healy* explicitly left this issue open, stating that "[i]t is unclear on this record whether recognition also carries with it a right to seek funds from the school budget. . . . [S]ince the record is silent as to the criteria used in allocating such funds, we do not consider possible funding as an associational aspect of nonrecognition in this case." 408 U.S. at 182 n.8.

⁹⁹ 461 U.S. 540 (1983).

¹⁰⁰ *Id.* at 541.

¹⁰¹ 26 U.S.C. § 501(c)(3) (1982).

¹⁰² 357 U.S. 513 (1958). *Speiser* held unconstitutional a California law denying persons a tax exemption unless they signed a declaration stating that they had never advocated the violent overthrow of the government. Noting that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech," *id.* at 518, the *Speiser* Court ruled that such a denial imposed an unconstitutional condition on the exercise of the plaintiffs' first amendment rights.

¹⁰³ 461 U.S. at 546-47.

¹⁰⁴ *Id.* at 545.

¹⁰⁵ *Id.* at 546, citing *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas

not have an absolute right to equality in the distribution of government funds and that Congress may choose which groups to fund based on the content of their speech. Importantly, however, the Court qualified this broad principle by stating that the outcome would have been different if Congress were to subsidize speech in a manner that was aimed at the suppression of a particular viewpoint or had that effect.¹⁰⁶ The government thus is bound to a "neutral principles" standard in funding decisions.

The *Taxation* Court also rejected the plaintiffs' equal protection claim, refusing to apply strict scrutiny because the distinction between veterans' organizations and other charitable organizations was not a suspect classification. In rejecting this claim, the Court did not delineate the extent of Congressional power to discriminate among speakers, saying only that decisions to fund one speaker and not another are ordinarily "a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find."¹⁰⁷

Taxation thus supports two principles relevant to the present discussion. First, *Taxation* suggests that courts reviewing a university's decisions to fund one student group and not another should treat the university's funding decisions with a degree of deference comparable to that which the *Taxation* Court provided Congress' classification of public interest groups. Just as Congress has traditionally enjoyed judicial deference with respect to funding decisions, public universities have received great deference with respect to educational policy decisions. Several courts, including the Supreme Court, have held that the university has such discretion. "Within wide limitations a [university] is free to adopt such educational philosophy as it chooses."¹⁰⁸ Discretion as to educational decisions encompasses academic decisions, the initial choice to open the university as a forum,¹⁰⁹ as well as budgetary decisions.¹¹⁰

concurring).

¹⁰⁶ *Taxation*, 461 U.S. at 548. The Court drew this principle from its ruling in *Speiser*, where the Court held that the denial of the exemption was "frankly aimed at the suppression of dangerous ideas." 357 U.S. at 519, quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 402 (1956).

¹⁰⁷ *Id.* at 549, quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937).

¹⁰⁸ *Veed v. Schwartzkopf*, 353 F.Supp. 149, 152 (D.Neb. 1973). The Supreme Court often has held that academic decisions are to be given great deference. See note 53 and accompanying text.

¹⁰⁹ See note 87. See also *Veed*, 353 F.Supp. at 152-53 (university practices indicate that it considers extracurricular activities for students as part of the educational process and such decisions should be given great deference by the courts).

¹¹⁰ See *Gay & Lesbian Students Ass'n v. Gohn*, 656 F.Supp. 1045 (W.D.Ark. 1987) (uni-

Second, and more importantly, the *Taxation* decision indicates that public universities, like Congress, cannot use funding decisions in ways that discriminate against particular viewpoints. Importantly, lower courts have recognized this first amendment limitation on university funding decisions, ruling that such decisions are bound by the neutral principles standard. A university cannot take adverse action against a student organization by withdrawing funds, refusing funds, or changing the funding mechanism because it disapproves of the organization's speech.¹¹¹

Unlike the public forum rules which prohibit broad content-based exclusions, the rule governing funding allocations merely prohibits discrimination against particular viewpoints. Therefore, courts must examine the university's action to determine whether a denial of funds is ultimately viewpoint-based. For example, a university cannot refuse to fund a school newspaper because it thought that some of its editorial positions were politically objectionable.¹¹² However, a university decision not to fund any political speech is a decision based upon neutral principles because it does not discriminate among political viewpoints.

