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## Note

### A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled-Speech Rights at American Universities

Kari Thoe\*

In 1995, the Supreme Court decided *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>1</sup> which required the University of Virginia to provide equal access to activities fees to all student organizations regardless of their messages.<sup>2</sup> The case stemmed from the University's denial of student activities fees to any activity that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."<sup>3</sup> In holding the denial unconstitutional, the Court spoke in broad terms about the importance of debate and intellectual exchange at

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1. 115 S. Ct. 2510 (1995).

2. *See id.* at 2517-18.

3. *Id.* at 2515. The University claimed the denial was necessary to avoid a violation of the Establishment Clause of the First Amendment. *See id.* at 2520. The Court held that the university's neutral distribution of funds did not offend the Establishment Clause but that denying funds violated the religious group's free speech rights. *See id.* at 2523. This Note addresses *Rosenberger* only as it deals with the Free Speech Clause issues. For a more detailed analysis of the *Rosenberger* decision in its entirety, see Melissa Manaugh Feldmeier, Note, *Amazing Disgrace: The Sin and Salvation of Rosenberger v. The University of Virginia*, 115 S. Ct. 2510 (1995), 65 U. CIN. L. REV. 293 (1996) (explaining *Rosenberger* analysis and arguing it was improper under existing Establishment Clause doctrine); Jennifer Lynn Davis, *The Serpentine Wall of Separation Between Church and State: Rosenberger v. Rector and Visitors of the University of Virginia*, 74 N.C. L. REV. 1225 (1996) (detailing *Rosenberger* opinions and exposing weaknesses of opinions' Establishment Clause doctrines); and Ben Brown, Recent Development, *A Jeffersonian Nightmare: The Supreme Court Launches a Confused Attack on the Establishment Clause—Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995), 31 HARV. C.R.-C.L. L. REV. 257 (1996) (critically analyzing the *Rosenberger* opinion).

American universities.<sup>4</sup> The Court seemed to take a stand in favor of protecting fee-funded speech—and particularly controversial or unpopular speech—at universities.<sup>5</sup>

At least one scholar, however, has predicted that *Rosenberger* could “sound the ‘death knell’” for student fees at American universities.<sup>6</sup> These fears were prompted by Justice Sandra Day O’Connor’s concurring opinion, in which she “note[d] the possibility that the 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.”<sup>7</sup> While the Court specifically reserved this question in *Rosenberger*,<sup>8</sup> Justice O’Connor strongly hinted she would rule in favor of dissenting speakers.<sup>9</sup>

Those fearing the end of student fees had their fears confirmed a year later, when a federal district court in Wisconsin held some uses of mandatory student fees at the University of Wisconsin-Madison unconstitutional.<sup>10</sup> In *Southworth v. Grebe*,<sup>11</sup> the court held that the university could not use mandatory student fees to fund student groups that were predominantly “political” rather than “educational.”<sup>12</sup> The court relied on *Rosenberger* for support of this holding.<sup>13</sup>

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4. See *Rosenberger*, 115 S. Ct. at 2520 (explaining the important First Amendment issues at stake in the university environment, “where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . The quality and creative power of student intellectual life to this day remains a vital measure of a school’s influence and attainment.”).

5. See *id.*

6. Davis, *supra* note 3, at 1254 (arguing the *Rosenberger* opinion “calls into question the longevity of student-fee programs at public universities around the country”). Davis specifically predicted the “death knell” would be sounded if the analysis suggested by Justice O’Connor’s *Rosenberger* concurrence were adopted in mandatory fees cases. See *id.* at 1256.

7. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2527 (1995) (O’Connor, J., concurring) (citing for support the union-dues compelled-association cases, see *infra* notes 66-76 and accompanying text).

8. *Rosenberger*, 115 S. Ct. at 2522.

9. See *id.* at 2527 (O’Connor, J., concurring).

10. See *Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. Dist. LEXIS 20980 (W.D. Wis. Nov. 29, 1996).

11. No. 96-C-0292-S, 1996 U.S. Dist. LEXIS 20980 (W.D. Wis. Nov. 29, 1996).

12. See *id.* at \*29.

13. See *id.* at \*18 (citing Justice O’Connor’s concurring opinion in *Rosenberger*). For further discussion of the *Southworth* court’s treatment of *Rosenberger*, see *supra* text accompanying notes 131-133.

*Rosenberger* and *Southworth* are only the latest examples in a long history of uncertainty regarding how universities may use mandatory student fees.<sup>14</sup> The cases, when examined together, reveal the tension among the interests implicated by student fees.<sup>15</sup> While in *Rosenberger* the Court sought to protect a controversial group's access to a public forum, in *Southworth* the controversial groups stood to lose access to the forum in the interest of protecting other students' rights of association. (Ironically, the plaintiffs in both cases were supported by the same conservative religious organization.<sup>16</sup>) Intertwined in both cases is the right of the university to create and administer a public forum it feels is supplemental to the education it is charged with providing.<sup>17</sup>

This Note argues that the courts must carefully consider each of these interests in determining the future of mandatory student fees at American public universities.<sup>18</sup> Part I describes the structure of the mandatory fees systems and traces the history of legal challenges to the systems. Part II argues that the courts have improperly balanced the interests implicated by a mandatory student fee in reaching decisions that deny student fees to "political or ideological" groups. Drawing on precedent in the area, Part III suggests a solution that better balances the three interests involved.

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14. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2527 (1995) (O'Connor, J., concurring) (noting split among lower courts as to whether certain uses of mandatory student fees violate students' freedom of association); see also *infra*, Part I.B.2. (outlining conflicting results in fees challenges).

15. See John H. Robinson & Catherine Pieronek, *The Law of Higher Education and the Courts: 1994 in Review*, 22 J.C. & U.L. 367, 394 (1996) (noting universities must strike a "delicate balance between providing funds to activities that contribute to the educational mission of the university no matter how distasteful some students might find such viewpoints, and respecting dissenters' rights against compelled speech").

16. See generally Anne-Marie Cusac, *Suing for Jesus: A New Legal Team Wants to Cleanse the Campuses for Christ*, PROGRESSIVE, Apr. 1, 1997, at 30, 30-32 (describing legal agenda of the Alliance Defense Fund, which footed the bill for both *Rosenberger* and *Southworth*).

17. See *infra* notes 82, 234-241 and accompanying text.

18. This Note addresses only public universities, as the state action required by the First Amendment often is not present in the cases of private universities. See Christina E. Wells, Comment, *Mandatory Student Fees: First Amendment Concerns and University Discretion*, 363 U. CHI. L. REV. 55, n.3 (1988) (noting distinctions between public and private universities for purposes of First Amendment analysis).

## I. STUDENT FEES: THE STORY SO FAR

## A. MANDATORY STUDENT FEES AS A SUPPLEMENT TO CLASSROOM EDUCATION

Historically, student activities have played a major role at American universities.<sup>19</sup> In colonial times, university officials viewed student activities as a positive supplement to education in the classroom.<sup>20</sup> Today, officials continue to insist that student activities are vital to supplementing education at U.S. universities<sup>21</sup> and that mandatory student fees are necessary to support those activities.<sup>22</sup>

Universities began collecting student fees at a time when they were not allowed to charge students tuition but were allowed to collect a fee for "incidental" or building expenses.<sup>23</sup> By the 1970s, many universities were using student fees to fund a variety of student groups and activities including student governments, publications, concerts, sports, academic clubs, honor societies, and health services, to name just a few.<sup>24</sup> The power of universities to collect student fees is well-established.<sup>25</sup> Just what the fees may be used to fund has been more controversial.<sup>26</sup>

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19. See DAVID L. MEABON ET AL., *STUDENT ACTIVITY FEES: A LEGAL AND NATIONAL PERSPECTIVE* 1 (1979).

20. See *id.* at 1-2.

21. See, e.g., Cusac, *supra* note 16, at 32 (noting that University of Wisconsin Regents state it is the purpose of a university to promote a forum allowing the free expression of competing viewpoints).

22. Proponents of mandatory student fees claim much of the speech currently thriving on campus would no longer be able to survive. See *id.* at 31 (claiming without funding "much student expression will end"); see also Dave Newbart, *College Student Fees Face First Amendment Test*, CHI. TRIB., June 4, 1997, § 1, at 1, 17 (reporting proponents argue without fees support, many groups will "fizzle," with the greatest impact hitting smaller or more controversial groups).

23. See generally MEABON ET AL., *supra* note 19, at 6-7 (describing early fees challenges in which courts validated collection of fees).

24. See MEABON ET AL., *supra* note 19, at 24 (reporting survey indicates 69.6% of universities surveyed used mandatory student fees to fund student activities). It is unclear how much this has changed since Meabon's survey. But see Newbart, *supra* note 22, at 17 ("As it stands, in addition to tuition, most schools charge students a few hundred dollars each year in mandatory fees to cover the costs of such services as student health programs, student unions and campus recreation centers. The fees also go to special-interest groups such as chess clubs, black student unions, Asian-American associations and food science clubs."). For a more exhaustive list of groups funded, see MEABON ET AL., *supra* note 19, at 23.

