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Note

*341 I'LL SPEAK FOR MYSELF: COMPULSORY SPEECH AND THE USE OF STUDENT FEES AT STATE UNIVERSITIES

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> The mere incantation of the rubric "education" cannot overcome a tactic, repugnant to the Constitution, of requiring objecting students to fund private political and ideological organizations. [FN1]

I. Introduction

Thomas Jefferson once announced that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." [FN2] Accordingly, it would seem that to compel a state university student to fund a primarily political organization is, likewise, sinful and tyrannical. Nevertheless, "the majority of courts have held . . . that a public university's interest in providing an educational environment outweighs any incidental infringement upon students' constitutional right()" [FN3] to be free from compelled speech and association. [FN4] The ***342** United States Supreme Court, however, has not determined, " whether . . . First Amendment corollaries protect objecting students from being forced by state universities to subsidize private political and ideological organizations." [FN5] Yet the Court has noted the "possibility that (a mandatory) student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees." [FN6] Hence, as the Second Circuit Court of Appeals once said, the courts "are asked . . . to resolve the conflict that occurs when Jefferson's 'tyrannical' compulsion occurs in a collegiate setting." [FN7]

Encapsulated in the First Amendment is the idea that an individual should not be compelled to speak for or associate with an organization through the appropriation of his money. [FN8] Moreover, it is an established principle of American jurisprudence that "an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state." [FN9] Thus, the Supreme Court requires that state entities "prevent() compulsory subsidization of ideological activity." [FN10]

This Note considers the constitutionality of mandatory student fees assessed at public [FN11] universities. Part II addresses the theoretical***343** underpinnings of the compelled speech doctrine. Part III explains the public forum and subsidy doctrines. Part IV describes how courts faced with student allegations of compelled speech have applied, or not applied, these two major legal doctrines. Part V first argues for a new legal standard of review to assess the constitutionality of mandatory student fees for both outside [FN12] political organizations and primarily ideological student organizations [FN13] and then applies this standard to funding mechanisms that aid both types of organizations. Part VI assesses the remedies for mandatory student fee First Amendment violations and argues that the availability of a refund, rebate, or pro-rata reduction of a fee does not make that fee permissible. This Note concludes that the fairest and most efficient way for universities to extract fees from students to fund either outside organizations or primarily political groups is to require that students affirmatively choose to contribute to these organizations in advance of paying their tuition and fees.

II. The Origins of Compelled Speech and Associ-

ation Doctrine

Students must rely on the First Amendment's protection of speech and association when they object to their university's use of mandatory***344** fees to fund organizations whose beliefs they find objectionable. [FN14] The right to speech is an explicit right that appears plainly in the text of the First Amendment. [FN15] The right to association, on the other hand, "is a right that has been implied by the courts from the First Amendment's guarantees of free speech and assembly." [FN16] Despite this distinction, "freedom of association is usually asserted and (is) always jurisprudentially analyzed together with the right of free speech." [FN17] The Supreme Court recognizes a person's right not to speak and not to associate with a group. In its landmark opinion, West Virginia State Board of Education v. Barnette, [FN18] the Court best articulated the right to free speech and association. In Barnette, the Court considered the constitutionality of a school board resolution that required students to recite the pledge of allegiance; in reaching its determination that the resolution was unconstitutional, the Court stated: "If 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." [FN19] Similarly, in Elrod v. Burns, [FN20] the Court found unconstitutional a system that forced a city process server and a city bailiff to support the Democratic party to keep their jobs. [FN21]

The Court also applied this view of compelled association when it considered challenges to union dues and state bar fees. Specifically, in Abood v. Detroit Board of Education [FN22] the Court addressed a challenge to mandatory union dues which contended that the challengers' constitutional rights not to speak or associate were impinged because a portion of the dues was spent on political activities ***345** unrelated to the union's collective bargaining purposes. [FN23] The Court upheld the union members' challenge on the theory that political activity unrelated to the union's collective bargaining purpose constituted an impermissible "compulsory subsidization of ideological activity." [FN24] The Court took a similar approach when it considered a challenge to a state bar association's use of mandatory dues for political speech. In Keller v. State Bar [FN25] the Court applied a standard akin to the one used in Abood and determined that "the functions for which mandatory fees could be used (are) limited to those 'in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession,' rather than taking positions on political issues." [FN26]

Hence, the Supreme Court established a "germaneness" test to assess the constitutionality of compulsory funding of political speech. [FN27] Commentators note this germaneness test established the principle that "(o)rganizations can fund political or ideological speech with the mandatory fees of dissenters as long as it is germane to the purpose that justifies the compelled association." [FN28] In Lehnert v. Farris Faculty Ass'n, [FN29] the Court applied this mode of analysis and articulated a three prong test to determine the germaneness of union dues. [FN30] Under this test a "chargeable" activity must: "(1) be 'germane' to collective-bargaining activity; (2) be justified by the government's ***346** vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." [FN31] In this way, the Court created a "First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" [FN32] The principles announced in these cases require that "activities supported by mandatory contributions . . . be 'germane' to the constitutionally relevant function" of the entity assessing the fees. [FN33]

III. The Doctrinal Approaches to Student Fee Challenges

A. The Public Forum Argument

Legal challenges to student fees often use the principles announced in the union dues and state bar cases. [FN34] Universities that defend the constitutionality of the fees they assess have "argued . . . (that) the public forum created by student fees is germane to an educational philosophy that doesn't end in the classroom, and thus that any burden on First Amendment freedoms is justified." [FN35] This response to a compelled speech challenge rests on Supreme Court jurisprudence which analyzes an individual's constitutional rights in the context of a so-called "public forum."

Most courts consider challenges to student fees under what is known as "the public forum doctrine." [FN36] This doctrine typically applies to specific physical locations where "restrictions on speech should be subject to higher scrutiny." [FN37] Professor Tribe describes these locations as "areas playing a vital role in communication--such ***347** as those places historically associated with First Amendment activities." [FN38] These locations are sites where public communication is likely to occur. Supreme Court directives governing the rights of individuals in public forums establish that the State must not "restrict expression because of its message, its ideas, its subject matter, or its content." [FN39] Accordingly, the Court declared that "(o)nce a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." [FN40] Thus, the public forum doctrine effectively prohibits content discrimination in specified contexts.

All discrimination in a state-created public forum is not prohibited. For instance, a government entity may permissibly place "'time, place, and manner' regulations (on speech) to further significant governmental interests." [FN41] Nevertheless, restrictions on time, place, and manner may not act as a pretext for content discrimination by effectively preventing speech itself. [FN42] Along these lines, strict public forum analysis applies exacting scrutiny to any explicit restrictions on communication in purely public forums.

Whether state universities fall into the category of "traditional public forums" or whether they constitute a limited public forum is subject to interpretation. The Supreme Court declared in Widmar v. Vincent [FN43] that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum." [FN44] In this way, the Court acknowledged that "due to (a university's) educational mission and primary duty to its students, as opposed to the public at large, a university is only a limited purpose or semi-public forum." [FN45] In Rosenberger v. University of Virginia, [FN46] the ***348** Court clarified its position on the status of public universities and announced that they were in fact "limited" public forums. [FN47] Accordingly, the University's discretion to impinge on speech rights is held to a reasonableness standard that removes it from the exacting strict scrutiny of a traditional public fora. [FN48] As one commentator noted, "(i)n limited public forums, the courts . . . allow content-based discrimination to maintain the boundaries of the forum, but they still presume that viewpoint discrimination is impermissible." [FN49]

Thus, application of the public forum doctrine to the public university setting poses delicate constitutional questions relevant to a consideration of mandatory student fees. Do the fees themselves create a public forum subject to First Amendment scrutiny? If so, would restrictions on funding of ideological groups with incidental educational benefits be permissible? A second potential mode of analysis, the so-called "subsidy doctrine," might provide an alternative approach to assessing the constitutionality of student fees at public universities.

***349** B. The Subsidy Approach

Unlike the public forum doctrine, which "presumes a state duty to recognize all speech equally," the subsidy doctrine "presumes that the state is not obligated to subsidize First Amendment rights." [FN50] A series of cases addressing so-called government subsidies, [FN51] culminating

with Regan v. Taxation with Representation, [FN52] repeated the general principle that "although government may not place obstacles in the path of a (person's) exercise of . . . freedom of (speech), it need not remove those not of its own creation." [FN53] Put another way, the government need not fund an organization because of that organization's own inability to exercise its free speech rights. The Regan Court seized upon this principle when it held that "an organization seeking funding from the federal government does not have an absolute right to receive funding simply because the government funds other organizations." [FN54] The constitutional challenge in Regan posed that a provision of the Internal Revenue Code violated taxpayers' First Amendment rights because it did not allow taxpayers to deduct contributions to organizations that engaged in lobbying efforts. [FN55] In reaching its decision that the challenged provision was constitutional, the Court stated: "Congress is not required by the First Amendment to subsidize lobbying." [FN56]

The subsidy doctrine allows government and government entities to refuse to subsidize speech under specified conditions. A traditional subsidy analysis posits that there are two broad categories where refusal to subsidize is presumably impermissible and is, therefore, subject to heightened scrutiny. First, a refusal to subsidize speech must not impinge the ability of a person to exercise his right to speak/associate. [FN57] Second, state refusal to fund speech must not constitute viewpoint discrimination. [FN58] Viewpoint discrimination is impermissible,***350** as one commentator notes, because it carries the "threat of state promotion of one view over another." [FN59] Nevertheless, as Justice Powell declared in Rust v. Sullivan, [FN60] "(g)overnment can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way." [FN61] Hence, subsidy doctrine analysis provides an alternative, but related, approach for assessing the constitutionality of student fees. Its application to the public university setting allows university administrators to define, within articulated limits (e.g., according to content, not viewpoint) the scope of the forum created by student fees and organizations. Subsidy doctrine does not presume a forum, but allows for one.

IV. Student Fee Challenges in the Courts

A. The Ebb and Flow of Student Fee Challenges--An Overview

Challenges to the constitutionality of student fees have a diverse history in American courts. As already noted, defenses of these fees often rest on an assertion that the university has a "role as a regulator in the marketplace of ideas." [FN62] This reliance on the underlying metaphor of the public forum doctrine, [FN63] falls on the deaf ears of dissenting***351** students who " allege() a violation of their right of freedom from compelled speech (and) assert() that universities (are) forcing them to subsidize particular points of view." [FN64] These opposing positions form the tension between student rights and university interests that state and federal courts have considered for nearly three decades.

The judicial battles between these opposing forces have had varying results. The student fee decisions announced before the Supreme Court's union dues cases uniformly failed in the state courts--which is where students typically brought their challenges. The state supreme courts which heard these cases consistently used the language of the public forum doctrine in their opinions. The ultimate conclusion in these cases was that challenges to student fees would fail unless objecting students could demonstrate that the funding of student organizations was not done on a viewpoint-neutral basis. In particular, courts found this standard appropriate where students challenged the funding of newspapers by claiming that the views espoused by the newspaper were politically or ideologically biased. [FN65] Hence, the early challenges to mandatory student fees at state universities were rejected because the courts determined that the objectionable activities were funded on a viewpoint-neut-

ral basis and were also an integral part of the marketplace of ideas on campus.