Taxation only establishes a general framework for analyzing funding decisions. It does not determine definitively whether a university may constitutionally deny funding to an organization based on students' objections. One still must determine whether that decision is based upon neutral principles.

V. LEGITIMACY OF ASSOCIATIONAL CONCERNS AS A REASON FOR DENYING FUNDING TO STUDENT GROUPS

A. University Denial of Funding for Associational Reasons

Although this Comment has demonstrated that the imposition of mandatory student fees is unlikely to interfere with students' associational interests, a university still might choose not to fund a group if it felt that forcing students to fund such a group would pose associational risks to individual students. For example, many

versity has discretion in dispersing funds to student groups).

¹¹¹ See *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) (university cannot change the funding mechanism of the campus newspaper because it found the paper's content offensive); *Joyner v. Whiting*, 477 F.2d 456, 460 (4th Cir. 1973) (university cannot withdraw funds from school newspaper because it finds the content of the paper abhorrent); *Antonelli v. Hammond*, 308 F.Supp. 1329, 1337-38 (D.Mass. 1970) (university cannot force student paper to submit its material to newspaper's advisory board by withdrawing funds until compliance).

¹¹² See *Stanley*, 719 F.2d at 282.

students vehemently protest funds allocated to PIRGs. Because of a PIRG's extremely political nature,¹¹³ a university might refuse to fund it in deference to objecting students.¹¹⁴ To determine whether the refusal to fund the PIRG is legitimate, one must—applying the framework developed in Part IV of this Comment—determine whether the university's concern for students' associational rights is a legitimate motive for selective funding of university groups.

Only one case has dealt specifically with this question. *Stanley v. Magrath*¹¹⁵ presented this issue to the Eighth Circuit. In *Stanley*, the university changed the funding mechanism of the *Minnesota Daily*, the campus newspaper. This change was prompted by the publication of the "Humor Issue" which was styled in the form of a sensationalist newspaper and which contained articles satirizing religion among other things. Because the university regents "deplor[ed] the content" of the edition, the university instituted a refundable fee system with regard to the newspaper.¹¹⁶ The court held such a change impermissible because of improper motivation on the university's part.¹¹⁷

The interesting portion of the court's decision is found in its dicta. The Eighth Circuit adopted the finding of the district court that "[o]ne of the motivations for the establishment of the refundable fee system was to respond to the concerns of those students who objected to being coerced into giving financial support to the *Daily*."¹¹⁸ The court indicated that if this had been the only reason for the university's action, the change of funding might have been a permissible exercise of discretion. Interestingly, the Court did not discuss the subsidy cases; its only pronouncement on the mat-

¹¹³ PIRGs are especially active in the areas of research, lobbying, and advocacy for social change. See Galda, 772 F.2d at 1061. For a more thorough discussion of the nature of PIRGs, see Estelle A. Fishbein, *Legal Aspects of Student Activity Fees*, 1 J.Col. & Uni.L. 190 (1974).

¹¹⁴ Often, the fees contributed to PIRGs are made refundable for this reason. Fishbein, 1 J.Col. & Uni.L. at 192. Note that a university might refuse to fund a PIRG on the basis of a neutral principle. For example, a university might choose never to fund a private corporation "which is neither under the control nor supervision of the university and which does not operate as a university-related educational, social, or recreational program." *Id.* In such a case, a court must decide whether this decision "is in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 811 (1985).

¹¹⁵ 719 F.2d 279 (8th Cir. 1983). In *Maryland Public Interest Research v. Elkins*, the court offhandedly referred to student associational concerns as a reason for a university's decision not to fund a PIRG's litigation expense, but it did not discuss the issue. 565 F.2d 864, 867 (4th Cir. 1977).

¹¹⁶ *Stanley*, 719 at 280-81.

¹¹⁷ *Id.* at 284.