25. See *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 505 (Cal.

## B. LEGAL CHALLENGES TO STUDENT FEES

Since the 1970s, challenges to fee distribution have fallen into two categories: those, such as *Rosenberger*, brought by student groups that feel they are unconstitutionally excluded from fees funding;<sup>27</sup> and those, such as *Southworth*, brought by individual students who feel they are unconstitutionally compelled through the fees to fund speech with which they disagree.<sup>28</sup>

### 1. Exclusion from Fees Funding as Impermissible Viewpoint Discrimination in a Limited Public Forum

While the *Rosenberger* opinion surprised and confused many scholars with its Establishment Clause doctrine,<sup>29</sup> its Speech Clause holdings seemed a natural application of its previous rulings with regard to universities.<sup>30</sup> People do not have a right to access all government property for expressive purposes, but the Supreme Court has recognized that once the government holds its property out for public use, it may not exclude people based on the message they wish to convey.<sup>31</sup> Within a public forum, the government may undertake content-based or viewpoint-based exclusions only where it can show that the exclusion is narrowly

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1993) (noting statutory authority of Regents to collect mandatory student activities fee).

26. See MEABON ET AL., *supra* note 19, at 14 (noting increasing concern over how student fees may be used); see also *id.* at 6 (noting influx of lawsuits regarding use of fees starting in the 1970s).

27. See *infra* Part I.B.1.

28. See *infra* Part I.B.2.

29. See sources cited *supra* at note 3.

30. At least the Court made its ruling seem "natural." See *Rosenberger*, 115 S. Ct. at 2517 (reasoning fees are directly analogous to university public fora in previous cases); *id.* (appealing to precedent to determine denial of funds was based upon viewpoint discrimination). The Court actually settled discussion among the lower courts and academics regarding whether the Court's public forum analysis could be extended to mandatory fee systems. Compare *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 509 n. 8 (Cal. 1993) (rejecting public forum analysis in fees case), with *Good v. Associated Students of the Univ. of Wash.*, 542 P.2d 762, 768 (applying forum analysis to uphold mandatory student fees). The Court also shed some clarity on determining when there is impermissible viewpoint discrimination. See *The Supreme Court, 1994—Leading Cases*, 109 HARV. L. REV. 111, 216 (1995) (noting "lack of clarity" in prior viewpoint discrimination jurisprudence led lower courts to adopt narrow definition). For further discussion of these points, see *supra* Parts II.A.1. and II.A.2.

31. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (holding content- or viewpoint-based restrictions on access to a public forum must withstand strict scrutiny).

tailored to meet a compelling government interest.<sup>32</sup> The Court also has recognized a limited public forum, where the government has opened up its property for certain specified uses, such as a school board meetings<sup>33</sup> or student organization meetings.<sup>34</sup> In limited public forums, the courts may allow content-based discrimination to maintain the boundaries of the forum, but they still presume that viewpoint discrimination is impermissible.<sup>35</sup>

The Court recognized in *Healy v. James*<sup>36</sup> that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."<sup>37</sup> In *Healy*, the Court held that denying recognition to a student group based on the group's views was a violation of the group's First Amendment rights of association.<sup>38</sup> In doing so, the Court also recognized that the First Amendment must be applied in light of the university environment, and it allowed that the university could establish "reasonable school rules governing conduct."<sup>39</sup>

The Court first applied public forum analysis in a student activities context in *Widmar v. Vincent*.<sup>40</sup> Reasoning that "the campus of a public university, at least for its students, possesses many of the characteristics of a public forum,"<sup>41</sup> the Court struck down a university's attempt to deny access to meeting facilities to a group because of its religious affiliation.<sup>42</sup> The university regulation prohibited use of university facilities "for purposes of religious worship or religious teaching."<sup>43</sup> The Court applied

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32. *See id.*

33. *See City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Rel. Comm'n*, 429 U.S. 167, 197 (1976).

34. *See Widmar v. Vincent*, 454 U.S. 263, 268 n. 5 (1981).

35. *See Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995). Commentators have argued that this flexibility allowed with regard to limited public fora has made them meaningless as a protector of First Amendment rights. For further discussion of this argument, see *supra* text accompanying notes 161-168.

36. 408 U.S. 169 (1972).

37. *Id.* at 180. *Healy* involved a challenge to a university's decision to deny funds to a local chapter of the Students for a Democratic Society, based in part on the university's impression that the group advocated violence and disruption. *See id.* at 186.

38. *See id.* at 187-88 ("The College, acting here as an instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.").

39. *Id.* at 190.

40. 454 U.S. 263 (1981).

41. *Id.* at 267 n.5.

42. *Id.* at 277.

43. *See id.* at 272 n.11.

strict scrutiny to the content-based restriction on access to a public forum<sup>44</sup> and reasoned that the university had not shown that the exclusion was necessary to serve a compelling government interest and narrowly tailored to meet that interest.<sup>45</sup>

Twelve years later in *Lamb's Chapel v. Center Moriches Union Free School District*,<sup>46</sup> the Court found a similar regulation to be impermissible viewpoint discrimination.<sup>47</sup> In *Lamb's Chapel*, a church sought use of school facilities to show a film dealing with family values from a Christian perspective.<sup>48</sup> The school denied the application, finding that the film was "church related"<sup>49</sup> and therefore in violation of a rule prohibiting the use of school facilities "by any group for religious purposes."<sup>50</sup> The Supreme Court struck down the regulation as applied, reasoning that the exclusion was viewpoint-based because there was no indication that family-values films from another perspective would have been excluded.<sup>51</sup>

Thus, the Court's application of public forum analysis has served to protect more controversial or less popular student

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44. The Court seemed to imply that the university had created a limited public forum by allowing use of its facilities for student organization meetings. See *id.* at 267 n.5 ("[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum." (emphasis added)). The Court later confirmed that implication in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983) (citing *Widmar* for its recognition of a limited purpose forum). The *Widmar* Court did not speculate as to whether the regulation in question was necessary to preserve the nature of a limited public forum. See *supra* note 35 and accompanying text. Language in *Rosenberger* suggests the Court may now allow universities more latitude in using content-based restrictions to preserve the purpose of a public forum. See *infra* text accompanying note 166. However, the outcome of *Widmar* might not change under the *Rosenberger* Court's analysis, as exclusion based upon the religious perspective of the organization would be impermissible viewpoint discrimination if the meetings regarded subjects otherwise permissible within the forum. See *infra* notes 196-200 and accompanying text.

45. See *Widmar*, 454 U.S. at 276-77. The Court rejected the state's asserted compelling interest that the exclusion was necessary to preserve separation of church and state under the Establishment Clause, reasoning there would be no Establishment Clause violation in providing equal access to the group. See *id.* at 271-72. See also *Rosenberger's* treatment of the Establishment Clause issue, *supra* note 3 (finding that a denial of funding violated the religious group's free speech rights).

46. 508 U.S. 384 (1993).

47. See *id.* at 393-94. The Court found it unnecessary to determine exactly what type of forum was at issue in the case, because viewpoint discrimination is impermissible even within nonpublic fora. See *id.* at 391-92, 394.

48. See *id.* at 387-88.

49. *Id.* at 389.

50. *Id.* at 387.

51. See *id.* at 393-94.



groups on university campuses. The *Rosenberger* decision extended that protection to cases involving mandatory student activities fees.<sup>52</sup>

## 2. Mandatory Student Fees as Compelled Association

While the First Amendment does not explicitly protect rights of association,<sup>53</sup> the Supreme Court has reasoned that implicit in the First Amendment are both the right to free association and the right *not* to associate.<sup>54</sup> Most compelled-association cases deal with a person's right not to be forcibly associated with a message with which he or she disagrees.<sup>55</sup> Most recently, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*<sup>56</sup> the Court found a violation of freedom of association where a state's public accommodations law forced a group to include a gay, lesbian, and bisexual contingent in its parade.<sup>57</sup> The Court found that forced inclusion changed the message of the group's parade and associated the group with a pro-homosexual message.<sup>58</sup>

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52. See *supra* notes 1-2 and accompanying text. At least one lower court has followed *Rosenberger* thus far. See *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997). In *GLBA*, the 11th Circuit Court of Appeals applied the *Rosenberger* Court's analysis to the exclusion, by statute, of organizations "that foster[] or promote[] a lifestyle or actions prohibited by the sodomy and sexual misconduct laws . . ." *Id.* at 1545. The court, in striking down the exclusion, reasoned "*Rosenberger* is directly on point with regard to both forum analysis and viewpoint discrimination." *Id.* at 1550; *cf.* *Gay and Lesbian Students Association v. Gohn*, 850 F.2d 361 (8th Cir. 1988) (striking down similar exclusion initiated by student senate based on viewpoint analysis alone).

53. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232-37 (1977).

54. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

55. In *Barnette*, the Court struck a school board rule requiring students to salute the flag. See 319 U.S. at 642. In doing so, the Court reasoned that saluting the flag "requires the individual to communicate by word and sign his acceptance of the political ideas" associated with the flag—"adherence to government as presently organized." *Id.* at 633. To do so was to allow "public authorities to compel him to utter what is not on his mind." *Id.* at 634. The Court again applied the compelled-association doctrine in *Wooley v. Maynard*, 430 U.S. 705 (1977). In that case, the Court struck down a state law requiring automobiles to bear license plates with the inscription "Live Free or Die." See *id.* at 717. The Court found sufficient infringement of freedom of association because Maynard was a Jehovah's Witness who was morally opposed to the message. See *id.* at 715. The Court additionally found no state interests "sufficiently compelling" to justify the infringement. See *id.* at 716-17. Both cases in broad terms stand for the proposition that "the right of freedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714.

56. 515 U.S. 557 (1995).

57. See *id.* at 572-73.

58. See *id.* The Court noted that the parade's organizers had not tried to

However, simply being forced to facilitate another person's speech usually is not enough to trigger the association right.<sup>59</sup> The Court generally has refused to find a violation of the right unless a plaintiff can show actual *association* with the objectionable message.<sup>60</sup> Thus, in *Pruneyard Shopping Center v. Robins*,<sup>61</sup> the Court rejected an argument by owners of a shopping mall that their rights against compelled association were violated by a California state constitutional ruling requiring them to allow demonstrators in the mall.<sup>62</sup> The Court found that there was no compelled-association violation because the mall had opened up its property to use by the public, because it was unlikely the demonstrators speech would be *associated* with the mall owners, and because the owners easily could disavow the messages they found objectionable.<sup>63</sup> In a similar vein, general tax expenditures are not subject to challenge under the compelled-association doctrine.<sup>64</sup>

Despite this seemingly well-established doctrine, the Court has extended the compelled-association rationale to union shop situations<sup>65</sup> where union dues are used to fund ideological or political speech—even though this situation arguably involves no

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exclude any gay person from marching in the parade; rather, they had tried to prevent a gay *message* from being supported by the parade. *See id.* at 572.

59. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980).

60. *See id.* *See generally* Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 15-20 (1983) (describing interests protected in early compelled-association cases).

61. 447 U.S. 74 (1980).

62. *See id.* at 88. The California Supreme Court found demonstrators had a right to distribute information and collect signatures for a petition under the California Constitution. *See id.* at 78. The mall owners challenged that ruling as a violation of their *federal* constitutional rights. *See id.* at 79.

63. *See id.* at 87.

64. The official reason that taxes are not subject to the doctrine has been that the tax system could not function if any group with ideological objections were allowed to "opt out." *See United States v. Lee*, 455 U.S. 252, 258-61 (1982) (holding Amish must pay Social Security tax even though morally opposed to government-funded retirement). Additionally, the government is *supposed* to act upon the will of the majority. *See Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990). For a more detailed discussion of the tax exemption from the compelled-association perspective, see Cantor, *supra* note 60, at 22-25. Cantor argues that the justifications offered for exemption of the tax system are equally applicable to the union-dues situation. He argues the more reasonable distinction is that taxes do not force *association*. *See id.*

65. Union shops exist where employees are required to pay union dues as a condition of employment, and in turn, those unions act as the exclusive bargaining representative for all employees. *See BLACK'S LAW DICTIONARY* 1532 (6th ed. 1990).

more *association* than the demonstrations in *Pruneyard*. In *Abood v. Detroit Board of Education*,<sup>66</sup> the Supreme Court held that public employees may be required to pay union dues but may not be compelled to support political activities of the union that are not germane to collective bargaining.<sup>67</sup> The Court accepted the government's interest in avoiding free-rider problems and promoting labor peace through unions as justification for mandatory dues but held those dues could be used only for purposes germane to the interests justifying the mandatory dues.<sup>68</sup> This has since been termed the "germaneness test."<sup>69</sup> Under the test the Court requires chargeable activities "(1) be germane to collective-bargaining activity; (2) be justified by the governments' 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."<sup>70</sup>

In *Abood*, the Court cited to the earlier compelled-association cases and commented on the dangers of compelled association.<sup>71</sup> However, it offered very little explanation of why the union dues situation involved compelled-association interests anymore than did the shopping mall speech in *Pruneyard*.<sup>72</sup> In both situations, dissenters were not actually forcibly *associated* with the message.<sup>73</sup> And in both cases, the dissenters remained free to broadcast their own messages, including those disavowing the messages they found offensive.<sup>74</sup> Nevertheless, the Court has continued to embrace the compelled-association rights of those subject to shop clauses<sup>75</sup> and has extended the

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66. 431 U.S. 209 (1977).

67. *See id.* at 234; *accord* *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 517-18 (1991).

68. *See Abood*, 431 U.S. at 234.

69. *Lehnert*, 500 U.S. at 519.

70. *Id.*

71. *See Abood*, 431 U.S. at 235 ("[N]o 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." (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))).

72. *See Cantor*, *supra* note 60, at 14 (describing Court's acceptance of the extension of compelled-association doctrine to forced monetary contributions).

73. The dissenters in *Abood* were not members of the union, and thus would not be associated with the speech of the union. *See supra* text accompanying note 63; *Cantor*, *supra* note 60, at 20.

74. Because they were nonmembers, the union exercised no control over the dissenters speech and could not prevent them from disavowing the union's messages. *See supra* text accompanying note 63; *Cantor*, *supra* note 60, at 20.

75. Following *Abood*, the Court further addressed the union dues problem

*Abood* rationale to cover integrated state bar associations, which require membership—and fees—as a condition of practicing law in the state.<sup>76</sup>

Though *Abood*'s broad language seems to prohibit any forced monetary support of another's speech,<sup>77</sup> the Court recently refused to extend its protections to California fruit growers who objected to mandatory contributions to a government-generated ad campaign for California fruits.<sup>78</sup> The Court explained that *Abood* "merely recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'"<sup>79</sup> The Court further defined the protection as extending only to where a person's compelled fees were used to fund "political or ideological" activities and found that the fees in question did not fall into that category.<sup>80</sup>

Students challenging mandatory student activities fees have claimed that their case is analogous to the union cases and argued that funding certain disagreeable groups is not germane to the universities' educational goals.<sup>81</sup> University officials, on the other hand, have argued 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.<sup>82</sup>

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in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 456 (1984) (upholding use of union dues for conventions, publications, and social events), *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986) (creating a remedy for return of nongermane dues), and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (upholding the use of union dues for miscellaneous professional activities but striking down use of fees for lobbying unrelated to collective bargaining).

76. See *Keller v. State Bar of California*, 496 U.S. 1, 10-13 (1990) (concluding the integrated bar situation is sufficiently similar to the union-dues situation and falls under the *Abood* analysis).

77. The Court spoke in broad terms about the "freedom of an individual to associate for the purpose of advancing beliefs and ideas." See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977).

78. See *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2139 (1997).

79. *Id.* (quoting *Abood*, 431 U.S. at 235).

80. *Id.* at 2140. The Court found it relevant that the fruit growers probably did not disagree with the speech, and that supporting advertisements "encouraging consumers to buy California tree fruit" would not cause a "crisis of conscience." *Id.* at 2139-40.

81. See, e.g., *Kania v. Fordham*, 702 F.2d 475, 479 (4th Cir. 1983).

82. See, e.g., *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 507 (Cal. 1993) (acknowledging the Regents' argument that educational benefits justify a burden on the plaintiff's rights).

a. *Rejection of the Compelled-Association Argument*

The first suits alleging that the use of mandatory student fees to support certain student groups constituted compelled association in violation of the First Amendment were decided in Nebraska in 1973.<sup>83</sup> Both suits were decided in favor of mandatory student-fees funding.<sup>84</sup> While the courts did not explicitly invoke public forum analysis, they emphasized that the broad nature of the speech funded by the fees prevented the students from being compelled to support a particular view.<sup>85</sup> The courts also deferred to the university's decision regarding the educational value of funding the student groups.<sup>86</sup>

By 1993, three state courts and four federal courts had upheld the use of mandatory student fees to support student groups.<sup>87</sup> The courts increasingly adopted public forum analy-

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83. One case was brought in federal court, one in state court. Both cases involved suits against the University of Nebraska, and both challenged the use of mandatory student fees to fund the student newspaper, the Association of Students of the University of Nebraska, and the speakers program at the university. See *Larson v. Board of Regents of Univ. of Neb.*, 204 N.W.2d 568, 569-70 (Neb. 1973); *Veed v. Schwartzkopf*, 353 F. Supp. 149, 150 (D. Neb. 1973) (noting challenging fees funneled into an unallocated fund). The Nebraska cases were decided prior to *Abood*, but the student-plaintiffs in these cases relied on two Supreme Court union cases that provided much of the framework for the *Abood* analysis. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), had resolved the union issue in much the same manner as *Abood* eventually would, but under a statutory rather than constitutional framework. See *Larson*, 204 N.W.2d at 570 (distinguishing *Hanson* and *Street*).