The announcement of Abood and Keller threw this relatively uniform body of law into disarray and pushed the constitutional questions presented by these challenges into the federal courts. Initially, the courts were inclined to hold the line on the mandatory student fee cases. Hence, the challenges immediately following Abood were also unsuccessful. In 1985, however, the Third Circuit Court of Appeals ended this consistency and upheld a challenge to mandatory student fees that supported the New Jersey Public Interest Group ("NJPIRG"). [FN66] Since NJPIRG was funded with a dedicated fee, the Third Circuit did not express an opinion with regard to the umbrella mandatory fee that New Jersey state university students paid to support a variety of other on-campus student organizations. The Third Circuit merely concluded that NJPIRG's activities, which were primarily directed off-campus, were not germane to the university's educational purpose. Years later, the Second Circuit Court of Appeals reached the opposite conclusion with regard to the New York Public Interest Research Group ("NYPIRG") and decided that its activities were sufficiently educational to justify the impingement of the objecting***352** students' constitutional rights--rights the Court was obliged to recognize in light of Abood and Keller. [FN67]

It was not until 1993 that students successfully challenged an umbrella mandatory student fee at a state university. In a hotly contested case, the California Supreme Court extended the scope of the Third Circuit's 1985 opinion when it determined that certain student organizations were primarily political and ideological and only marginally relevant to legitimate educational purposes. [FN68] The court held that students who objected to these organizations were entitled to a pro-rata reduction of their mandatory student fee. Following the lead of the California Supreme Court, in 1998 the Seventh Circuit Court of Appeals announced that state university students in Wisconsin were entitled to a pro-rata reduction of their student fees. [FN69] The Seventh Circuit, unlike the California Supreme Court, relied heavily on the union dues cases and other Supreme Court compelled speech and association decisions.

By the time the Seventh Circuit announced its decision, cases addressing student fee challenges--or at least those decided using the public forum doctrine--had held: 1) that mandatory umbrella fees were permissible and did not entitle dissenters to a pro-rata reduction of their fees; 2) that mandatory umbrella fees were permissible but that dissenters were entitled to pro-rata reductions for organizations that are primarily political or ideological; 3) that certain organizations that direct their activities beyond the campus gates are sufficiently educational to justify impinging the First Amendment rights of dissenters; and 4) that the activities of off-campus organizations of this ilk are not germane to the educational purpose of the university and that dissenters are entitled to a pro-rata reduction of the fees that support such groups. This body of decisions leaves unresolved the question of whether the various mandatory student fee mechanisms at state universities across the nation are constitutionally permissible. To fully understand the challenge that faces any entity that attempting to resolve this issue, it is necessary to more fully comprehend the major mandatory student fee challenges decided under both the public forum doctrine--where the debate over its application continues--and under the underappreciated and relatively consistent subsidy doctrine.

***353** B. Early Student Fee Challenges Under the Public Forum Doctrine

In the early 1970s, challenges to state university mandatory student fees consistently failed in both state and federal courts. [FN70] Encouraged by the early union dues cases discussed above, such as Street, student dissenters unsuccessfully "argued that their constitutional right not to associate, established by the labor union dues cases, was violated through forced financial contributions, however small, to support political views of the recipient groups." [FN71]

For instance, in Lace v. University of Vermont, [FN72] students challenged fees levied by the university that were given to organizations which the students found objectionable. [FN73] Specifically, the students found repugnant the viewpoints expressed in the student newspaper, by particular speakers, and by certain films. [FN74] In rejecting the students' contention that the fees violated their constitutional rights, the court seized upon public forum notions and declared that "student . . . funds provide the monetary platform for various and divergent student organizations to inject a spectrum of ideas into the campus community." [FN75] In response to the students' contention that the challenged activities were not educational, the court stated "the fact that certain ideas are controversial and wholly disagreed with does not automatically make them non-educational." [FN76]

University of Nebraska students raised a similar challenge to the validity of fees that supported a student newspaper, the student government, and other campus organizations. [FN77] In Larson v. University***354** of Nebraska, the Nebraska Supreme Court refused to grant students injunctive relief against university funding of a political speakers program and the university newspaper. [FN78] In reaching its decision, the court stated that so long as "views are expressed only as a part of the exchange of ideas . . . there is no violation of the constitutional rights of the plaintiffs." [FN79] A federal district court which also ruled on the constitutionality of student fees at the University of Nebraska determined that the "university was not constitutionally prohibited from providing a public forum for the advocacy of students' political views with financial support form mandatory student fees." [FN80]

Similarly, University of Washington students who challenged fees that supported organizations repugnant to their convictions failed to overcome the hurdle of public forum analysis. In Good v. Associated Students of the University of Washington, [FN81] the Washington Supreme Court recognized the need to "balance the plaintiffs' First Amendment rights against the traditional need and desirability of the university to provide an atmosphere of learning, debate, and dissent and controversy." [FN82] The court found the challenged activities were justified because they occurred in an "arena in which accepted, discounted--even repugnant--beliefs, opinions and ideas challenge(d) each other." [FN83]

In Arrington v. Taylor, [FN84] a federal district court rejected a challenge to fees that supported a student newspaper at the University of ***355** North Carolina, Chapel Hill. [FN85] The court recognized that the paper espoused a particular viewpoint on certain subjects and political issues but found that it did not attempt to impose its beliefs on others who disagreed. [FN86] The court held that the fees were merely a "governmental subsidy of a forum wherein others may express their views." [FN87]

Thus, prior to the Supreme Court's decision in Abood, both federal and state courts afforded state universities considerable discretion in sponsoring ideological activity through student fees. The principles announced in the Abood decision merely fueled the fires of dissenting state university students and encouraged additional challenges to mandatory fee structures. The result was a diverse and unclear body of jurisprudence that has yet to be resolved by the Court, as noted by Justice O'Connor in her concurring opinion in Rosenberger. [FN88]

C. Post Abood Confusion, the Modern Student Fees Cases: Champions or Foes of Public Forum Analysis?

1. Galda v. Rutgers ("Galda II")--Forum Analysis Avoided

The first state university students to successfully challenge a mandatory student fee attended college on the Camden campus of Rutgers University. These students objected to a dedicated fee that supported NJPIRG, a nonprofit corporation that engaged in environmental education and lobbying. [FN89] NJPIRG was an organization independent of the university and thus the fee assessed was segregated from the umbrella, mandatory student activities fee. [FN90] The Third Circuit Court of

Appeals seized on language in Abood and declared that "what Abood holds objectionable is the 'compulsory subsidization of ideological activity' by those who object to it." [FN91] Like plaintiffs in earlier cases, the students in Galda II found the ideological positions taken by NJPIRG objectionable and argued that NJPIRG functioned as a "political action group." [FN92]

The Galda II majority found merit in the plaintiffs' constitutional objections***356** and ultimately decided that the fee was unconstitutional. Yet the court rested its holding on narrow grounds. [FN93] The Third Circuit emphasized the "distinction between (NJ)PIRG and student organizations that are funded through the student activity fee." [FN94] The majority rested its distinction on a public forum analogy in stating that organizations funded from the general fee "can be 'perceived broadly as providing a 'forum' for a diverse range of opinion' . . . (while) 'PIRG does not provide a forum for the expression of differing views."' [FN95] Moreover, the court emphasized that NJPIRG's "efforts are primarily devoted to changing conditions outside the University." [FN96] In this way, the Third Circuit removed itself from a true public forum analysis. Despite the narrow grounds for its decision, the court established a new standard of review to determine the constitutionality of student fees. The first part of the court's standard of review comported with established constitutional precedent. In accordance with Supreme Court directives, the Galda II majority accorded "'considerable deference"' to Rutgers' decision to fund NJPIRG and stated that students challenging this fee had to "'overcome the presumptive validity of the university's judgment."' [FN97] At this point Galda II's adherence to precedent ended. The court departed from all other courts to have considered the constitutionality of mandatory student fees when it announced the following rule:

> In order to "overcome the presumptive validity of the university's judgment and to make out a prima facie case that exaction of the (challenged) fee conflicts with the mandate of the First Amendment,"***357** (students) must establish that (a funded organization) "functions essentially as a political action group with only an incidental educational component" (and that) the university is free to "counter the (students') showing or to otherwise demonstrate a compelling state interest by establishing the importance of the challenged group's contribution to the university forum." [FN98]

Thus, the court established a sort of "political action group" litmus test for organizations funded by student fees. Moreover, it applied strict scrutiny to a university's decision to fund these organizations. The Third Circuit loosely applied the Abood/Keller/Lehnert germaneness test when it announced the above standard. As another court put it, "the Third Circuit applied the Abood and Keller 'germaneness' analysis, and concluded that while (NJPIRG) offered some educational benefits to students, such benefits were incidental to the organization's primary political and ideological purpose." [FN99]

With regard to remedy, the Third Circuit remanded to the district court and required that it enter an order that prohibited Rutgers from assessing the mandatory NJPIRG fee. [FN100] Before making this decision, the court noted that Rutgers had not advanced an argument that would allow the university to implement an "advance proration" of the mandatory fee. [FN101] Moreover, the court mentioned that it had already found a post hoc refund of the fee "unsatisfactory." [FN102] Yet, in a footnote, the majority mentioned that it "did not express any views" on PIRG funding procedures at other universities whose programs were described to the court, but it did note that these other universities "allow(ed) students to decide in advance if they wish(ed) to support PIRG." [FN103] Hence, the court implied that it might allow a funding mechanism which allowed students to opt out of funding NJPIRG in advance of paying their tuition and fees. [FN104]

The Galda II court explicitly distinguished the case before it from other student fee challenges by relying on the general activities fee distinction de-

scribed above. [FN105] Despite this apparent intention to ***358** narrow its holding, the Galda II court clearly departed from other post-Abood courts to consider fees challenges [FN106] and opened the door for further challenges, not just to outside, separately funded organizations, but also to the general activities funds it refused to consider. Even so, the next court to consider a state university student fee challenge refused Galda II's invitation to determine the constitutionality of funding schemes based on the "political action group" test.

2. Carroll v. Blinken--Public Forum Analysis Embraced

At the same time that Rutgers University students were fighting to strike the NJPIRG fee from their term bills, across the Hudson River students at various campuses of the State University of New York ("SUNY") began an ultimately unsuccessful challenge of student fees used to support the New York student chapters of NYPIRG. [FN107] The Second Circuit considered this case under the public forum doctrine and in the context of the Supreme Court's compelled speech jurisprudence. [FN108] The court rejected the district court's conclusion that the fee was constitutional because of the "attenuated" relationship***359** between the challenged fee and the plaintiffs. [FN109] The Second Circuit openly acknowledged the "appellants' right to be free from compelled speech suffers when NYPIRG uses student funds to raise issues on campus, organize the community and lobby the legislature in pursuit of 'economic and social justice."' [FN110] The court then declared that SUNY's "intrusions must be justified by the state." [FN111]

When the court assessed the merits of the claimants' arguments it applied a standard of review that was less exacting than the one used by the Galda II court. The Carroll court decided that the constitutionality of a student fee depends on "whether (the challenged provision) 'promotes a substantial government interest that would be achieved less effectively absent the regulation."' [FN112] Similar to the Galda II court, the Carroll court followed established precedent by "accord(ing) wide latitude to (SUNY) to define and carry out (its) own educational mission()." [FN113]

The Carroll court ultimately decided that the state's various interests, including "the stimulation of robust campus debate on a variety of functions," justified the impingement of the plaintiffs' First Amendment rights. [FN114] The court's opinion included both a lengthy defense of the compelled speech doctrine [FN115] and numerous declarations that SUNY's allocation of student fee money to NYPIRG impinged the plaintiffs constitutional rights. [FN116] In the end, however, Judge Kaufman decided that the various educational interests SUNY articulated were "substantial enough" to excuse the resultant encroachment***360** on appellants' rights. [FN117] In particular, the Second Circuit found the state's interest sufficient because of SUNY's desire " to stimulate uninhibited and vigorous discussion on matters of campus and public concern." [FN118] The Second Circuit implicitly accepted SUNY's argument that the mandatory funding provision was germane to its educational purpose. [FN119] The court rationalized its decision in the following way: SUNY's challenged funding scheme is necessary because it provides "stability and predictability" for organizations that receive student fee money by allowing these groups to "estimate their yearly funding with some accuracy and (to) expect a steady annual flow of money." [FN120]

The court drew a strong distinction between the activities in the campus forum and activities that occur beyond the university. Hence, it ruled that SUNY could not compel students to fund activities NYPIRG engaged in beyond the campus gates. [FN121] The Carroll opinion deferred to University discretion and championed the notion that general student activity fees were crucial to the maintenance of a campus forum where students exchange diverse ideas. Judicial deference***361** to state university discretion in assessing student fees soon ended as a result of a controversial decision handed down by the California Supreme Court.