¹¹⁸ *Id.* at 283.

ter was that "[a]s far as the First Amendment is concerned, the University could certainly choose not to own or support any newspapers, so long as its motivation is permissible."¹¹⁹

At first glance, the *Stanley* dicta might seem consistent with the ruling in *Taxation* that, absent an impermissible discrimination which either aims at or has the effect of suppressing a particular viewpoint, the state can allocate funds as it wishes. Denials of funds premised upon concern over students' right not to associate do not appear to be aimed at suppressing a particular viewpoint. The university is merely respecting students' views that they should not be forced to subsidize such speech. Thus, in the PIRG example above, it seems that the university could rightly refuse funding. On closer examination, however, it appears that courts should not accept as legitimate a university's desire to respect the associational rights of some of its students by silencing a particular speaker.

B. Legitimacy of the University's Motive

Although the *Stanley* decision may seem consistent with the Supreme Court's subsidy cases, one nevertheless can argue that the principles of those cases are not satisfied when a university official denies funding based upon students' right not to associate. While a concern for the associational rights of students is facially viewpoint-neutral, the resulting funding allocation rule is content-based, not content-neutral.

As *Taxation* makes clear, not all such content-based allocation schemes are unconstitutional. A court must determine whether the scheme is a facade for viewpoint discrimination. The law in this area is still in its early stages of development; courts have not yet determined what content-based subsidies constitute viewpoint discrimination. Content-based allocation schemes are not all equally

¹¹⁹ Id. at 283 n.6 In *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court suggested that it was impermissible to look into the government's motive when determining whether a statute violates the first amendment. In upholding a law prohibiting the knowing destruction of draft cards—even as symbolic speech—the Court stated that "the purpose of Congress . . . is not a basis for declaring this legislation unconstitutional." Id. at 383. Although *O'Brien* seems to preclude an inquiry into motive, it has not been followed consistently. The Court often looks to motivation to determine the constitutionality of government action. See, e.g., *Cornelius*, 473 U.S. at 811 ("existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination"); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) (termination of teacher for permissible reasons unconstitutional if partly motivated by desire to punish exercise of first amendment rights).

suspicious. A university rule barring funding for all political speakers, for example, seems less suspicious than a rule barring funding for all speakers who discuss the university's investments in South Africa.

This Comment, for two reasons, argues that courts should hold unconstitutional university funding allocations based only upon concern for the associational rights of students who object to funding certain groups. First, although neutral reasons ostensibly motivate such decisions, they allow private biases to deter free speech. Second, such exclusions from funding undercut the ideals of tolerance and free intellectual exchange that the university has historically facilitated.

1. Private Biases as Non-Neutral Standards of Decision. Whether a university can deny funding because of its students' associational concerns depends on whether such a criterion is "neutral"—i.e., it is not aimed at suppressing a particular viewpoint. Decisions like the one posited in *Stanley* are only superficially neutral. Although framed in terms of "students' associational concerns" such decisions actually give effect to students' prejudices.

While democracy is theoretically predicated on the reflection of individuals' private preferences in government decision making,¹²⁰ the government cannot in some instances use those preferences to impair other rights. The Supreme Court has held that "neutral criteria" that give effect to private prejudices are not constitutionally permissible if the result is an infringement of another's fundamental rights. The Court has ruled in the first amendment context that private biases cannot be used as a premise for suppressing speech. In the "hostile audience" cases, the Supreme Court consistently has held that a hostile audience reaction to a particular speaker is an insufficient reason to suppress that speaker.¹²¹

Generally, the hostile audience cases involve enforcement of a state statute or a common law charge of breach of the peace against speakers who allegedly "stirred people to anger, invited public dispute, or brought about a condition of unrest."¹²² Keeping the peace is a legitimate and "neutral" motive for governmental

¹²⁰ See Cass R. Sunstein, *Lochner's Legacy*, 87 Colum.L.Rev. 873, 900 (1987) ("public and private law generally take private preferences as the appropriate basis for social choice").

¹²¹ See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. Chicago*, 394 U.S. 111 (1969).

¹²² *Edwards*, 372 U.S. at 238, quoting *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949).

action; yet, the Court has struck down these laws arguing that they infringe the plaintiffs' free speech rights because the laws make "criminal the peaceful expression of unpopular views."¹²³ Although the laws in hostile audience cases have a goal other than the suppression of speech, the Court has held that these laws amount to governmental suppression of speech. Essentially, the Court has reasoned that the government cannot give effect to private biases that result in the infringement of one's fundamental rights.