84. See *Larson*, 204 N.W.2d at 571; *Veed*, 353 F. Supp. at 152.

85. See *Larson*, 204 N.W.2d at 571 ("If such views are expressed only as a part of the exchange of ideas and there is no limitation or control imposed so that only one point of view is expressed through the program, there is not violation of the constitutional rights of the plaintiffs."); *Veed*, 353 F. Supp. at 152 (holding a university may provide a forum for the expression of political and personal opinions with the financial support of mandatory student fees).

86. See *Larson*, 204 N.W.2d at 570 (reasoning university officials have a right to determine what is essential for the "creation of a better educational environment"); *Veed*, 353 F. Supp. at 152 ("Within wide limitations a state [university] is free to adopt such educational philosophy as it chooses.").

87. See *Larson*, 204 N.W.2d at 571; *Veed*, 353 F. Supp. at 152; *Hays County Guardian v. Supple*, 969 F.2d 111, 122 (5th Cir. 1992) (finding no First Amendment violation in a university newspaper supported with mandatory fees); *Carroll v. Blinken*, 957 F.2d 991, 1001 (2d Cir. 1992) (upholding Public Interest Research Group funding, but requiring the fee be used to directly benefit the university); *Kania v. Fordham*, 702 F.2d 475, 481 (4th Cir. 1983) (upholding the use of mandatory fees to partially support a student newspaper); *Good v. Associated Students of the Univ. of Wash.*, 542 P.2d 762, 769 (Wash. 1975) (holding fees permissible where not used to support a single viewpoint); *Lace v. Univ. of Vt.*, 303 A.2d 475, 479-480 (Vt. 1973) (challenging fees to

sis<sup>88</sup> and rejected compelled-association allegations, usually by reasoning that the public forum created by student fees were justified by educational goals.<sup>89</sup> Although the courts conducted public forum analysis, they considered only the universities' interest in creating a public forum,<sup>90</sup> not, as in the exclusion cases, the student groups' interest in participating in the public forum.<sup>91</sup> Additionally, it was unclear if each activity had to be a public forum or if a large forum could justify the activities within it.<sup>92</sup> The courts balanced the students' First Amendment rights against the universities "traditional need and desirability" to supplement classroom education with an "atmosphere of learning, debate, dissent and controversy," and determined the scale tipped in the universities' favor as long as the fees were not being used as a vehicle to forward one particular viewpoint.<sup>93</sup>

### b. Adoption of the *Abood* Analysis—The *PIRG* Cases

The first time a court struck down use of a fee on compelled-association grounds, it was a fee earmarked for just one organi-

speakers bureau, newspaper, certain films, and travel of student government president to conference). Until 1993, only the Third Circuit had rejected the any use of a mandatory student fee. See *Galda v. Rutgers*, 772 F.2d 1060, 1068 (3d Cir. 1985) (holding that mandatory student fees could not be used to support a Public Interest Research Group); see also *infra* notes 94-107 and accompanying text (discussing *Galda*).

88. See, e.g., *Lace*, 303 A.2d at 479 (comparing the "monetary platform" of fees funding with the platform provided by the "speakers corner of Hyde Park in London"); *Hays*, 969 F.2d at 123 (finding fees funding provided to support a campus newspaper "creates a forum for public discussion of University-related issues").

89. *Abood*, handed down in 1976, did not change the courts' fees analysis. Rather, the courts reasoned that even if the *Abood* test was applicable, the contested funded activities were "germane" to the universities' educational missions. See, e.g., *Kania*, 702 F.2d at 479-480 (distinguishing *Abood* because providing public forum is a vital part of university's educational mission and because a variety of viewpoints are fostered by fees funding); *Hayes*, 969 F.2d at 123 (reasoning fees funding meets *Abood* "germaneness" test).

90. See, e.g., *Good*, 542 P.2d at 768 (balancing the rights of a university to create a public forum against the associational rights of dissenting students).

91. While student groups undoubtedly have no right to student activity funds, the public forum analysis indicates they have a right to equal access once a public forum for funding has been allowed. See *supra* Part I.B.1.

92. See, e.g., Jason F. Lauren, Comment, "Fee Speech": *First Amendment Limitations on Student Fee Expenditures*, 20 CAL. W. L. REV. 279, 304 (1984) (arguing early court decisions failed to address whether each activity needed to be a forum); see also *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 509 n.8 (Cal. 1993) (interpreting early fees cases as requiring each individual activity be a forum).

93. *Good*, 542 P.2d at 768-69.

zation. *Galda v. Rutgers*<sup>94</sup> involved a refundable fee granted exclusively to the New Jersey Public Interest Research Group (NJPIRG).<sup>95</sup> The NJPIRG was independent of the university, participated in legislative matters, and "actively engaged in research lobbying and advocacy for social change."<sup>96</sup> The *Galda* court reasoned that since most of the NJPIRG's activities were political and most took place off-campus, funding the NJPIRG could not be justified as a supplement to education at the university.<sup>97</sup> The court rejected public forum analysis because the NJPIRG was funded through a process separate from other "student" organizations.<sup>98</sup> Thus, the court specifically declined to approach the question posed by mandatory fees funding a broad range of activities.<sup>99</sup> While the *Galda* ruling fit in with other courts' dicta regarding fees used to support one particular viewpoint (or set of viewpoints),<sup>100</sup> the case marked the first time a court refused to defer to the university regarding what was "educational."<sup>101</sup>

The Second Circuit Court of Appeals addressed the issue of mandatorily funded PIRGs in *Carroll v. Blinken*.<sup>102</sup> In that case, the court recognized the New York PIRG as an infringement of the speech rights of dissenting students,<sup>103</sup> but it held that the university's interests were "substantial enough" to justify the infringement with regard to speech activities directed at the campus

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94. 772 F.2d 1060 (3d Cir. 1985).

95. *See id.* at 1061-62.

96. *Id.* at 1061.

97. *See id.* at 1065-66.

98. *See id.* at 1064.

99. *See id.*

100. For an argument that *Galda* broke with precedent, see 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 (1983).

101. *See Galda*, 772 F.2d at 1065 (concluding the educational component of group did not overcome its political nature). The *Galda* court began a discussion among courts questioning the primary function of purported educational groups. *See Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 513 (Cal. 1993) (holding that where a group's educational function has become merely incidental to its political and ideological activities, mandatory fees can not be used to support that organization); *Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. Dist. LEXIS 20980, at \*25-29 (W.D. Wis. Nov. 29, 1996) (reasoning that *Smith* and *Galda* are persuasive and finding at least four challenged organizations are more political than educational).

102. *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992).

103. *See id.* at 998.

community.<sup>104</sup> However, the court found that the justified infringement still must be narrowly drawn and reasoned that some aspects of NYPIRG “stretch the nexus between the extracted fee and [the university’s] educational interests too far, beyond what is constitutionally permissible.”<sup>105</sup> Where political or ideological speech was directed outside the campus, the *Carroll* court held mandatory funding unconstitutional.<sup>106</sup> The court required NYPIRG to put as much money toward on-campus speech and activities as it garnered from the mandatory fee.<sup>107</sup>

### c. *Rejection of the Public Forum Doctrine*

Until 1993, students brought suits challenging the use of mandatory student fees to fund certain, specific groups.<sup>108</sup> In 1993, the California Supreme Court heard a challenge to the entire system of mandatory student activities fees distribution at UC-Berkeley.<sup>109</sup> In *Smith v. Regents of the University of California*,<sup>110</sup>

104. See *id.* at 1001. The *Carroll* court, in applying intermediate scrutiny, was one of the first courts to explicitly name a standard of review in cases involving compelled-funding challenges. *Abood* and its progeny, the leading compelled-funding cases, provide no guidance on this issue. See *infra* notes 220-222 and accompanying text.

105. See *Carroll*, 957 F.2d at 1002.

106. See *id.*

107. See *id.* at 1002.

108. See *Southworth*, 1996 U.S. Dist. LEXIS 20980, at \*24 n.3 (noting *Smith* was the first case to challenge the entire mandatory student-fee system). The prior suits challenged using student fees to fund newspapers, speakers’ groups, student government associations, and PIRGs. See *supra* note 87 and accompanying text (citing prior suits and their targets).

109. See *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 503 (Cal. 1993). Specifically, the student-plaintiffs objected to the use of mandatory fees to fund certain “political” or “ideological” groups, lobbying efforts, and student government political activities. See *id.* at 506-07, 514, 517. With regard to the latter two issues, the Court held mandatory fees could not be used to fund outside lobbying groups and remanded for further consideration the student government issue. See *id.* at 517. Most recently the California Supreme Court denied review of a lower court ruling allowing mandatory fees to fund the student government. See Charles Burrell, *UC Fees Suit Has Stretched On for 18 Years*, S.F. CHRON., Oct. 17, 1997, at A22. This analysis limits its consideration to the funding of student groups that, while they may use student funds to take political or ideological stands purport to speak only for their members. Student governments that pass resolutions purportedly in the name of the student body at large pose a special problem for compelled-speech doctrine. For an argument that mandatory funding of these types of student governments is unconstitutional, see generally Donna M. Cote, Comment, *The First Amendment and Compulsory Funding of Student Government Political Resolutions at State Universities*, 62 U. CHI. L. REV. 825 (1995).