3. Smith v. University of California: Public Forum Analysis Ignored

In Smith, dissenting students once again objected to the allocation of mandatory student fees to fund primarily political or ideological organizations. [FN122] Unlike the students that preceded them, the plaintiffs in Smith successfully challenged the university's allocation of a portion of their umbrella activity fee to primarily political or ideological organizations. [FN123]

In stark contrast to the Carroll court, the Smith court accepted the Third Circuit's implicit invitation to apply the political action group test to student challenges of mandatory activity fees. [FN124] The California Supreme Court offered the following solution to the constitutional problem posed by mandatory fees. The Smith court recognized that "a group's dedication to achieving its political or ideological goals, at some point, begins to outweigh any legitimate claim it may have to be educating students on the University's behalf." [FN125] Next, the Smith court proceeded with a loose statement of its strict scrutiny standard of review when it announced:

> To fund such a group through mandatory fees will usually constitute more of a burden on dissenting students' speech and associational rights than is necessary to achieve any significant educational goal. The University can teach civics in other ways that involve a lesser ***362** burden on (First Amendment) rights, or no burden at all. [FN126]

Eventually, the court concluded that "(a) university may, in general, support student groups through mandatory (student) contributions," but it may not support a group whose "educational benefits . . . become incidental to the group's primary function of advancing its own political and ideological interests." [FN127] Hence, like the Galda II court, the Smith majority found that mandatory fees can, in certain instances, be germane to the university's educational interests. The Smith court seemed to propose, however, that the judiciary must apply a strict scrutiny, political action group/ germaneness standard to mandatory student fee challenges regardless of the type of mandatory fee. [FN128]

In mandating a remedy to compensate objecting students, the Smith majority implicitly rejected a post hoc refund of mandatory fees when it declared that the university must implement the procedures described in Hudson. [FN129] Hence, the court's use of the term "refund" is only correct insofar as it uses the word as properly understood--as an opt out deduction or pro-rata return. [FN130]

Finally, the Smith majority prohibited the university from collecting money from dissenting students to subsidize student lobbying. [FN131] The court noted the only interest that the university advanced in support of funding lobbying was that it "provid(ed) an educational opportunity" for the lobbyists themselves. [FN132] The court determined that "the educational benefit to a few student lobbyists cannot justify the burden on all students' free speech and ***363** associational rights." [FN133] Thus, the Smith majority joined the Galda II and Carroll courts in condemning the compelled funding of outside activities.

Conspicuously absent from Smith's majority opinion was an in depth public forum analysis. In fact, as numerous commentators noted, [FN134] the Smith majority quickly and rather casually dismissed the public forum argument advanced by the appellees. The court buried its dismissal of the public forum doctrine in a footnote wherein it stated "(n)o one argues that any of the student groups involved in the case before us is a public forum." [FN135] As at least one commentator noted, "(a)pparently, because the University was not required to create a forum, the (Smith) majority did not feel obligated to determine if the University might have voluntarily done so." [FN136] Thus, the Smith opinion completely avoided a determination of the following: (1) whether the mandatory fee system was itself a forum; (2) whether the university chose to create a limited public forum by assessing these fees; and (3) whether these issues were relevant at all to an inquiry involving the compelled speech doctrine.

The next major decision regarding student fees could not simply ignore this preliminary analysis.

Two years after Smith, the Supreme Court forced the judiciary's collective hand when it decided Rosenberger and declared that a student activity fund is itself a voluntarily created public forum. [FN137] Even so, when the Seventh Circuit ***364** faced another student fee challenge by University of Wisconsin students it continued Smith's project of assessing the constitutionality of mandatory student fees almost exclusively outside the realm of the public forum doctrine. In fact, the Seventh Circuit even made a brief foray into subsidy analysis in what is the most current major decision on the constitutionality of mandatory umbrella student activity fees.

4. Southworth v. Grebe: Public Forum Analysis Replaced & Subsidy Analysis Acknowledged

Students at the University of Wisconsin-Madison challenged the allocation of a portion of their mandatory fees to groups engaged primarily in political and ideological activities. [FN138] This challenge allowed the Seventh Circuit Court of Appeals to accept Supreme Court Justice Sandra Day O'Connor's invitation to consider how "susceptible" a mandatory student fee system is to a compelled speech and association challenge. [FN139]

Unlike the Smith majority, the Seventh Circuit recognized that the challenged fees created a forum that had to be administered on a viewpoint-neutral basis. [FN140] Yet, the court's consideration of the public forum created by the student fees ended where it began. The Seventh Circuit payed the necessary lip service to Rosenberger's finding of a public forum and then immediately declared that Rosenberger itself required an analysis of the plaintiffs' case under the principles announced in Abood and Keller. [FN141]

***365** The court noted that all of the other federal circuit courts that considered mandatory student fee challenges also applied the principles announced in Abood, Keller, and Lehnert. [FN142] Circuit Judge Manion determined that the three prong analysis outlined in Lehnert represented the current standard for determining the constitutionality of compelled funding mechanisms. [FN143] Accordingly, the court engaged in an analysis of Lehnert's three part test. [FN144]

With regard to the first prong, the Seventh Circuit rejected the university's contention that the challenged funding mechanism was germane to its legitimate government interest in education. [FN145] The court declined to adopt the broad reading of "education" advanced by the university and explained that "unlike, for example a political science class on socialism, the International Socialist Organization (one of the challenged groups) is only incidentally concerned with education." [FN146] In other words, the court was unwilling to adopt Carroll's broad reading of the university's interest and instead found "Galda and Smith's analyses and conclusions more persuasive." [FN147] ***366** The Southworth court recognized "everything is in a sense educational" and thus found the university's funding mechanism failed the first prong of the Lehnert test. [FN148]

Unlike any of its predecessors, the Seventh Circuit continued its analysis and decided to apply the second and third parts of the Lehnert test. In doing so, the court ultimately determined the challenged funding mechanism was not "justified by vital interests of the government" and that it added "significantly to the burdening of free speech inherent in achieving those interests." [FN149] The Southworth court supported its contention regarding the second part of Lehnert and declared there was no vital policy interest in compelling the objecting students to fund the challenged political and ideological activities--such as lobbying. [FN150]

With respect to the third prong, the court argued that even if the university did have a vital interest in compelling funding from the plaintiffs, the university nevertheless failed this prong of the Lehnert test because it "significantly add(ed) to the burdening of free speech inherent in achieving (that) interest()." [FN151] The court reached this conclusion because it determined that the challenged organizations attempted to "garner the support of the public in its endeavors" and hence the burden of the

forced funding on plaintiffs was "particularly great" under the Lehnert standard. [FN152] The court also noted that the plaintiffs objected to funding speech on "emotionally charged" topics such as abortion and homosexuality, because of "their deeply held religious and personal beliefs," and that this was important since, under Lehnert "'the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect.'" [FN153]

The court made use of the underappreciated subsidy doctrine to respond to the university's contention that without compelled funding there would be less speech. The court stated simply, quickly, and decisively that, even if it were true that "less speech" would result from the absence of the compelled funding, the Constitution nevertheless "does not mandate that citizens pay for it." [FN154] Therefore, the Seventh Circuit repeated the constitutional guarantee that people, including students, "will not be compelled to pay for . . . speech" to which they do not subscribe. [FN155]

***367** The court also addressed the appropriate remedy for the plaintiffs. Like Smith, it ultimately decided to apply the Hudson/Keller pro-rata reduction standard. [FN156] Yet, the Seventh Circuit narrowed the order of the district court--an order which would have required, inter alia, that the university cease funding any ideological or political groups, regardless of whether students objected to the funding. [FN157]

Ultimately, the Seventh Circuit simply dispensed with a public forum analysis [FN158] in favor of the Abood/Keller/Lehnert standard of review it believed was mandated by the Supreme Court. During the course of this endeavor, the court acknowledged an underutilized device in the struggle to determine the constitutionality of mandatory student fees--the subsidy doctrine. Consequently, before proceeding with an analysis of a new more effective standard of review, it is important to briefly outline how some courts have used subsidy doctrine analysis in the student organization funding context.

D. The Subsidy Doctrine Cases: A Dearth of Precedent, A Wealth of Potential

The Seventh Circuit decided that the viewpoint/content discrimination analysis of Rosenberger--a subsidy case--was not necessary to evaluate an objecting student's compelled speech action. [FN159] Yet, since the Supreme Court has never considered an action like the one in Southworth, it is not clear that this was necessarily the proper course. [FN160] Nevertheless, Southworth's use of a very basic subsidy analysis demonstrates the utility of the subsidy approach in the ***368** mandatory students fees debate. [FN161] A brief summary of the way that two other federal circuit courts used this doctrine in the student organization funding context provides further insight into the discretion that a state university can exercise when it creates or modifies a mandatory fee system.

1. Gay and Lesbian Students Association v. Gohn: Impermissible Viewpoint Discrimination

a. Facts

The Gay and Lesbian Students Association ("GLSA") at the University of Arkansas (the "University") made three requests to the Student Senate (the "Senate") for money to fund their activities, all of which were denied except one. [FN162] Great debate surrounded the GSLA's applications for money both at the University and in the state legislature. The Eighth Circuit's description of this debate revealed strong anti-homosexual sentiments both within the Senate and among state lawmakers. [FN163] In fact, at one point the Senate voted to approve a rule that prohibited "the funding of any group organized around sexual preference." [FN164] Not surprisingly, the GLSA was the only group on campus that fit this category. To the chagrin of the Senate, the president of the student government vetoed the rule. [FN165] Eventually, the GSLA brought an action against the university.

b. Legal Reasoning

The court agreed with the district court's assess-

ment that student organizations had no right to receive funding but that once the University decided to fund any organization, it had to disperse funds on a viewpoint-neutral basis. [FN166] Next, the court stated that although the GLSA met "all the objective criteria for funding" it was denied funds twice absent any articulated, compelling state interest to deny the funds. The court then concluded "(i)t is apparent that the GLSA was denied . . . funds because of the views it espoused." [FN167] Hence, ***369** the court declared the University's decision not to fund the GLSA unconstitutional under the subsidy doctrine because "the government may not discriminate against people because it dislikes their ideas." [FN168] The Eighth Circuit made it clear that the viewpoint neutrality requirement of the subsidy doctrine has teeth.