More recently, in the equal protection context, the Supreme Court has stated this principle explicitly. In *Palmore v. Sidoti*,¹²⁴ the Court struck down a lower court ruling that denied a divorced woman custody of her child because the woman had married a black man. The lower court had reasoned that the child might be adversely affected by living in a mixed-race household; thus, it was in the child's "best interest" to reside with her father. The Court struck down the custody ruling:

[t]he Constitution cannot control [racial] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.¹²⁵

Ostensibly neutral criteria must fall when they give effect to prejudices that infringe upon others' constitutional rights.¹²⁶

The principle of the hostile audience cases and *Palmore* provides a basis for holding unconstitutional university decisions that cut off funding of a particular student organization because of a concern for students' associational freedoms. Such a decision in effect penalizes student organizations for "unpopular views." It facilitates private prejudices that are aimed at suppressing a particular viewpoint.¹²⁷ Although, under *Taxation*, funds may be denied to

¹²³ Edwards, 372 U.S. at 237.

¹²⁴ 466 U.S. 429 (1984).

¹²⁵ Id. at 433.

¹²⁶ See *Shelley v. Kraemer*, 334 U.S. 1 (1948). The Court there refused to enforce an ostensibly neutral rule of law—that restrictive covenant agreements are enforceable—because of the inequality inherent in such enforcement. Unequal enforcement is due not to a state decision to harm blacks but to the racial animus of those who draft racial covenants. See also David A. Strauss, *The Myth of Colorblindness*, 1986 Sup.Ct.Rev. 99, 130-4 (inadequacy of racially neutral statutes suggests that affirmative action sometimes may be constitutionally mandated).

¹²⁷ The denial of funds to a university organization has a more acute effect than similar action against an organization in the real world. Students are notoriously short of time and money. The little they have in the way of energy and funds is often devoted to other functions. Under such conditions, the selective denial of funding can substantially deter speech. See, e.g., *Kania*, 702 F.2d at 477 ("undisputed evidence show[s] that without partial funding

achieve viewpoint-neutral goals, student associational concerns cannot justify a selective withdrawal of funding: state classifications based upon student preferences legitimate and enforce student hostility toward unpopular viewpoints.¹²⁸

2. *Upholding University Ideals.* A second consideration supports the conclusion that courts should apply strict scrutiny when reviewing a university's decision not to fund a particular student group due to a concern for the associational rights of objecting students. A major theme of this Comment has been that the university setting is particularly suited to the expression of dissenting viewpoints. Such an atmosphere of expression forces students to consider new ideas and accept, reject, or—at a minimum—tolerate those ideas. A university seriously undercuts this atmosphere if it allows students to determine whether a group deserves funding based upon their disdain for its ideology. University accommodation of students' objections would suggest that its teachings of tolerance regarding minority viewpoints are wholly a facade. Such accommodations necessarily encourage the "standardization of ideas . . . by dominant political groups"¹²⁹ against which the Supreme Court has fought.

Moreover, as the *Stanley* decision illustrates, the motive behind a particular funding decision may be difficult to discern. Even in those cases where the court finds a permissible motive, it is possible that this seemingly innocent motive masks a more invidious one. As long as a university official¹³⁰ can hide her reaction to a group's speech, she permissibly can withdraw funds from student organizations on the premise that other students' associational

by the student fees [the campus newspaper] could not survive in its present form").

Justice Blackmun's concurring opinion in *Taxation* supports this argument. There, § 501(c)(4) of the tax statute allowed an organization denied benefits under § 501(c)(3) to create an affiliate that could pursue lobbying activities. According to Justice Blackmun, this alone saved the statute from unconstitutionality because it created a channel through which the denied organizations could speak. Any restriction on an organization's § 501(c)(4) activities would render the statute unconstitutional because it effectively would deny benefits to an organization choosing to exercise its first amendment rights. 461 U.S. at 552-553.