110. 844 P.2d 500 (Cal. 1993).



the court held that the fee system unconstitutionally funded political and ideological speech.<sup>111</sup> In doing so, the court rejected the idea that the fees created a public forum.<sup>112</sup> Rather, the court held that the fee system was, in part, unconstitutional compelled association akin to that of the union-dues cases.<sup>113</sup> The court required UC-Berkeley to set a new fee structure whereby students would not be *required* to fund groups whose political component outweighed their educational value.<sup>114</sup>

The *Smith* court additionally found that the remedies constitutionally required by *Abood's* progeny were required in the student-fees context as well. Thus, while the university could continue to fund these groups through student fees, it needed to offer dissenting students a chance to opt out without having their fees used, even temporarily, for political or ideological views to which they were opposed.<sup>115</sup> Specifically, the court required the university to provide students with "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."<sup>116</sup>

*d. The Importance of Rosenberger*

*Rosenberger*, handed down two years after *Smith*, has two important implications for compelled-association cases. First,

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111. *See id.* at 513.

112. *See id.* at 509 n.8 ("No one argues that any of the student groups involved in the case before us is a public forum."). The *Smith* court's analysis on this point arguably was in line with precedent. While previous courts addressing the fees issue broadly addressed the universities' right to fund public fora, most of those cases dealt with organizations—newspapers, speakers groups, and student government associations—that in and of themselves could be considered public fora. *See supra* note 87. Moreover, the PIRG cases also weakened the broad public fora argument. While the *Galda* court professed not to deal with the issue of mandatory student activity fees, it could have dealt with the PIRG as part of a broad-based public forum. Instead, the court focused on the separate funding mechanism. *See supra* text accompanying note 98. The *Carroll* court accepted the forum argument, but held the PIRG fee was not narrowly enough drawn to be completely justified by the public forum argument. *See supra* notes 105-106 and accompanying text.

113. *See Smith*, 844 P.2d at 507 (applying *Abood's* "germaneness" test to mandatory student fees).

114. *See id.* at 514. The university was left with the task of determining which organizations could be funded only by voluntary fees. *See id.* at 513.

115. *See id.* at 513-514. (citing *Keller v. State Bar of Cal.*, 496 U.S. 1, 15-17 (1990)).

116. *Id.* at 514 (quoting *Keller*, 496 U.S. at 16).

the decision indicated that student activity fees funds should be treated as a public forum.<sup>117</sup> The court reasoned that fees were a forum "more in a metaphysical than in a spatial or geographic sense,"<sup>118</sup> but that nevertheless "the same principles are applicable."<sup>119</sup> This is important because the results in *Galda* and *Smith* arguably would have been different under the public forum analysis.<sup>120</sup> Second, the *Rosenberger* decision relied on a broad definition of viewpoint discrimination.<sup>121</sup> The court held that banning religious speech was equivalent to banning a religious viewpoint on subjects that otherwise were permissible within the forum.<sup>122</sup> This broad conception of viewpoint discrimination calls into question court-ordered remedies requiring universities to exclude "political" groups from a public forum.<sup>123</sup>

e. *After Rosenberger: Southworth v. Grebe*

In April 1996, little more than a year after *Rosenberger* was handed down, three University of Wisconsin law students accepted Justice O'Connor's invitation to challenge the mandatory fees system as a violation of their association rights under the First Amendment.<sup>124</sup> The student-plaintiffs challenged the use of mandatory fees to fund eighteen groups that they alleged used the funds to pursue political or ideological goals.<sup>125</sup> They claimed

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117. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517; see also *Davis*, *supra* note 3, at 1252.

118. *Rosenberger*, 115 S. Ct. at 2517.

119. *Id.* (emphasis added).

120. See Carolyn Wiggan, Note, *A Funny Thing Happens When You Pay for a Public Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 YALE L.J. 2009 (1994) (arguing the *Smith* court should have applied public forum doctrine and upheld mandatory fees funding); Robert L. Waring, Comment, *Talk Is Not Cheap: Funded Student Speech at Public Universities on Trial*, 29 U.S.F. L. REV. 541, 543 (1995).

121. See *Rosenberger*, 115 S. Ct. at 2518 (rejecting the argument that exclusion of religious speech is content-based restriction by reasoning that all debate is not bipolar); see also *The Supreme Court, 1994—Leading Cases*, *supra* note 30, at 214 (explaining *Rosenberger's* broadened definition of viewpoint discrimination).

122. See *Rosenberger*, 115 S. Ct. at 2517.

123. See *Wiggan*, *supra* note 120, at 2031 (arguing that court-ordered exclusion of political groups is impermissible viewpoint discrimination).

124. See *supra* text accompanying notes 7-9.

125. See *Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. Dist. LEXIS 20980, at \*9 (W.D. Wis. Nov. 29, 1996). Specifically, the students objected to funding the following groups: WISPIRG, the Lesbian, Gay, and Bisexual Campus Center, the Campus Women's Center, the UW Greens, the Madison AIDS Support Network, the International Socialist Organization, the Ten Percent Society, the Progressive Student Network, Amnesty International,

that in order to attend UW-Madison, they were compelled to "subsidize groups that contradict their views opposing abortion, homosexuality, socialism, extreme environmentalism, etc."<sup>126</sup>

In *Southworth v. Grebe*, the court held that mandatory student activities fees used to fund groups that engage primarily in political, rather than educational, activities constituted unconstitutional compelled association.<sup>127</sup> The court found persuasive the California Supreme Court's analysis of the balancing of interests and its approach to the remedy.<sup>128</sup> The court explained:

The California Supreme Court determined that the cumulative holdings in *Carroll* and *Galda*, in addition to *Abood* and *Keller*, stood for three principles. First, a state university may support student organizations through mandatory student fees because the use of funds can be germane to the university's educational mission. Second, at some point, the educational benefits that the funded student groups offer become incidental to the group's primary function of advancing its own political and ideological interests. Third, while the funding of those student groups may still provide some educational benefits to students attending the university, the incidental benefit to the students' education will not justify the burden on the dissenting students' constitutional rights.<sup>129</sup>

The court accordingly ordered the university to determine which student groups were more political than educational and allow students to opt out of funding those groups.<sup>130</sup>

In adopting the *Smith's* court's reasoning, the *Southworth* court twice referred to *Rosenberger*. The court acknowledged that the *Rosenberger* court treated fees as a public forum,<sup>131</sup> but the *Southworth* court rejected application of the public forum analysis to the case at hand, reasoning that many of the groups being challenged were "clearly to fund political or ideological ac-

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United States Student Association, Community Action on Latin America, La Colectiva Cultural de Aztlan, the Militant Student Union of the University of Wisconsin, the Student Labor Action Coalition, Student Solidarity, Students of National Organization for Women, MADPAC, and Madison Treaty Rights Support Group. See *id.*

126. See Cusac, *supra* note 16, at 30 (quoting the plaintiff's brief).

127. See *Southworth*, 1996 U.S. Dist. LEXIS 20980, at \*25-26 (applying the analysis from the *Smith* decision to reach such a result).

128. See *id.*

129. *Id.* at \*22-23 (citations omitted).

130. See *Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. Dist. LEXIS 20980, at \*25-29 (W.D. Wis. July 24, 1997) (memorandum and order).

131. See *Southworth*, 1996 U.S. LEXIS 20980, at \*31 ("The United States Supreme Court has found that in some sense student activities fees constitute a forum for speech or association." (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995))).

tivity, not to provide a forum for the free exchange of ideas."<sup>132</sup> The court's second cite to *Rosenberger* was in reference to Justice O'Connor's concurrence indicating that the mandatory student fee was subject to challenge.<sup>133</sup>

While the *Southworth* court declined to determine which of the University's 140 funded organizations were predominantly political and should thus be denied funding from mandatory fees,<sup>134</sup> it did determine that the Lesbian, Gay, Bisexual Campus Center, the Ten Percent Society,<sup>135</sup> the UW Greens,<sup>136</sup> and the International Socialist Society were examples of student organizations that engaging in "primarily political or ideological activity while being subsidized by the mandatory segregated fee."<sup>137</sup> The court ruled that the University could not constitutionally fund these groups through a mandatory fee.<sup>138</sup>

The *Smith* and *Southworth* courts both adopted a remedy whereby groups that were primarily political with only incidental educational benefits would be excluded from the forum, but neither court provided a useful definition of what is educational versus political in a fees-funded forum.<sup>139</sup> Both courts reasoned

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132. *Id.* at \*32. While this argument may be legitimate with reference to previous fees cases, *see supra* note 112, it is in tension with *Rosenberger*. While the *Rosenberger* case dealt with denial of funding to a newspaper, the Court explicitly rested its holding on the its determination that the student activities fees fund—not the newspaper involved—was a limited public forum for purposes of constitutional analysis. *See Rosenberger*, 115 S. Ct. at 2516-17.