2. University of Massachusetts v. Board of Trustees: [FN169] Permissible Content-Based Discrimination

a. Facts

Between August 1986 and August 1987 the Board of Trustees (the "Trustees") of the University of Massachusetts (the "University") rescinded all support for the Legal Services Office ("LSO"), an organization that provided legal advice to, and engaged in legal action on behalf of students and student organizations. [FN170] The Trustees replaced the LSO with the Legal Services Center ("LSC"), which was not allowed to engage in any litigation and could only dispense legal advice to students. [FN171] The LSO was "almost exclusively" funded through mandatory student fees. [FN172] The plaintiffs brought suit against the University alleging that the Trustees' actions were impermissible because their motive was to put an end to the LSO's successful suits against the University. [FN173] Plaintiffs argued the LSO was itself a limited public forum and that the First Circuit should therefore reverse the district court's decision to grant summary judgment to the University and remand in order to determine whether the Trustees had an improper motive under the public forum doctrine.

b. Legal Reasoning

In dismissing the plaintiffs allegation of improper motive the First Circuit rejected the plaintiffs contention that the case was governed by the public forum doctrine and concluded that the proper authority was the subsidy doctrine. [FN174] The court found public forum analysis to be inappropriate because the LSO itself was not a public forum.***370** [FN175] Instead, the court asserted that the LSO "merely represents an in-kind speech subsidy granted by UMass to students who use the court system." [FN176] Accordingly, the opinion analyzed the merits of the plaintiff's allegations under the Supreme Court's subsidy cases. [FN177] The court concluded that the Trustees' action was permissible under the subsidy doctrine, because its order "applie(d) to all litigation" and hence it was not "framed in an invidiously discriminatory manner" that suppresses a particular viewpoint. [FN178] The First Circuit's opinion demonstrates that a state University has a considerable amount of discretion in mandatory student funding decisions.

V. A New Standard of Review: Sharp Lines Drawn in Search of a Consistent Jurisprudence on Mandatory Student Fee Challenges

Part IV set forth the varied and seemingly inconsistent judicial resolutions of mandatory student fee challenges. [FN179] The courts that ***371** decided these cases used a variety of standards of review. For example, they applied, ignored or supplanted public forum doctrine. Similarly, they championed or distinguished the compelled speech decisions (Abood, Keller, & Lehnert). The courts assessing mandatory student fee challenges occasionally paid lip service to the subsidy doctrine. To resolve these apparent inconsistencies and establish a constitutionally permissible standard, courts should draw bright line distinctions and apply strict scrutiny when they assess the constitutionality of mandatory student fees allocated to organizations or activities directed beyond the campus gates. Courts should apply existing Supreme Court precedent on compelled speech when they consider challenges regarding the allocation of mandatory student fees to organizations or activities engaged in on-campus activities.

Several commentators have criticized the existing mandatory student fees jurisprudence. Some argue that the courts have created uncertainty. [FN180] Moreover, some contend that the existing decisions offer ambiguous rules without any guidance on the application of those rules. [FN181] A few of these commentators propose an alternative standard of review for deciding student fee challenges. [FN182] Not surprisingly,***372** several of these scholars feel there is an urgent need for the Supreme Court to articulate a consistent standard. [FN183] Yet, despite the deserved criticism levied at the current mandatory fee jurisprudence, none of the proposed solutions apply a proper legal standard. Each one fails to recognize either the implications or the logic of existing Supreme Court precedent. Perhaps part of this difficulty arises from the dated nature of their writing--for instance, none of the commentators wrote after the Seventh Circuit decided Southworth. The following proposal presents the most effective, constitutionally sound standard of review.

Courts should follow a bifurcated standard when considering challenges to the assessment of mandatory student fees. First, courts should presume that the allocation of mandatory student fees to outside organizations, such as NJPIRG in Galda II, [FN184] is unconstitutional. Likewise, courts should presume that the allocation of mandatory student fees to any off campus activity of an individual student or student organization, such as the lobbying discussed in Smith and Southworth, [FN185] is unconstitutional. Moreover, courts must insist on a compelling state interest to justify the challenged funding. Second, when faced with a dissenting student's challenge to the allocation of his fee to allegedly political or ideological organizations, a court should heed the example of Southworth and apply, with slight modifications that will be discussed below, the Abood/Keller/Lehnert standards regarding compelled speech.

A. Compelled Funding of Off-Campus Activities is Presumptively Unconstitutional

The presumption of unconstitutionality for all mandatory student fees used to fund off-campus activities both comports with the outcome of each of the post-Abood cases and is consistent with the purposes of the limited public forum that a university creates when it assesses mandatory student fees to foster a "robust debate" on campus. Support for this argument appears in both court decisions and intellectual commentaries. For example, the Galda II court announced***373** "a university's role of presenting a variety of ideas . . . loses its force . . . when an outside organization independent of a university and dedicated to advancing one position, is entitled to compelled contributions from those who are opposed (to that position)." [FN186] Similarly, the Second Circuit stated "(t)aking (the plaintiffs') money and using it, as NYPIRG does, off . . . campus--to, e.g., pay non-student lobbyists (and) cover statewide administrative costs . . . stretches the nexus between the extracted fee and SUNY Albany's educational interests too far, beyond what is constitutionally permissible." [FN187] More recently, the Seventh Circuit recognized that mandatory fees that fund off-campus speech undermine the contention that dissenting students who are able to withhold money are free riders. The court stated that when "speech to which (a student) object(s) occur(s) off-campus" this "further limit(s) the benefit" of that speech to the objecting student. [FN188] The Seventh Circuit continued to highlight its concern in this area when it noted "the burden on objecting students . . . 'is particularly great' (because) the private organizations use the funds to 'garner the support of the public in its endeavors.'" [FN189] These federal circuit courts all recognized that off-campus speech does not expose the entire student body to a rich exchange of ideas but instead only adds to the educational experience of those involved in the off-campus activity.

Commentators also argue that "supporting political or ideological activities outside the (university) forum" is not narrowly tailored to the government's interest in a robust debate and thus universities should "exclude political or ideological activities that are directed outside the university, such as lobbying, proposing legislation, or letter-

writing campaigns to legislators." [FN190] Many universities already heed this advice and prohibit the forced funding of off-campus political activities. [FN191] Moreover, as Thoe notes, a rule that prohibits compelled student funding of certain kinds of activities does not run afoul of the subsidy doctrine/Rosenberger rule with regard to viewpoint neutrality, because such a prohibition does not discriminate ***374** based on an organization's or individual's ideas. [FN192] A prohibition of this nature applies to all students and all student organizations regardless of political or ideological persuasion. Finally, if we assume all state universities assess a mandatory student fee to create a limited public forum that exposes students to "robust debate" and diverse ideas on campus, it seems that to compel students to fund off-campus activities--such as lobbying--would rarely, if ever, be narrowly tailored to that interest. [FN193] Thus, it is appropriate to presume the unconstitutionality of mandatory funding of outside organizations and off-campus activities

B. Southworth v. Grebe Got It Right: The Supreme Court has Directed Us to an Abood Style Analysis of Mandatory Fee Challenges

Courts should follow the Abood/Keller/Lehnert standards when faced with challenges to compelled funding of on-campus political or ideological activities by an organization because, as the Seventh Circuit correctly concluded, the Supreme Court's decision in Rosenberger has directed courts to this mode of analysis. [FN194] It is hard to imagine what other implication one could take from the Court's citation to Abood and Keller immediately following its observation that Rosenberger did not present a compelled speech question. Moreover, it is incorrect to conclude that Abood and its progeny are inappropriate precedents because they examined mandatory fees assessed by labor unions and state bar associations or because they ignored a proper public forum analysis.

Several commentators have argued that the labor union analogy fails because compelled student fees are used to "fund a forum of ideas, not a particular ideology or a group of students that function as the exclusive mouthpiece of the student body," as is the case with a union representative. [FN195] Also, universities that defend their mandatory***375** fee structure dispute the utility of the labor union analogy. For example, the plaintiffs in Southworth argued "the expansive governmental interest (in) education--as compared to the limited interests involved in Abood and Keller--collective bargaining and oversight of the bar-. . . is so broad, (that) more activities are germane." [FN196] For the following reasons, these arguments are unpersuasive and misplaced.

First, the allegation that the analogy fails because compelled student fees fund a forum of ideas, not a particular viewpoint, is both irrelevant and often untrue. It is irrelevant because the context of the objectionable speech-- whether it is inside or outside a forum--is important only to the germaneness of that speech to the government interest advanced. Put another way, the question is whether speech that espouses a particular ideology is germane to the government interest advanced or, likewise, whether the speech that occurs within the forum is germane to the advanced government interest. Hence, the labor union analogy is rather useful because the principle of germaneness applies despite the context of the speech.

Moreover, when compelled student fees support off-campus political or ideological activities they do not support a forum of ideas. Contrariwise, they only support the political group that is espousing those ideas. Thus, only one particular viewpoint on an issue is funded and there is no "robust debate" on that particular topic. For example, it is difficult to imagine how NJPIRG's lobbying before a governmental body adds to the exchange of ideas among students on a state university campus. As the Seventh Circuit noted, to conclude otherwise would require courts to adopt an impermissibly expansive definition of the government's interest in education. [FN197] The Seventh Circuit recognized that the danger in adopting such a definition is "everything is in a sense educational . . . even if it merely teaches you that you do not want to do it

again." [FN198] Thus, the Abood line of ***376** cases is still useful even though those cases did not address student fees.

What remains, therefore, is the need to determine what modifications of the Southworth approach to mandatory student fee challenges are necessary. To avoid the danger of repetition, this Note will only address the portions of Southworth analysis that are unsatisfactory. First, the Seventh Circuit recognized that the university creates a limited public forum when it assesses mandatory student fees and that once established the university must make the forum "available" in a viewpoint-neutral fashion. [FN199] Yet, unfortunately, this is the only mention of a public forum the court made in its opinion. Courts must recognize that the government interest advanced by the compelled funding of students is the maintenance of a limited public forum wherein students can engage in a "robust" exchange of ideas. Compelled funding of an activity is acceptable so long as it is germane to this limited interest and fulfills the other Lehnert requirements. [FN200] Accordingly, not all political and ideological speech a particular student finds objectionable will offend the Constitution. Only political speech that occurs outside the confines of the limited public forum is impermissible. Of course, this will require difficult line drawing and courts will have to determine whether a particular student or student organization has chosen to advocate its views outside the campus forum. There is no reason, however, to doubt that the courts can recognize the difference between an exchange of ideas that takes place on-campus and creates robust debate versus the advocating of a particular viewpoint to the exclusion of others that takes place off-campus.

Additionally, the Seventh Circuit failed to define what "garner(ing) the support of the public" [FN201] means and it did not make the important distinction between off-campus activities and their relationship to the university forum. [FN202] Hence the Southworth court failed to acknowledge that "(i)f . . . groups getting mandatory student funding at a public university are spending . . . their energies off-campus, then no forum exists because no members of the student body-other than members of the groups themselves-are benefitted." [FN203] Thus, the ***377** court not only failed to define its standard with respect to "garnering support of the public," but it also failed to recognize the importance of forum analysis.

Lastly, the Southworth court misinterpreted Rosenberger and thus misinterpreted the permissible steps a university may take to establish a mandatory fee system (steps that will be addressed in more detail in Part VI). In a footnote, the Seventh Circuit declared "(i)f the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities--that is the only way to protect the individual's rights." [FN204] The court cited Rosenberger in support of this proposition. [FN205] The Southworth panel completely misconstrued the viewpoint neutrality requirement that arises in government subsidized limited public fora. The court seemed to adopt commentator Carolyn Wiggin's position that "for public fora to be legitimate, should the state use subsidies to finance speech within the public forum, funds must be distributed on a content-neutral basis." [FN206] Without entering the debate regarding the usefulness of the content and viewpoint neutrality distinction, it suffices to note that in Rosenberger the Supreme Court stated:

> (I)n determining whether the state is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations. [FN207]

The above point is essential to remember and is emphasized here because it relates to this Note's criticism of the Seventh Circuit's Southworth opinion. Moreover, since, as with all standards of review, the one advocated above has its limitations, it

is important to be aware of the parameters a university must act within if it wants to avoid legal challenges to its fee system.