¹²⁸ See generally Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum.L.Rev. 1689, 1710-16 (1984)(arguing for control of majoritarian power in the equal protection context); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U.Chi.L.Rev. 1129, 1135 (1986)(discussing legitimate limitations on use of private preferences in public policy).

¹²⁹ *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949).

¹³⁰ Some universities allocate funds through student government committees rather than through the administrative system. Regardless of who allocates the funds, it must be done according to neutral principles. Whoever is responsible for the allocation must ensure that her personal motives are not affecting her decision.

rights are drawn into question.

This concern should be taken seriously in light of the numerous instances where school officials have attempted to suppress students' speech in the past.¹³¹ It is the natural reaction of many people to want suppressed those ideas they find abhorrent.¹³² A university official is no different. Although the university is premised upon the notion that the exchange of ideas should be protected, a university official is only human.

3. *University Discretion.* The arguments made here regarding private prejudices and tolerance are not meant to undercut entirely university discretion. A university must retain its flexibility in making funding decisions; it would otherwise have no ability usefully to dispense funds. This Comment merely suggests that this discretion is limited; it does not suggest that a university lacks discretion as to the amount of funds given to student groups. As long as funding decisions are not aimed at suppressing a particular viewpoint, directly or indirectly, such decisions are clearly within the university's power and do not undercut its model of tolerance.

For example, university officials might decide that the university will fund only those groups that have a faculty advisor. The university might also decide to base its funding on the number of students involved in the organization. Alternatively, the university could look to the needs of the different groups: a university newspaper may need more money than a group hosting one speaker per semester. Such criteria are reasonable and do not infringe on students' first amendment rights. Although these requirements may *affect* the group's speech, they are constitutional because they are not aimed at suppressing any particular viewpoint.¹³³ Rather, such a requirement is akin to the content-neutral regulations that a university is allowed to impose upon the use of its forum.¹³⁴ Also, this requirement does not undercut a university's atmosphere of tolerance because it does not send conflicting messages to students.

In a somewhat different vein, the university might also decide not to fund any political groups at all. While this exclusion is

¹³¹ See, e.g., *Healy*, 408 U.S. 169 (university president denied recognition to student groups because he disagreed with its views); *Tinker*, 393 U.S. 503 (ban on wearing of black armbands protesting the Vietnam War).

¹³² See *Bollinger*, *The Tolerant Society* at 109 (cited in note 28) ("It is a tendency of human nature to overreact in the use of legal restraints of speech.").

¹³³ Of course, the university must be willing to provide an advisor to all groups requesting one; it could not deny a group an advisor because it did not approve of that group's speech.

¹³⁴ See note 81 and accompanying text.

based upon the content of a group's speech it is not unconstitutional because it excludes *all* political groups, not just those with a particular viewpoint. The distinction between political and nonpolitical groups may be extremely difficult to make.¹³⁵ Some universities nonetheless might decide that its resources are better channeled into scholarly or entertainment-oriented speech, or student services such as hospitals or counselling services. Such a decision has an adverse impact upon those excluded groups but it is not unconstitutional or necessarily out of step with a university's mission. This Comment argues not that all student organizations should receive funds but that all organizations should be allowed to compete for funds on an equal footing regardless of what they intend to say.

CONCLUSION

The democratic ideal is an integral part of the university setting. As such, the university should do everything in its power to ensure that students' first amendment rights are protected. Equally important is the participation of students in the exchange of ideas. A university has discretion to choose how it wishes to promote this model. If it chooses to mandate fees to support student groups, it may do so. In some instances, it may be barred from denying funding to ensure that an intolerant student faction does not undercut the "marketplace of ideas." In a world of increasing student apathy and intolerance,¹³⁶ such a model may be the only way to ensure that students retain the capacity for self-criticism and doubt that mark the "tolerant mind sought through free speech."¹³⁷

¹³⁵ For example, would a typical school newspaper be characterized as political or nonpolitical? One sees the difficulty in answering this question when one examines the many cases involving protests against fees used to fund newspapers espousing views with which some students disagree.

¹³⁶ See generally Bloom, *American Mind* at 47-137 (cited in note 28).

¹³⁷ Bollinger, *The Tolerant Society* at 247 (cited in note 28).