133. *See supra* note 7 and accompanying text.

134. *See Southworth*, 1996 U.S. LEXIS 20980, at \*26-27. Like the *Smith* court, the *Southworth* court chose to exercise deference to the university in determining what was more educational than political. At first, the court did not even fashion a remedy because the parties had agreed they would create a remedy among themselves. *See Southworth*, 1996 U.S. LEXIS 20980, at \*30. However, after the Seventh Circuit returned the case for lack of a final order, the Court fashioned its remedy after *Smith*, requiring the Regents to determine what groups were predominantly political in nature. *See Southworth*, 124 F.3d 205 (7th Cir. 1997); No. 92-C-0292-S, at \*4 (W.D. Wis. July 24, 1997) (memorandum and order).

135. The court found that both groups are student organizations which promote homosexual political activism as well as provide educational services to UW-Madison students. *See Southworth*, 1996 U.S. LEXIS 20980, at \*27-28.

136. *See id.* The UW Greens is an environmental organization. *See id.* at \*27.

137. *See id.* at \*28-29.

138. *See id.* at \*29. The Court's injunction against the fees has been stayed while the case is on appeal to the Seventh Circuit. *See Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. LEXIS 20980 (W.D. Wis. Sept. 16, 1997) (stipulation and order for stay of injunction).

139. This lack of definitional guidance was one of the main criticisms of the

this was a task better left to the discretion of the university.<sup>140</sup> However—perhaps in an attempt to provide guidance or to deter the university from deciding that all the groups it funded were more educational than political—the *Southworth* court provided examples of groups it felt should fail the test.<sup>141</sup> While the court singled out groups engaged in specific off-campus political activities, such as lobbying,<sup>142</sup> the court also referred to groups it felt primarily existed to “advocat[e] a political and ideological agenda.”<sup>143</sup> Furthermore, sponsoring campus debates, which the court acknowledged as educational, was not enough to save a group’s funding where the court felt the group’s primary purpose was to promote an ideology.<sup>144</sup> Under both *Smith* and *Southworth*, once a group is determined to be engaged in political or ideological activity with only “incidental educational benefits,” it is ineligible for any mandatory funds.<sup>145</sup>

## II. CLASHING FIRST AMENDMENT DOCTRINES REQUIRE CAREFUL BALANCING

### A. THE *SOUTHWORTH* REMEDY AS IMPERMISSIBLE VIEWPOINT DISCRIMINATION IN A LIMITED PUBLIC FORUM

#### 1. Failure to Recognize the Forum

The *Southworth*<sup>146</sup> court adopted its reasoning and holdings from *Abood* and its progeny.<sup>147</sup> While the mandatory fees situa-

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dissenting Justice in *Smith*. See *Smith v. Regents of Univ. of Cal.*, 844 P.2d 500, 518-19 (Cal. 1993) (Arabian, J., dissenting). Commentators also have criticized the *Smith* holding for its ambiguity. See, e.g., Waring, *supra* note 120, at 625 (discussing “headaches of determining the political status of each student group”).

140. See *Smith*, 844 P.2d at 514; *Southworth*, 1996 U.S. LEXIS 20980, at \*3-4 (W.D. Wis. July 24, 1997) (memorandum and order).

141. See *supra* text accompanying note 137.

142. As an example, the court cited the UW Greens, a group which had sought introduction of bills in the Wisconsin Assembly and marched to the state capitol to demonstrate. See *Southworth*, 1996 U.S. LEXIS 20980, at \*27.

143. For instance, “[t]he International Socialist Organization’s primary purpose is to promote socialism on the UW-Madison campus.” *Id.* (emphasis added).

144. See *id.*

145. See *id.* at \*35 (“If the student organizations are subsidized at least in part with portions of the mandatory segregated fee, plaintiffs’ First Amendment rights are implicated because they are being compelled to support political and ideological activity with which they disagree.” (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 n. 35 (1977))).

146. Because the *Southworth* court adopted the *Smith* court’s remedies,

tion may be largely analogous to the union dues situation,<sup>148</sup> there is one important distinction that the *Southworth* court failed to weigh into its decision. While union and bar dues are used to fund the voice of one entity—the union or bar association, respectively—the student fees are used to fund a public forum.<sup>149</sup> This is critical because it means that any decision in a compelled-funding case has implications upon the rights of those who use the forum.<sup>150</sup> Unlike the recipients of a union's non-germane dues,<sup>151</sup> who have no claim to the funds, members of the mandatory fees-funded designated public forum have some rights not to be excluded from funding.<sup>152</sup>

While the public forum doctrine was established prior to *Rosenberger*, there was some judicial<sup>153</sup> and academic<sup>154</sup> debate regarding whether it was applicable in the student-fees context. Some commentators<sup>155</sup> and at least one court<sup>156</sup> have questioned

most of this argument is applicable to that decision as well. The major distinction between the two cases is that the *Southworth* court had the benefit of the Supreme Court's holdings in *Rosenberger*, which frame this argument.

147. See *supra* notes 66-69 and accompanying text; see also note 75 (detailing cases upholding and further defining the *Abood* test).

148. See *infra* notes 213-219 (discussing the applicability of *Abood*).

149. See *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983) ("The mandatory fees in *Abood*, therefore, enhance the power of one, and only one, ideological group to further its political goals. In contrast, the Daily Tar Heel increases the overall exchange of information, ideas, and opinions on the campus."); Bauer, *supra* note 100, at 166 (arguing there is "simply no similarity" between the union and student-fees situations); Wells, *supra* note 18, at 373-74 (noting the public forum distinction between unions and student-fees).

150. Wells and other commentators have argued *Abood* is inapplicable or, alternatively, that *Abood*'s germaneness test can be met by student-fee funds. These arguments are addressed further at *infra* notes 209-212 and accompanying text. This Note argues that the public forum distinction is an important distinction in judging the appropriateness of the remedy adopted by the *Smith* and *Southworth* Courts. See Wiggin, *supra* note 120, at 2030-37 (arguing *Smith* remedy is unconstitutional).

151. For instance, a person involved in litigation who is not a member of the local union. See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528 (1991).

152. See *supra* Part I.B.1.

153. Compare *Smith v. Board of Regents of the Univ. of Cal.*, 844 P.2d 500, 509 (1993) (rejecting public forum analysis), with *Lace v. Univ. of Vt.*, 303 A.2d 475, 479 (Vt. 1973) (analogizing campus forum to speakers corner on Hyde Park).

154. Commentators have argued for years that public forum analysis should be applied in the context of mandatory student fees. See, e.g., Karen M. Kramer, Comment, *The Free Rider Problem and First Amendment Concerns: A Balance Upset by New Limitations on Mandatory Student Fees*, 21 J.C. & U.L. 691, 696-97 (1995); Wiggin, *supra* note 120, at 2030.

155. See Elizabeth E. Gordon, Comment, *University Regulation of Student Speech: Considering Content-Based Criteria Under Public Forum and Subsidy*

whether subsidy analysis is more appropriate in the student-fees context because the government is spending money. Generally, the Court has allowed the government to grant funds in support of one policy or program while denying funds to another, reasoning that "although the 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."<sup>157</sup> However, even in its subsidy cases, the Court has acknowledged that what looks like a public forum and acts like a public forum should be treated like a public forum.<sup>158</sup> More importantly, the Supreme Court in *Rosenberger* explicitly held that mandatory student-fees funds are public fora—albeit *limited* public fora.<sup>159</sup>

Limited public fora are unique within public forum doctrine because of the limitations the government is allowed to place upon them.<sup>160</sup> This power of the government to limit public fora has led some commentators to conclude the limited public forum doctrine fails to limit the government's actions in any meaningful way at all.<sup>161</sup> However, it is not clear that the Court will allow

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*Doctrines*, 1991 U. CHI. LEGAL F. 393, 405-11 (1991) (examining fees under forum and subsidy analysis and concluding within fees context, the two are two means to same end); Wells, *supra* note 18, at 385-88 (examining fees under subsidy analysis). Even after *Rosenberger*, some continue to argue subsidy analysis is most appropriate. See Luba L. Shur, Note, *Content-Based Distinctions in a University Funding System and the Irrelevance of the Establishment Clause: Putting Wide Awake to Rest*, 81 VA. L. REV. 1665, 1710-11 (1995) (arguing subsidy doctrine appropriate because no government intent exists to create a public forum).

156. See *Student Gov't Ass'n v. Board of Trustees of the Univ. of Mass.*, 868 F.2d 473, 476, 482 (1st Cir. 1989) (finding grant of funding to legal services office was subsidy and that revocation of those funds was not First Amendment violation).

157. *Regan v. Taxation with Representation*, 461 U.S. 540, 549-50 (1983) (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)). In *Regan*, the Court upheld the government's grant of tax exempt status to nonprofit veteran organizations that lobby while denying it to other nonprofit organizations that lobby. See *id.*; see also *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (holding government may choose to fund only those family planning clinics that do not counsel on the use of abortion).