VI. Conclusion: In Support of a Voluntary Fee System

Current public university fee structures typically do not allow a student to obtain a pro-rata reduction of his umbrella mandatory ***378** student fee for organizations/activities he finds objectionable. The only places where a state university student may obtain such a deduction are Wisconsin and California-- the states subject to the Smith and Southworth orders. Sometimes, a state university will allow a student to deduct a potentially objectionable fee in advance of paying tuition and other fees. The pro-rata deduction of a portion of an umbrella fee or the ability to opt out of an entire dedicated fee provides an insufficient solution to the constitutional quandry at hand, even when this deduction is done in accordance with Hudson/Keller.

First, the Supreme Court has repeatedly declared that even the temporary use of compelled funds for non-germane activities violates the constitutional rights of objecting individuals. [FN208] Furthermore, the Court has noted that any administrative burden associated with implementing its directives is justified. [FN209] Yet, the Court has never been forced to fashion a remedy for objecting state university students. It follows that state universities have little judicial guidance in fashioning their fee systems. Consequently, some commentators have proposed alternative fee systems [FN210] or alternative standards within which a university can construct its student fee mechanisms. [FN211] These alternative proposals correctly identify the increased discretion the university has under the often ignored subsidy doctrine. A proposal like Thoe's "activities based exclusion"--wherein universities would refuse to fund any off campus political and ideological speech--seems consistent with current First Amendment jurisprudence. Such a proposal, however, fails to address the reality of compelled funding of political or ideological student organizations.

The first criticism of such a system is closely related to one levied by the Seventh Circuit in Southworth. If we limit compelled funding of political or ideological organizations to germane on campus activities, as Thoe suggests, then we have not addressed the fungibility of the resources these organizations receive. As the Southworth court noted, to take the simple "bookkeeping" approach of requiring dissenting students pay only for the on-campus, forum related activities ***379** "does not cure the obvious subsidy." [FN212] Put another way, if a university compels funding for only germane, on-campus activities, these funds will allow political and ideological organizations to support off-campus activities with whatever money these groups might have garnered from other sources. Hence, these supposedly permissible compelled fees would actually enhance the ability of many groups to fund non-germane, non-forum related activities with money coerced from dissenters.

This fear is not unfounded. For example, if student organizations at most state universities are like those at the University of Wisconsin-Madison, then approximately seventy percent of them receive enough money from non-student fee ("outside") sources to be self-sufficient. [FN213] It would not be unreasonable to assume that the other thirty percent of student organizations receive at least some outside support and make up the balance with student fees. Thus, the adoption of either the standard of review proposed in Part V regarding outside organizations/activities or Thoe's activities based exclusion would still result in the compelled funding of non-germane activities by dissenting students.

The second problem with Thoe's proposal relates to the pro-rata deduction remedy required by Hudson/Keller and ordered by the Southworth court. Admittedly, this concern rests on more pragmatic grounds as opposed to constitutional grounds. Simply put, a pro-rata deduction where a student opts out of a compelled fee--such as the one implemented by Rutgers University in the aftermath of Galda II--ignores the reality that most students are

unaware of the specific activities that are funded through these fees. Many students do not opt-out of funding activities because they do not possess the requisite information. If students possessed more information, many would likely opt-out of funding organizations whose activities they find offensive. Also, the ability to opt-out is often not very well publicized. Again many students are not aware they have the ability to opt-out.

Although these arguments are of a pragmatic nature, the Supreme Court places importance on such "practical" matters when it analyzes compelled funding cases. [FN214] Moreover, these practical concerns represent additional, viable reasons for abandoning the enterprise of insisting on a pro-rata reduction. Even the Supreme Court admits that ***380** requiring a state entity to calculate and administer such deductions is costly--and yet the Court still requires that labor unions and bar associations follow this established course. [FN215] The best solution for avoiding the difficulties of a pro-rata reduction system is a simple one--state universities should require that students opt-in to fees for student activities that support political or ideological organizations. By doing so, public universities would be following the lead of the IRS (which allows taxpayers to opt-in to the federal campaign matching funds program) and select state universities that have already chosen a voluntary system. [FN216]

Such a voluntary system is acceptable and desirable for a number of reasons. First, a voluntary system is consistent with a state university's ability to enact content based restrictions on its funding decisions. [FN217] Allowing only voluntary funding of all political and ideological organizations does not discriminate against a particular viewpoint. It affects all political and ideological organizations in the same way. A voluntary system would potentially remove the current dispute from court dockets because there would no longer be any dissenting students demanding a return or pro-rata reduction of their fees. Moreover, a voluntary system addresses the fungibility problem raised above by ensuring that any non-germane activities are funded only by voluntary donations of students' money. Those who fear such a system would result in "less speech" need only remember that government is not required to subsidize speech and that probably over two thirds of the organizations in question would not be affected at all. [FN218] As the Seventh Circuit pointed out, there would not be a free rider problem because dissenting students receive no benefits from speech they refuse to fund because they find it objectionable. [FN219] Finally, a voluntary system is less costly to administer and it would ensure that uninformed students are not forced to even temporarily pay for speech they find abhorrent.

The only way to completely avoid the tyrannical and sinful compulsion Jefferson described is to enact a voluntary student fee system ***381** at all state colleges and universities.

[FNa1]. J.D. Candidate, Rutgers University Law School-Newark, 2000; B.A., Columbia College, Columbia University, 1996.

[FN1]. Southworth v. Grebe, 151 F.3d 717, 725 (7th Cir.), reh'g en banc denied, 157 F.3d 1124, 1125 (7th Cir. 1998), and cert. granted sub nom. University of Wis. Sys. v. Southworth, 119 S. Ct. 1332 (Mar. 29, 1999).

[FN2]. Thomas Jefferson, A Bill for Establishing Religious Freedom, in 2 The Papers of Thomas Jefferson 545 (1950); see also Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) (citing the same passage from Jefferson); Smith v. University of Cal., 844 P.2d 500, 506 (Cal. 1993) (noting that "(c)ourts have often stressed this principle by repeating (the Jefferson passage cited supra)"); Christina E. Wells, Comment, Mandatory Student Fees: First Amendment Concerns and University Discretion, 55 U. Chi. L. Rev. 363, 363 (1988) (citing to the same Jefferson quotation).

[FN3]. Charles Thomas Steele, Jr., Mandatory Student Fees at Public Universities: Bringing the First Amendment Within the Campus Gate, 13 J.C. &

U.L. 353, 353-54 (1995).

[FN4]. See Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032, 1036-38 (9th Cir. 1999); Hays County Guardian v. Supple, 969 F.2d 111, 123-124 (5th Cir. 1992); Carroll v. Blinken, 957 F.2d 991, 1001 (2d Cir. 1992); Kania v. Fordham, 702 F.2d 475, 479-80 (4th Cir. 1983); cf. Arrington v. Taylor, 380 F. Supp. 1348, 1363-64 (D.N.C. 1974) (concluding that the constitutional rights of the plaintiff students were not violated because the challenged program which the university supported with mandatory student fees was relevant to the university's educational purpose); Veed v. Schwartzkopf, 353 F. Supp. 149, 152-53 (D. Neb. 1973) (asserting that the university may finance the challenged activities so long as they are part of an educational forum and so long as they do not force students to indirectly adopt/adhere to a single viewpoint or position); Larson v. University of Neb., 204 N.W.2d 568, 571 (Neb. 1973) (same); Good v. Associated Students of the Univ. of Wash., 542 P.2d 762, 769 (Wash. 1975) (en banc) (same).

[FN5]. Southworth, 151 F.3d at 722.

[FN6]. Rosenberger v. University of Va., 515 U.S. 819, 851 (1995) (O'Connor, J., concurring).
The Court is currently reviewing the Seventh Circuit's Southworth opinion. Oral argument ocurred on November 9, 1999. At the time that this Note went to print, no decision had yet been made in the case.

[FN7]. Carroll, 957 F.2d at 992.

[FN8]. See Wells, supra note 2, at 363.

[FN9]. Abood, 431 U.S. at 235.

[FN10]. Id. at 237; see also Robert L. Waring, Comment, Talk is Not Cheap: Funded Student Speech at Public Universities on Trial, 29 U.S.F. L. Rev. 541, 547-48 (1995) (analyzing the Supreme Court's union dues jurisprudence and noting its dicta regarding compelled speech).

[FN11]. As commentators have noted, "(b)ecause of the state action doctrine, constitutional guarantees of human rights are effective only against action which is 'fairly attributable to the State.'" Wells, supra note 2, at 363 n.3 (citing Lugar v. Edmunson Oil Co., 457 U.S. 922, 937 (1982)). Some have argued that federal funding of private universities subjects the states that fund these institutions to constitutional limitations. See United States v. Virginia, 518 U.S. 515, 599 (1996) (Scalia J., dissenting) (arguing that the majority's decision requiring VMI to admit women might result in a determination that the "government itself would be violating the Constitution by providing state support to single-sex colleges"). Nevertheless, it is not clear whether private universities are subject to this limitation. This Note, however, will only address state universities. For further discussion of the relationship between the Constitution and private colleges and other private actors, see Julian N. Eule & Jonathan D. Varat, Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes A Curse, 45 UCLA L. Rev. 1537, 1539 (1998) and H. Kathryn Merrill, The Encroachment of the Federal Government into Private Institutions of Higher Education, 1994 BYU Educ. & L.J. 63, 64 (1994). For a more focused discussion involving the constitutional rights of students at private universities, see Charles Alan Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1036 (1969) (arguing that it is "unthinkable" that a private college "would consider recognizing fewer rights in their students than the minimum the Constitution exacts of the state universities").

[FN12]. Courts analyzing compelled speech challenges to mandatory student fees define outside organizations as "organization(s) independent of the University." See Galda v. Rutgers, 772 F.2d 1060, 1061 (3d Cir. 1985).

[FN13]. For the purposes of this Note, the term "primarily ideological student organizations" refers to certain kinds of organizations funded under a general student activity fee. At the time such a fee is assessed, no distinction is made for individual student organizations. The money collected is distributed to these organizations from a central fund. For an explanation of what the term "primarily

ideological" means in the context of the debate over mandatory student fees, see infra Part IV.C.

[FN14]. See Wells, supra note 2, at 364-65.

[FN15]. See U.S. Const. amend. I.

[FN16]. Waring, supra note 10, at 551; see also Karen M. Kramer, The Free Rider Problem and First Amendment Concerns: A Balance Upset by New Limitations on Mandatory Student Fees, 21 J.C. & U.L. 691, 692 (1995); Wells, supra note 2, at 365 n.7 (noting "(t)he 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"). Wells also highlights the Supreme Court's recognition that "'(e)ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."' Id. (quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958)).

[FN17]. Waring, supra note 10, at 551.

[FN18]. 319 U.S. 624 (1943).

[FN19]. Id. at 642. Furthermore, the Court noted that people should be free from the compulsion "to declare a belief" because "(c)ompulsory unification of opinion achieves only the unanimity of the graveyard." Id. at 641.

[FN20]. 427 U.S. 347 (1976).

[FN21]. See id. at 347.

[FN22]. 431 U.S. 209 (1977).

[FN23]. See id. at 213.

[FN24]. Id. at 225-26, 237. The Court announced that "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." Id. This language refers to Justice Douglas's opinion in International Ass'n of Machinists v. Street, 367 U.S. 740 (1961), in which Justice Douglas stated: "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." Id. at 778; see also Wells, supra note 2, at 367 n.21.

[FN25]. 496 U.S. 1 (1990).

[FN26]. Carolyn Wiggin, Note, A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities, 103 Yale L.J. 2009, 2015 (1994) (citing Keller, 496 U.S. at 15-16).