158. See *Rust*, 500 U.S. at 176 (acknowledging that existence of "subsidy in the form of Government-owned property does not justify the restriction of speech in areas that have been traditionally open to the public for expressive activity") (citations omitted); see also Wiggan, *supra* note 120, at 2030.

159. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2516-17 (1995).

160. See *supra* note 35 and accompanying text; see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (describing the three types of fora and the limitations that may be placed on them).

161. See, e.g., Robert C. Post, *Between Governance and Management: The*

just any content-based restriction to pass scrutiny. Rather, the restriction must be "to preserve the purposes of [the] limited forum"<sup>162</sup>—a concept that has been given little practical meaning.<sup>163</sup>

With regard to the fees-funded public forum, the purpose of the forum is, broadly, to promote uninhibited debate. It is hard to conceive a content-based limitation in line with this purpose aside from the "students only" restriction already approved by the Court.<sup>164</sup> Additionally, viewpoint discrimination is presumed unconstitutional within any public forum.<sup>165</sup> As the Court explained in *Rosenberger*:

[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.<sup>166</sup>

Thus the limited public forum contains an important constraint on the state; it may choose not to offer "universal access" and then exclude certain groups on the basis of their points of view. Additionally, the Court will take part in determining just how limited the limited public forum was intended to be.<sup>167</sup>

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*History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1753 (1987) (arguing that limited public forum doctrine imposes no real protection because "Perry imposes no first amendment constraints whatever on the government's ability to build discriminatory criteria into the very definition or purpose of the limited public forum"); see also Shur, *supra* note 155, at 1710-11 (arguing no public forum existed in *Rosenberger* because university did not intend to create one). For an interesting restatement of public forum doctrine, see Daniel A. Farber, *The First Amendment* (1998 unpublished manuscript, on file with author) (asserting public forum analysis matters with regard to non-viewpoint content distinctions, which are broadly allowed in nonpublic fora, but subject to strict scrutiny in limited or traditional public fora).

162. *Rosenberger*, 115 S. Ct. at 2517.

163. The Court has offered only two examples of the permissible content-based distinctions to preserve limited public fora: "students-only" rules in university public fora and school board business only rules for school board meetings. See *supra* notes 33-34.

164. See *Widmar v. Vincent*, 454 U.S. 263, 268 (1981).

165. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2516-17 (1995). Viewpoint discrimination is presumed unconstitutional even in a nonpublic forum.

166. 115 S. Ct. at 2517.

167. See *Waring*, *supra* note 120, at 559-60. *Waring* argues that "a general policy of open access does not vanish when the government adopts a specific restriction on speech, because the government's intent is indicated by its consistent practice . . ." *Id.* This is arguably the case in *Rosenberger*, where the Court could have found exclusion of religion was in line with the purposes of



The *Southworth* court not only failed to acknowledge that its decision could have an impermissible viewpoint-based impact on the fees-funded public forum but it denied the existence of a public forum altogether.<sup>168</sup> The court did recognize that *Rosenberger* “found that in some sense student activities fees constitute a forum for speech or association,”<sup>169</sup> but distinguished *Rosenberger* as well as other earlier fees cases as dealing with “challenges to campus newspapers” and reasoned that “[c]learly, a newspaper is a forum whereby students may express diverse viewpoints.”<sup>170</sup> In essence, the court seemed to suggest that each group funded must individually be a public forum before the forum issue could be addressed. While this analysis may have been acceptable prior to *Rosenberger*,<sup>171</sup> the *Rosenberger* Court expressly based its analysis and holdings on the determination that the fund for student activities fees itself was a limited public forum.<sup>172</sup>

The fact that student fees are used to fund a limited public forum is not in and of itself dispositive in the compelled-funding cases, but courts addressing compelled-funding cases in the fees context must take care not to hand down rulings that will violate the public forum doctrine. To do so would shift from one violation of First Amendment rights to another.<sup>173</sup> After *Rosenberger*, this arguably is the impact of the *Southworth* ruling.

## 2. *Rosenberger*'s Second Lesson: Impermissible Viewpoint Discrimination Within the Forum

The *Southworth* court should have acknowledged fees as a limited public forum and then should have determined if its application of the *Abood* remedy would infringe upon the First

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the limited public forum, but instead perceived it as an anomalous restriction in the face of a general policy of universal access.

168. *Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. LEXIS 20980, at \*31-32 (W.D. Wis. Nov. 29, 1996).

169. *Id.* at \*31.

170. *Id.* at \*32.

171. See *supra* note 112 (discussing judicial differences about whether each activity needed to be forum).

172. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995).

173. This sort of face-off between First Amendment rights is not uncommon, but usually takes place between the two religion clauses or between the Establishment Clause and the Free Speech Clause. See Farber, *supra* note 161, at 280-83. The Fourth Circuit *Rosenberger* opinion reasoned that case presented a First Amendment trade-off between the Establishment Clause and the Free Speech Clause. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 18 F.3d 269 (4th Cir.), *rev'd* 115 S. Ct. 2510 (1995).

Amendment rights of participants in the forum. While a content-based restriction to preserve the nature of the forum would be permissible, a viewpoint-based distinction would not. It is arguable that the *Southworth* remedy, under *Rosenberger* analysis, is an impermissible viewpoint-based exclusion.

The Supreme Court has categorized speech restrictions based on whether they are content-neutral or content-based.<sup>174</sup> Content-neutral restrictions usually are permissible while content-based restrictions usually are not.<sup>175</sup> The Court has recognized viewpoint-based restrictions as a subcategory of content-based restriction.<sup>176</sup> Viewpoint-based distinctions have been described by the Court as an "egregious" form of content-based discrimination where one side of a controversy is censored while the other is allowed to be spoken.<sup>177</sup> While the distinction seems simple enough, both the lower courts and commentators have struggled to apply the distinction.<sup>178</sup>

An obvious example of viewpoint discrimination occurs when the government allows speech in favor of unions and disallows speech against unions. A more difficult question faces the courts when the government censors speech on an entire subject matter and argues that the restriction is content-based rather than viewpoint-based.<sup>179</sup> This determination seems to depend upon how broadly the court defines the relevant conversation.<sup>180</sup>

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174. Content-based restrictions regulate speech based upon what the speaker is saying, whereas content neutral distinctions regulate based on neutral criteria and have only an incidental impact on speech. See Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 81 (1978).

175. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (within a public forum, "[r]easonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest"); Stone, *supra* note 174, at 81-82 (noting Supreme Court conducted a balancing test to determine reasonableness of content-neutral restrictions, while sustaining content-based restrictions for full value speech only in the "most extraordinary circumstances").

176. See *Rosenberger*, 115 S. Ct. at 2516; see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (finding viewpoint discrimination where racist fighting words were proscribed, but fighting words advocating equality were not).

177. See *Rosenberger*, 115 S. Ct. at 2516.

178. See *The Supreme Court, 1994—Leading Cases*, *supra* note 30, at 215 (asserting lack of clarity surrounding viewpoint definition "often led lower courts to adopt a narrow definition"). Commentators prior to *Rosenberger* disagreed whether a ban on political speech within the fees-funded forum would be content-based or viewpoint-based discrimination. Compare Wiggin, *supra* note 120, at 2030-37 (arguing impermissible viewpoint discrimination), with Wells, *supra* note 18, at 394-95 (arguing permissible content-based discrimination).

179. This was the case in *Rosenberger*. See 115 S. Ct. at 2517 (acknowledging

In *Rosenberger and Lamb's Chapel*, the Court held impermissible as viewpoint discrimination subject-matter restrictions on religious speech.<sup>181</sup> The Court also has found restrictions on racist speech to be impermissible viewpoint discrimination. In *R.A.V. v. City of St. Paul*,<sup>182</sup> the Court struck down an ordinance which proscribed "fighting words" that insult, or provoke violence 'on the basis of race, color, creed, religion, or gender'" because the court found that the ordinance, in its practical application, censored only one side of a conversation.<sup>183</sup> The Court reasoned that only those with racist views were censored by the statute, while those advocating racial equality could "fight freestyle."<sup>184</sup>

However, the court has upheld subject-matter restrictions as well. In *Lehman v. City of Shaker Heights*<sup>185</sup> the Court upheld a restriction banning political advertisements on city buses.<sup>186</sup> In doing so, a plurality of the Court reasoned that the buses were nonpublic fora where content-based discrimination against political advertising was permissible.<sup>187</sup> In a second case, *Greer v. Spock*,<sup>188</sup> the Court allowed a military base to exclude "demonstrations, picketing, sit-ins, protest marches, political

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university's argument that distinction was drawn on basis of content rather than viewpoint).

180. This has been the major dispute between majority and dissenting opinions in several of the viewpoint discrimination cases. Compare *Rosenberger*, 115 S. Ct. at 2517 (majority reasoning that regulation constitutes viewpoint discrimination) and *R.A.V.*, 505 U.S. at 391 (majority finding of viewpoint discrimination), with *Rosenberger*, 115 S. Ct. at 2549 (Souter, J., dissenting) (reasoning that ban on the "entire subject matter of relig[ion]" is content-based) and *R.A.V.*, 505 U.S. at 434 (Stevens, J., concurring in judgment) (reasoning ordinance which bans all fighting words based on race, etc., is content-based); see also Farber, *supra* note 161, at 30-31 ("Perhaps the only thing that is truly clear is that the Court has not yet found a satisfactory definition of viewpoint regulation.")