[FN27]. See, e.g., id. at 2015-16 (describing the "germaneness test" established by Abood and Keller); see also Donna M. Cote, Note, The First Amendment and Compulsory Funding of Student Government Political Resolutions at State Universities, 62 U. Chi. L. Rev. 825, 831 (1995) (noting that the Abood decision "held that . . . the union could use . . . mandatory dues to finance political activities germane to collective bargaining").

[FN28]. Wiggin, supra note 26, at 2015.

[FN29]. 500 U.S. 507 (1991).

[FN30]. See id. at 519.

[FN31]. Id.

[FN32]. Glickman v. Wileman Bros. & Elliot Inc., 521 U.S. 457, 471 (1997).

[FN33]. Smith v. University of Cal., 844 P.2d 500, 508 (Cal. 1993).

[FN34]. See, e.g., Kania v. Fordham, 702 F.2d 475, 479 (4th Cir. 1983) (noting the plaintiff's reliance on Abood's compelled speech arguments to support his contention that his university's partial funding of its student newspaper violated his constitutional rights).

[FN35]. Kari Thoe, Note, A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled-Speech Rights at American Universities, 82 Minn. L. Rev. 1425, 1435 (1998); see also, Smith v. University of Cal., 844 P.2d 500, 507 (Cal. 1993) (noting the Regents' contention that educational benefits justify a burden on students' constitutional rights).

[FN36]. See, e.g., Elizabeth E. Gordon, University Regulation of Student Speech: Considering Content Based Criteria Under Public Forum and Subsidy Doctrines, 1991 U. Chi. Legal F. 393, 394 (noting that the public forum doctrine is the mode of analysis courts "traditionally" use to assess regulation of student speech).

[FN37]. Laurence H. Tribe, American Constitutional Law § 12-24, at 987 (Foundation Press, 2d ed. 1988).

[FN38]. Id. Examples of areas typically implicated as public forums include "streets, sidewalks, parks, and other similar public places (which) are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 315 (1968).

[FN39]. Police Dept. v. Mosley, 408 U.S. 92, 95 (1972).

[FN40]. Id. at 96. In Mosley, the Court considered a city ordinance that prohibited picketing near a school unless the picketers were peaceful labor picketers. See id.

[FN41]. Mosley, 408 U.S. at 98 (citing Cox v. New Hampshire, 312 U.S. 569, 575-76 (1941)); see also Adderly v. Florida, 385 U.S. 39, 46-48 (1966).

[FN42]. See Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983). In Perry Educ. Ass'n, the Court announced that restrictions are acceptable where they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Id.

[FN43]. 454 U.S. 263 (1981).

[FN44]. Id. at 267 n.5.

[FN45]. Gordon, supra note 36, at 397.

[FN46]. 515 U.S. 819 (1995). Similarly, commentators note that as it was "(o)riginally conceived, (public) forum analysis is an analytical construct that is intended, ideally, to achieve an appropriate balance between the individual's right to speak in public places or forums and the government's right to preserve at least some of those forums for their special or unique governmental purposes." Gail Paulus Sorenson, The 'Public Forum Doctrine' and its Application in School and College Cases, 20 J.L. & Educ. 445, 445 (1991). Adherence to this principle would allow state universities to preserve their special or unique educational purpose.

[FN47]. See Rosenberger, 515 U.S. at 828-29. The category known a "limited public forum" originated in the Court's opinion in Perry Educ. Ass'n. See Perry Educ. Ass'n, 460 U.S. at 45. In Perry Educ. Ass'n the Court divided public fora into traditional public fora, limited purpose public fora, and nonpublic fora. As one commentator noted, the "right of the state to limit expressive activity is 'sharply circumscribed' in traditional public fora, less circumscribed in the limited purpose fora, and least restricted in nonpublic fora." Gordon, supra note 36, at 397 n.24.

[FN48]. See Curtis Anderson, Note, Planned Parenthood v. Clark County School District: "Having Your Cake and Eating It Too" in Public School Free Speech Cases, 1993 BYU L. Rev. 983, 987 (defining the reasonableness standard).

[FN49]. Thoe, supra note 35, at 1430. Thoe also states that some commentators view the discretion afforded government entities in limited public fora as a "meaningless" protection of First Amendment rights, see id. at 1430 n.35, 1446-47, and notes, as an example, the position of commentator Robert C.

Post. See id. at 1446 n.161. Post argues that the boundaries set forth in Perry Educ. Ass'n allow government entities to "build discriminatory criteria into the very definition or purpose of the limited public forum." Robert C. Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1753 (1987).

[FN50]. Gordon, supra note 36, at 397.

[FN51]. See Harris v. MacRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Cammarano v. United States, 358 U.S. 498 (1959); Speiser v. Randall, 357 U.S. 513 (1958).

[FN52]. 461 U.S. 540 (1983).

[FN53]. Harris, 448 U.S. at 316.

[FN54]. Gordon, supra note 36, at 398.

[FN55]. See Regan, 461 U.S. at 542.

[FN56]. Id. at 546.

[FN57]. See id. at 547 (noting that "(s)tatutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech"); see also id. at 553 (Blackmun, J. concurring). Justice Blackmun's concurring opinion echoed the majority's choice of precedent and emphasized that if the challenged provision of the IRS code impinged on or limited the "control (that appelee's) exercise over the lobbying of (its) . . . affiliates, the First Amendment problems would be insurmountable." Id.

[FN58]. See id. at 548. Although the terms "content" and "viewpoint," are sometimes used interchangeably in court opinions, the terms have different meanings. See id. As commentators have noted, "viewpoint" is distinct from "content," since content implies a mode of expression--such as lobbying-- whereas viewpoint implies a form of expression conveying a particular opinion-- such as lobbying for anti-abortion legislation. See, e.g., Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189 (1983) (describing the subtle distinction between content regulation and viewpoint regulation).

[FN59]. Gordon, supra note 36, at 399-400.

[FN60]. 500 U.S. 173 (1991).

[FN61]. Id. at 193. For a critical approach to the Rust decision, see generally Phillip J. Cooper, Rusty Pipes: The Rust Decision and the Supreme Court's Free Flow Theory of the First Amendment, 6 Notre Dame J.L. Ethics & Pub. Pol'y 359 (1992); Dorothy E. Roberts, Rust v. Sullivan and the Control of Knowledge, 61 Geo. Wash. L. Rev. 587 (1993).

[FN62]. Student Gov't Ass'n v. University of Mass., 868 F.2d 473, 477 (1st Cir. 1989).

[FN63]. The marketplace metaphor began with Justice Holmes's declaration that "the best test of truth is the power of thought to get itself accepted in the competition of the market . . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting). Justice Brennan was the first person to use the phrase "marketplace of ideas" in Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J. concurring). For further discussion of the marketplace metaphor see generally Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1.

[FN64]. Waring, supra note 10, at 562.

[FN65]. See infra Part IV.B.

[FN66]. See infra Part IV.C.1.

[FN67]. See infra Part IV.C.2.

[FN68]. See infra Part IV.C.3.

[FN69]. See infra Part IV.C.4.

[FN70]. See Veed v. Schwartzkopf, 353 F. Supp. 149, 152-53 (D. Neb. 1973); Larson v. University of Neb., 204 N.W.2d 568, 571 (Neb. 1973); Good v. Associated Students of the Univ. of Wash., 542 P.2d 762, 769 (Wash. 1975).

[FN71]. Janine G. Bauer, Note, The Constitutionality of Student Fees for Political Student Groups in the Campus Public Forum: Galda v. Bloustein and the Right to Associate, 15 Rutgers L.J. 135, 153 (1983).

[FN72]. 303 A.2d 475 (Vt. 1973).

[FN73]. See id. at 476-80.

[FN74]. See id.

[FN75]. Id. at 479. The court compared the university forum to the "'speakers corner' of Hyde Park in London (that) provides a platform for the espousing of social, religious and political ideas by various and divergent individuals." Id.

[FN76]. Id. at 480. The court cited Justice Brennan's opinion in Keyishian v. Board of Regents of New York, 385 U.S. 589 (1967), wherein Justice Brennan stated: "(t)he classroom is peculiarly the 'marketplace of ideas' . . . (t)he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection."' Id. (quoting Keyishian, 385 U.S. at 603) (citations omitted) (alteration in original).

[FN77]. See Veed, 353 F. Supp. at 150-51; Larson, 204 N.W.2d at 570-71.

[FN78]. See Larson, 204 N.W.2d at 571.

[FN79]. Id. at 571. The court voiced its concern that, for example, the student newspaper "not be allowed to become a vehicle for expressing a single political point of view." Id. The court further elaborated:
(w)here a university newspaper is supported by mandatory student fees, or by other university funds, reasonable supervision is required by the university authorities with a view to promoting and permitting the reflection of a broad spectrum of university life and reasonable representation of the various aspects of student thought and action.Id.

[FN80]. Bauer, supra note 71, at 154 (discussing the public forum analysis in Veed, 353 F. Supp at 152).

[FN81]. 542 P.2d 762 (Wash. 1975). The plaintiffs in this case challenged the fees the University of Washington assessed to support the Associated Students of the University of Washington ("ASUW"), a student union that sponsored activities such as promoting speakers and disseminating a contraceptive handbook. See id. at 764. The students argued that the actions of the ASUW "promoted a one sided political viewpoint." Id.

[FN82]. Id. at 768.

[FN83]. Id. at 769.

[FN84]. 380 F. Supp. 1348 (M.D.N.C. 1974).

[FN85]. See id. at 1355.

[FN86]. See id. at 1355-58.

[FN87]. Id. at 1364.

[FN88]. See Rosenberger, 515 U.S. at 851 (noting the "possibility" that a mandatory fee is susceptible to a free speech challenge).

[FN89]. See Galda v. Rutgers, 772 F.2d 1060, 1061 (3d Cir. 1985) (hereinafter "Galda II").

[FN90]. See id.

[FN91]. Id. at 1064 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 237 (1977)).

[FN92]. Id. at 1062.

[FN93]. See id. at 1066. For elaboration on the alleged narrowness of the scope of the Galda II holding, see Waring, supra note 10, at 575-76.

[FN94]. Galda II, 772 F.2d at 1064.

[FN95]. Id. (quoting Galda v. Bloustein, 686 F.2d 159, 166 (3d Cir. 1983) (hereinafter "Galda I"). In Galda I the Third Circuit reversed a summary judgment that the district court originally granted on behalf of the defendants, Rutgers University. See id.

at 1061. On remand, the district court found for the defendants and determined that NJPIRG contributed to the education of its student members. See id. at 1063.

[FN96]. Id.

[FN97]. Id. at 1064-65 (quoting Galda I). The established principles the court followed in this portion of its standard of review can be found in Supreme Court decisions which addressed the discretion of universities in constructing their educational systems. See, e.g., University of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (noting "the freedom of a University to make its own judgments as to education"); see also University of Mich. v. Ewing, 474 U.S. 214, 226 & n.12 (1985) (noting the Court's "reluctance to trench on the prerogatives of state and local educational institutions" and declaring that "(a)cademic freedom thrives . . . on autonomous decisionmaking by the academy itself").

[FN98]. Galda II, 772 F.2d at 1064-65 (citations omitted).

[FN99]. Southworth, 151 F.3d at 726.

[FN100]. See Galda II, 772 F.2d at 1068.

[FN101]. See id.

[FN102]. See id.; Galda I, 686 F.2d at 168-69.

[FN103]. Galda II, 772 F.2d at 1068 n.5.

[FN104]. Note that this opt out mechanism is the one Rutgers University currently follows with regard to funding NJPIRG and this program has not been struck down by any court.

[FN105]. The court stated: "we do not enter the controversy on whether a given campus organization may participate in the general activities fee despite the objections of some who are required to contribute to that fund." See id. at 1064. The court cited Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983) and Maryland Public Interest Research Group v. Elkins, 565 F.2d 864 (4th Cir. 1977).

[FN106]. For example, in Kania, a group of students at the University of North Carolina, Chapel Hill, challenged the constitutionality of mandatory fees that supported a student newspaper whose views these students found repugnant. See Kania, 702 F.2d at 476. The initial challenge to these fees failed. See Arrington, 526 F.2d at 587. Following the Abood decision, the plaintiff's attorney from Arrington unsuccessfully petitioned the Fourth Circuit to reconsider that decision. See Kania, 702 F.2d at 476. Accordingly, plaintiffs Kania, et al., commenced a second action in the district court of North Carolina and, relying largely on the Abood decision, argued that "even if Arrington reached a permissible result when first decided, it has been invalidated by subsequent Supreme Court elucidation of the constitutional doctrines of freedom of speech and association." Kania, 702 F.2d at 478. The district court and the United States Court of Appeals for the Fourth Circuit found no merit in plaintiff's claims and declared that "(t)he Abood Court was concerned with labor relations in the public sector, not with the peculiar setting of a student newspaper in a public university." Id. at 479. The court noted that Abood allowed mandatory fees which supported a Union's "central purpose"--collective bargaining--and concluded that since the student newspaper was germane to "the University's educational mission," the fees assessed to support the newspaper were permissible. Id. at 479-80. Moreover, the Fourth Circuit concluded that the fees were constitutional because the newspaper contributed to a public forum and did not act as a vehicle to communicate a single point of view. See id. at 480.

[FN107]. See Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992).

[FN108]. See id. at 995-97, 1000-01. The court set forth the background of the compelled speech and association doctrine, discussing, inter alia, Abood and West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943). See id. at 995-97. Moreover, the court noted the applicability of the public forum doctrine to a consideration of the constitutionality of the fees. See id. at 1000-01.

[FN109]. See Carroll, 957 F.2d at 997-98 (noting that "there is linkage enough (between the fee and the plaintiffs) in being compelled to fund an unsupported cause").

[FN110]. Id. at 999.

[FN111]. Id.

[FN112]. Id. (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). Oddly, although the test the court articulated uses the language of intermediate scrutiny and thus requires a "substantial government interest," Judge Kaufman quoted strict scrutiny language in support of the court's choice of a standard of review. See id. (quoting Schad v. Mount Ephraim, 452 U.S. 61, 69 n.7 (1981), as saying "(e)ven where a challenged regulation restricts freedom of expression only incidentally . . . (it) must be narrowly drawn to avoid unnecessary intrusion on freedom of expression" (emphasis added)). At least one commentator has argued that challenges to fees of the sort addressed in Carroll are most appropriately reviewed under a "mid-level balancing" standard. See Leslie Gielow Jacobs, Pledges, Parades, and Mandatory Payments, 52 Rutgers L. Rev. 165, 215-16 (1999).

[FN113]. Carroll, 957 F.2d at 999 (citing, inter alia, Ewing and Bakke).

[FN114]. Id. at 1001.

[FN115]. See id. at 995-97.

[FN116]. See, e.g., id. at 1001 ("(I)nfringement of appellants' First Amendment right against compelled speech . . . occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG.").

[FN117]. See id. at 999-1001. The Second Circuit considered three interests SUNY put forth to justify its fee structure. See id. at 999-1000. The court discussed the first two interests--"1) the general promotion of extracurricular activities (and) 2) the facilitation of . . . 'participatory physics training"'--but it did not consider these interests to be crucial to reaching its decision. See id. at 1000.

[FN118]. Id.

[FN119]. See Southworth, 151 F.3d at 725-26.

[FN120]. Carroll, 957 F.2d at 1001-02. The court believed "the ability of NYPIRG and other campus groups to function effectively is tied to the level of resources they can muster in support of their activities." Id. 1001-02. At this point, the court engaged in supposition regarding the ramifications of implementing a funding mechanism different from the one that the appellees challenged:

Viewed from the students' perspective, an alternate funding scheme would seem less likely to commit the university community to the goals of enriching campus life and promoting debate. Rather, funding would be balkanized and students would cease to be linked by a common bond to the tolerant support of all points of view.Id. at 1002.As discussed supra, SUNY had no obligation to fund NYPIRG and to thereby ensure "the predictability" of its annual budget. See supra Part III.B. SUNY had no such obligation because NYPIRG was not a part of the limited public forum that had been created on the various SUNY campuses. See id.; supra Part III.A.

[FN121]. See id. at 1002-03. The court chose to implement this directive and required NYPIRG to spend as much money on campus activities/events as it received from the challenged funding mechanism. See id. By choosing this method, the court stated a purpose echoed by many of its predecessors. It did not want to "micromanage" the affairs of the university. See id. at 1002. This concern comports with the Supreme Court's articulation of a need to accord universities a considerable amount of discretion in constituting their educational system.

[FN122]. See Smith v. University of Cal., 844 P.2d 500, 505 (Cal. 1993). Specifically, students at the University of California at Berkeley in 1981 objected to the funding of 14 organizations. See id. at 504-05. Some of the organizations in this group included: Amnesty International, Berkeley Students for Peace, Campus N.O.W., Greenpeace Berkeley, the Progressive Student Organization, and the Radical Education and Action Project. See id.

[FN123]. See id. at 505-14 (setting forth the court's rationale for declaring the allocation of umbrella activity funds to primarily political organizations unconstitutional).

[FN124]. Compare Smith, 844 P.2d at 508, 513 (paraphrasing the political action group standard described supra at note 92 and citing Galda II in support) and Galda II, 772 F.2d at 1065 (setting forth its standard of review and announcing that an infringement on a student's First Amendment rights occurs when a student "establish(es) that (an organization) 'functions essentially as a political action group with only an incidental educational component"' (quoting Galda I)) with Carroll, 957 F.2d at 999 (setting forth its standard of review and eschewing the political action group language of Galda II).

[FN125]. Smith, 844 P.2d at 508.

[FN126]. Id.

[FN127]. Id. at 511.

[FN128]. In fact, the Smith court practically announced a per se rule when it declared that "a regulation that permits the mandatory funding of (organizations which function primarily as political action groups) is not 'narrowly drawn to avoid unnecessary intrusion on freedom of expression."' Id. at 511-12 (internal quotations partially omitted) (citation omitted). The court continued its discussion of this type of regulation and asserted that "it 'unnecessarily restrict(s) constitutionally protected liberty, (when) there is open a less drastic way of satisfying its legitimate interest."' Id. at 512 (citation omitted) (alteration in original).

[FN129]. See id. at 513. The Hudson Court had previously announced that "(a) forced exaction followed by a rebate equal to the amount improperly expended is . . . not a permissible response." Hudson, 475 U.S. at 305-06.

[FN130]. Like other commentators, this author takes the language of the court to mean that this so called "refund" is in fact the prepayment deduction mandated in Hudson, et al. See, e.g., Waring, supra note 10, at 600 (noting that the Smith court required that the Regents adopt "the same system mandated in Hudson and Keller").

[FN131]. See Smith, 844 P.2d at 515-16.

[FN132]. Id. at 516.

[FN133]. Id.

[FN134]. See, e.g., Thoe, supra note 35, at 1439-40 (noting that "the (Smith) court rejected the idea that the fees created a public forum"); Waring, supra note 10, at 594-95 (pointing out that "(t)he (Smith) court declined to analyze the case using public forum doctrine for a number of reasons"); Wiggin, supra note 26, at 2013 (noting that the Smith majority "dismissed the possibility that the public forum doctrine applied to the case . . . . (r)ather than analyzing the entire mandatory fee system as a means of promoting a forum for a wide range of student speech").

[FN135]. Smith, 844 P.2d. at 509 n.8. The court took this opportunity to distinguish previous decisions such as Kania, Veed, and Arrington by noting that those cases involved challenges to funding an organization that might itself be considered a public forum, such as a student newspaper. See id. The court also distinguished Lace and Good on other grounds. See Smith, 844 P.2d at 509 n.8.

[FN136]. Waring, supra note 10, at 595.

[FN137]. In Rosenberger, the Court announced that the University of Virginia's Student Activities Fund ("SAF") "is a forum more in a metaphysical sense." Rosenberger, 515 U.S. at 830. Moreover, the Court declared that "(t)he object of the SAF is to open a forum for speech, and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life." Id. at 840. Despite its "metaphysical" disclaimer, the Court engaged in a detailed review of the rules regarding content versus viewpoint discrimination in a voluntarily created limited public forum. See id. at 829-35. Al-

though the facts of Rosenberger required the Court to decide on the constitutionality of a university's choice to withhold fees from a student organization, see id. at 822-28, the explicit acknowledgment that a student activity fund was itself a public forum seemed to preclude the possibility that a future court could ignore public forum analysis when faced with a compelled speech challenge of such a fund.

[FN138]. See Southworth, 151 F.3d at 718-20.

[FN139]. See Rosenberger, 515 U.S. at 851 (O'Connor, J. concurring); see also supra note 6 (noting the Supreme Court's current consideration of the constitutional questions posed by Southworth).

[FN140]. See Southworth, 151 F.3d at 722. Specifically, the Southworth court stated that the "Supreme Court held that the student activity fees created a forum of money." Id. (emphasis added). It does not appear that the "forum of money" assertion is necessarily correct, because the Supreme Court stated explicitly that the forum was metaphysical and, in reality, the SAF truly opened a forum. See Rosenberger, 515 U.S. at 840. Even so, the significance of this difference seems minimal because, as noted infra at note 141 and accompanying text, the Court did not pursue the public forum principle any further than this initial acknowledgment.

[FN141]. See Southworth, 151 F.3d at 722. Circuit Judge Manion, writing for the court, stated: "(w)hile Rosenberger did not consider the question we have before us, in noting what was not before it, the Court directed us to the Abood and Keller analysis." Id. In support of this proposition, Judge Manion cited the following passage from Rosenberger:

The fee (assessed by the University of Virginia) is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe. See Keller v. State Bar of California, 496 U.S. 1, 15-16 . . . (1990); Abood v. Detroit Board of Ed., 431 U.S. 209, 235, 236 . . . (1977).Id. (citation to Rosenberger omitted).

[FN142]. See Southworth, 151 F.3d at 723. The court ultimately justified its application of the Abood/Keller standards by citing to "the Supreme Court's lead and the overwhelming authority from other circuits." Id.

[FN143]. See id. at 724; supra notes 29-30 and accompanying text (outlining the "germaneness" test and Lehnert's adoption of a three-part test).

[FN144]. See Southworth, 151 F.3d at 724. The Seventh Circuit ultimately decided against the University. See id. at 735. The university applied for and was denied rehearing en banc. See Southworth v. Grebe, 157 F.3d 1124, 1125 (7th Cir. 1998). Several circuit judges dissented from the denial of the application for rehearing en banc; included in the dissent was an argument that Circuit Judge Manion's reliance on the Lehnert three prong test was improper because that test received "the support of only four justices, and thus is not controlling." Id. at 1127. Yet, as Circuit Judge Manion noted, the Court "reaffirmed" its three prong Lehnert test in Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998). See Southworth, 151 F.3d at 724. Moreover, in the Lehnert opinion five justices adopted the three part test, "although only four of those five justices agreed on the application of the factors." Id. at 725 n.5. Hence, the criticism of the circuit court judges that dissented from the rehearing en banc seems unfounded.

[FN145]. See Southworth, 151 F.3d at 725-27.

[FN146]. Id. at 725.

[FN147]. Id. at 726.

[FN148]. Id. at 725-27.

[FN149]. Id. at 727-33.

[FN150]. See id. at 727-28.

[FN151]. See id. at 729 (internal quotations omitted).

[FN152]. See id.

[FN153]. Id. (citation omitted).

[FN154]. Id.

[FN155]. Id. at 729-30. In a footnote, the court noted that since, after Rosenberger, "the university cannot discriminate in the disbursement of funds, it is imperative that students not be compelled to fund organizations which engage in political and ideological activities--that is the only way to protect the individual's rights." Id. at 730 n.11. In fact, universities can discriminate in their disbursements based on content, but they must remain viewpoint-neutral. See infra note 207 and accompanying text.

[FN156]. See Southworth, 151 F.3d at 733-35.

[FN157]. See id.

[FN158]. References to the Southworth court are to the three judge panel that heard the initial appeal from the district court. As already noted, the Seventh Circuit voted to deny rehearing en banc, but an opinion dissenting from that denial did include a thorough public forum analysis. The dissent argued that the "the panel"--i.e., the Seventh Circuit judges who wrote the original opinion--issued a holding that "flies in the face of numerous Supreme Court pronouncements regarding the importance of robust debate and free expression in a university setting." Southworth, 157 F.3d at 1126 (citing Keyshian and Widmar as examples of cases recognizing this principle).

[FN159]. See supra Part IV.C.4.

[FN160]. As already noted, the Court is currently reviewing Southworth and a decision is expected sometime in 2000. See supra note 6.

[FN161]. See Southworth, 151 F.3d at 729-30.

[FN162]. See Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 363-65 (1988). According to the court's recitation of facts, the Senate honored one of the GLSA's requests only because that particular funding request was submitted with requests from other organizations and the Senate could not legally separate the requests. See id. at 364.

[FN163]. See id.

[FN164]. Id. at 364 n.7.

[FN165]. See id at 364.

[FN166]. See id. at 366.

[FN167]. Id. at 367.

[FN168]. Id. at 368. The court attributed the Senate's denial of funds to the University because the University retained the "final say (over student) funding decisions." Id. at 366.

[FN169]. 868 F.2d 473 (1st Cir. 1989).

[FN170]. See id. at 474-75.

[FN171]. See id. at 475.

[FN172]. See id.

[FN173]. See id.

[FN174]. See id. at 477.

[FN175]. See id.

[FN176]. Id. at 476.

[FN177]. See id. at 477-82. The court dismissed the plaintiff's argument that subsidy analysis was inappropriate, and declared that the "(s)tudent activity fees (that supported the LSO) do not 'belong' to the students" because

(p)ayment of (the) fees is voluntary only in the sense that one may choose not to enroll; (because) payment is a contractual condition of enrollment . . . (and because the student activities) (f)und is administered by Umass officers . . . subject to the direction of the Board of Trustees, who are authorized by statute to determine how the fees are to be spent.Id. Six years later, Justice O'Connor rejected this argument, without citation to Student Gov't Association (and moreover, without effectively overruling the First Circuit on this point). See Rosen-

berger, 515 U.S. at 851-52 (O'Connor, J., concurring). She argued that since the "government neither pays into nor draws from" the student activities fund, the student activities fund "represents not government resources . . . but a fund that simply belongs to the students." Id.The First Circuit also recognized that "there is some overlap between the (public forum and subsidy doctrines) because in maintaining forums, the state indirectly subsidizes private speech." Student Gov't Ass'n, 868 F.2d at 480. Also, the court expressed its belief that to adopt the plaintiff's position would require the government to discontinue the funding of speech only when its reasons were "unconnected" with the speech's content. See id. at 482. The court argued that such a rule would run contrary to the policy that allows the government to "speak indirectly by subsidizing certain speech (for example public school teaching) and refusing to subsidize other speech (for example, lobbying)." Id.

[FN178]. Student Gov't Ass'n, 868 F.2d at 479-80.

[FN179]. Various commentators, see infra notes 180-83 and accompanying text, and a number of courts, see Rosenberger v. University of Va., 515 U.S. 819, 851 (1995) (O'Connor, J. concurring); Southworth v. Grebe, 151 F.3d 717, 723 (7th Cir.), reh'g en banc denied, 157 F.3d 1124, 1125 (7th Cir. 1998), cert. granted sub nom. University of Wis. Sys. v. Southworth, 119 S. Ct. 1332 (Mar. 29, 1999), have also concluded that the courts that have considered mandatory fee challenges applied different standards and reached disparate, inconsistent results. Nevertheless, the most recent circuit court decision on this issue concluded that the Southworth, Carroll, Galda, and Kania decisions are all consistent and that the "conclusions" of these courts were different only because of the "specific factual setting" involved in each situation. See Rounds v. Oregon Bd. of Higher Educ., 166 F.3d 1032, 1037 (9th Cir. 1999). This Note will proceed based on the assumption that Justice O'Connor, among others, correctly recognized the inconsistency of these decisions.

[FN180]. See, e.g., Thoe, supra note 35, at 1427 ("Rosenberger and (the district court's decision in) Southworth are only the latest examples in a long history of uncertainty regarding how universities may use mandatory student fees.").

[FN181]. See, e.g., Maxine G. Schmitz, Mandatory Student Activity Fees in Public Colleges and Universities: The Impact of Smith v. University of California, 25 J.L. & Educ. 601, 633 (1996) (contending that the "court in Smith provided little guidance in determining which activities were educational and supportive of the university's mission and which activities were political or ideological and not justifiable based on the purported educational benefit"). Kari Thoe recently made the following observation: "No satisfactory approach (to the mandatory fee problem) has emerged from the courts. Initially, courts recognized public forum rights of students, discounting or denying the compelled-speech rights. More recently, courts have recognized compelled-speech rights, creating remedies that arguably violate public forum rights." Thoe, supra note 35, at 1462.

[FN182]. See, e.g., Kramer, supra note 16, at 715-18 (proposing the application of a four part standard of review whereby, "(o)nce the student dissenters' First Amendment rights are implicated" the courts consider 1) whether there is a "free rider problem"; 2) "whether the funding furthers the university's educational mission on campus"; 3) whether the challenged funding would serve "an important or substantial state interest"; and 4) whether students can still engage in debate/whether the distribution of funds was "nondiscriminatory").

[FN183]. See, e.g., Waring, supra note 10, at 544 (contending that "the time is long past due for the United States Supreme Court to rule on a public university student fees case"). Of course, Waring's article was written before the Court decided Rosenberger. Still, commentators after Rosenberger have argued that "courts need to develop a solution to the fees challenges," Thoe, supra note 35, at 1458, as opposed to a solution to the problem of what to do when a university refuses to fund a group.

[FN184]. See supra Part IV.C.1.

[FN185]. See supra Part IV.C.3.

[FN186]. Galda v. Rutgers, 772 F.2d 1060, 1067 (3d Cir. 1985).

[FN187]. Carroll v. Blinken, 957 F.2d 991, 1002 (2d Cir. 1992).

[FN188]. Southworth, 151 F.3d at 728.

[FN189]. Id. at 729 (internal citations omitted).

[FN190]. Thoe, supra note 35, at 1460; see also Jacobs, supra note 112, at 218 n.352 (citing to Galda II and noting the important distinction between fees that support outside organizations and fees that "create() a public forum").

[FN191]. See, e.g., Rounds, 166 F.3d at 1038 (noting that the compelled funding at the University of Oregon does not fund PIRG itself, but only a PIRG educational fund and none of the coerced fees are allocated to PIRG's lobbying activities).

[FN192]. See Thoe, supra note 35, at 1458-61.

[FN193]. Some might argue that under the Southworth decision, application of strict scrutiny is inappropriate. This argument, however, lacks force since the Seventh Circuit itself recognized that the compelled funding of political and ideological activities--not even necessarily off-campus activities--would fail a strict scrutiny test. See Southworth, 151 F.3d at 731 n.13.

[FN194]. See Rosenberger, 515 U.S. at 840; Southworth, 151 F.3d at 722; see also supra notes 140-55 and accompanying text (discussing the Southworth court's choice of a standard of review).

[FN195]. Wells, supra note 2, at 373-74. Wells also argues that since the labor unions are required by law to collect dues to enact a collective bargaining agreement, the First Amendment rights of members are not implicated because the speech is compelled by statute. See id. at 373-75. Yet, what Wells forgets is that the Court did not object to compelled funding of collective bargaining activity, the Court objected to the non-collective bargaining speech which the union representatives engaged in and which was not mandated by law. Moreover, even if this distinction was relevant, the First Amendment rights of the nonunion members or objecting members were still implicated. See also Steele, supra note 3, at 370 (compelled students "can reasonably be considered additions to the 'marketplace of ideas,"' in contrast to union dues).

[FN196]. Southworth, 151 F.3d at 725. Ironically, the Southworth plaintiffs also advanced a free rider argument in support of their position and thus attempted to prove the usefulness of the labor union analogy at the same time that they tried to distinguish its utility. See id. at 728.

[FN197]. See id. at 725.

[FN198]. Id. The court continued to note that the Keller Court rejected a "similarly broad interest . . . the advancement of the law." Id. (citing Keller v. State Bar, 496 U.S. 1, 15-16 (1990)).

[FN199]. See id. at 722.

[FN200]. See Southworth, 151 F.3d at 724 (discussing the three part Lehnert analysis).

[FN201]. Id. at 729.

[FN202]. The court did note that off-campus activities offer limited benefits to objecting students, see id., but it did not expand on this point and highlight the difficulty of justifying off-campus political activities on limited public forum grounds.

[FN203]. Paul Cellupica, Recent Developments, 9 Harv. J.L. & Pub. Pol'y 731, 735-36 (1986).

[FN204]. Southworth, 151 F.3d at 730 n.11.

[FN205]. See id.

[FN206]. Wiggin, supra note 26, at 2028.

[FN207]. Rosenberger, 515 U.S. at 829-830.

[FN208]. See Southworth, 151 F.3d 717, 733 (citing Hudson regarding temporary exaction), reh'g

en banc denied, 157 F.3d 1124, 1125 (7th Cir. 1998), cert. granted sub nom., University of Wis. Sys. v. Southworth, 119 S. Ct. 1332 (Mar. 29, 1999).

[FN209]. See Southworth, 151 F.3d at 733.

[FN210]. See Thoe, supra note 35, at 1458-62 (advocating an activities based remedy).

[FN211]. See Gordon, supra note 36, at 412 (noting that a state university has increased discretion to "consider content based criteria" when making funding decisions).

[FN212]. Southworth, 151 F.3d at 732.

[FN213]. See id. at 725. The Southworth court noted that "most of the private student groups (over 70%) do not even apply for funding, showing that the funding is not even germane to the private organizations' existence, much less germane to education." Id.

[FN214]. See Chicago Teachers Union v. Hudson, 475 U.S. 292, 307 n.18 (1986).

[FN215]. See Southworth, 151 F.3d at 733.

[FN216]. See, e.g., Marc Levin, Closing the Pocketbook: Eliminating Mandatory Fees for Political Groups, Campus, Spring 1999, at 3 (noting the voluntary "positive checkoff" systems implemented at the University of Texas and at Bridgewater State College in Massachusetts).

[FN217]. See Gordon, supra note 36, at 412 (noting that the overlap in subsidy and public forum doctrine leaves the university with the ability to place content based restricts on its decision to fund organizations with mandatory student fees).

[FN218]. See supra note 213.

[FN219]. Students who withheld money from an organization would not receive any benefits from the speech they refused to fund. See Southworth, 151 F.3d at 728.

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