181. See *Rosenberger*, 115 S. Ct. at 2520; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

182. 505 U.S. 377 (1992).

183. *Id.* at 391 (citations omitted).

184. *Id.* at 392.

185. 418 U.S. 298 (1974).

186. See *id.* at 303-04.

187. Not unlike a limited public forum, the government is allowed to make content-based restrictions within a nonpublic forum as long as the restriction "is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). In *Lehman*, the Court accepted the city's purported need to "minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience." See 418 U.S. at 304.

188. 424 U.S. 828 (1976).

speeches and similar activities” while allowing civilian speeches on subjects such as business management and drug abuse.<sup>189</sup> The Court held that this was permissible restriction—again in a nonpublic forum—on the basis of political content, rather than viewpoint-based discrimination.<sup>190</sup> Thus, the Court in these cases viewed the exclusion of political speech as the exclusion of an entire conversation.

In contrast, the *Rosenberger* Court found impermissible viewpoint discrimination where the University of Virginia excluded a religious group from receiving mandatory fees.<sup>191</sup> The University defined a “religious activity” as one that “primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality.”<sup>192</sup> In *Rosenberger*, the Court viewed the ban on religious groups as excluding one side of a single conversation—or more accurately several conversations<sup>193</sup>—and thus struck down the restriction as impermissible viewpoint discrimination.<sup>194</sup>

In so ruling, the Court reaffirmed a broad definition of viewpoint discrimination it had begun to develop in earlier cases.<sup>195</sup> The Court specifically relied on its holding in *Lamb’s Chapel*<sup>196</sup> that excluding religious groups from access to school facilities constituted impermissible viewpoint discrimination.<sup>197</sup>

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189. *Id.* at 831.

190. *See id.* at 839-40 (noting regulation was applied even-handedly).

191. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517-18 (1995).

192. *Id.* at 2515.

193. *See infra* notes 199-200 and accompanying text.

194. *See Rosenberger*, 115 S. Ct. at 2517-18 (“The prohibited perspective, not the general subject matter, resulted in the refusal to [fund].”).

195. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In *R.A.V.*, the Court reasoned that the ordinance was viewpoint-based, rather than content-based, because it “license[d] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *Id.* at 392. The Court so ruled despite the fact that *all* fighting words based on race, color, creed or gender were proscribed by the ordinance. The Court reasoned that “[d]isplays containing some words—odious racial epithets, for example—would be prohibited to all proponents of all views. But ‘fighting words’ that do not themselves invoke race, color, creed, religion, or gender—aspersions on a person’s mother, for example—would seemingly be usable *ad libitum* in the placards of those arguing *in favor* of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents.” *Id.* at 391. *See also Lamb’s Chapel v. Center Moriches Union Free School District*, which is discussed *supra* at notes 46-51 and accompanying text.

196. 508 U.S. 384 (1993).

197. *See id.* at 393-94.

In that case, the Court reasoned that “[t]here was no indication in the record . . . that the request to use the school facilities was ‘denied for any reason other than the fact that the presentation would have been from a religious perspective . . . . It discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues except those dealing with the subject matter from a religious standpoint.’”<sup>198</sup>

The Court reasoned in *Rosenberger* that, as in *Lamb’s Chapel*, religious groups were excluded from sharing their perspective on subjects otherwise permissible within the forum.<sup>199</sup> The Court reasoned that “[t]he prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.”<sup>200</sup> While the Court seemed to leave some room for an argument that a restriction of religion as a “subject” (rather than a perspective) could survive viewpoint analysis,<sup>201</sup> it is easy to construe any ban on religious speech as a ban on religious perspectives, and thus impermissible under *Rosenberger*.<sup>202</sup>

*Southworth’s* exclusion of political speech is analogous to the religious speech exclusion in *Rosenberger*. While exclusion of political speech has survived in other contexts as content-based,<sup>203</sup> it is difficult to escape application of the *Rosenberger* analysis. While the *Southworth* remedy allows “educational” views on world events or family planning, it does not allow so-called “political” views on the same subjects.<sup>204</sup> Thus, the remedy

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198. *Id.* (citation omitted).

199. The student group excluded in *Rosenberger* was a student publication called *Wide Awake: A Christian Perspective at the University of Virginia*. See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2515 (1995). *Wide Awake* contained articles about homosexuality, Christian missionary work, eating disorders, music reviews, and interviews with University professors—all from a Christian perspective. See *id.*

200. *Id.* at 2517-18.

201. The Court acknowledged that it was “something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought.” *Id.* at 2517. But the Court seemed to emphasize the wording of the exclusion, which was based on the “perspective” of the message. See *id.*

202. See Shur, *supra* note 155, at 1681-82 (arguing the *Rosenberger* Court does not explain what religious restriction could pass its test).

203. See *supra* text accompanying notes 185-190.

204. For instance, while it presumably would allow a film or speaker on the subject of the American form of government, it does not allow the International Socialist Organization to “promote socialism on the UW-Madison campus.” See *supra* note 143.

prohibits political viewpoints on subjects "otherwise within the forum's limitations."<sup>205</sup> In fact, political speech is uniquely susceptible to *Rosenberger's* recognition that not all debate is bipolar<sup>206</sup> because the response to political speech is not always more political speech. As Justice Adams pointed out in his *Galda* dissent, "All too often in our society one particular ideology—that of passivity, acceptance of things as they are, and exaltation of commercial values—is simply taken for granted, assumed to be a nonideology, and allowed to choke out all the rest."<sup>207</sup> Thus, one response to a political environmentalist view may be a speaker that does not think the saving the environment is worth talking about, but would rather talk about sports or history. Under *Southworth*, the speaker effectively favoring the environmental status quo (by ignoring the issue altogether) would be allowed to speak, while the speaker in favor of change would not. This is impermissible viewpoint discrimination under *Rosenberger*.<sup>208</sup>

Several commentators have argued that a university's interest in creating and maintaining a fees-funded public forum justifies the infringement on dissenters' compelled-speech rights.<sup>209</sup> As was discussed above, the courts have recognized universities' educational interests in creating fees-funded public fora, and once a university has created a public forum, it must not impermissibly discriminate within that forum.<sup>210</sup> However, none of these commentators persuasively argues why the public forum matters for purposes determining if there is an infringement of compelled-speech rights nor adequately explains why, once there is an infringement, the public forum can justify any group within it.<sup>211</sup> This may be the center of the tension between

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205. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995).

206. *See id.* at 2518 (noting that the exclusion of an entire class of viewpoints is no less discriminatory).

207. *Galda v. Rutgers*, 772 F.2d 1060, 1071 n.4 (3d Cir. 1985) (Adams, J., dissenting) (citation omitted).

208. For an excellent analysis of political exclusion as viewpoint discrimination, see Wiggin, *supra* note 120, at 2030-37. *See also The Supreme Court, 1994—Leading Cases*, *supra* note 30, 215 (arguing *Rosenberger's* analysis will "encompass most bans on religious and political speech"). This article contains an interesting analysis of bans on speech about sexual orientation as viewpoint-based. *See id.* at 214-15.

209. *See, e.g.,* Waring, *supra* note 120, at 623; Wiggin, *supra* note 120, at 2010; Wells, *supra* note 18, at 381-82.

210. *See supra* Parts I.B.1., II.A (discussing relevant case precedent).

211. As discussed above, the public forum distinction between *Abood* and the fees cases is critical in assessing what remedies are permissible. *See su-*

the two doctrines: public forum analysis requires that speakers are guaranteed equal access, but under compelled-speech doctrine, the equal access requirement just compounds the harm to dissenters' rights by requiring them to fund lots of different viewpoints with which they disagree.<sup>212</sup> Thus, the *Smith* and *Southworth* courts were correct to look at the compelled-speech implications of mandatory fees funds outside of the public forum context.

## B. PUBLIC FORA ACTIVITIES AS A VIOLATION OF COMPELLED-SPEECH RIGHTS

While the *Abood* doctrine has been questioned as an undue extension of compelled-association rights,<sup>213</sup> the Supreme Court has continued to embrace the compelled-funding doctrine announced in *Abood*<sup>214</sup> and extended to cover integrated state bar associations.<sup>215</sup> The union-dues and bar association-fees situations are largely analogous to the mandatory student activity fees situation. In each case, the state has appointed an organization to provide a special service for a discrete group of people.<sup>216</sup> In each case, to prevent free riders, the organizations must charge a fee to those who will benefit from the services.<sup>217</sup>

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*pra* Part II.A (comparing *Abood* and the fees cases). However, the forum, while it may serve as a justification for infringement of compelled-speech rights, is not determinative of whether rights have been violated. See Lauren, *supra* note 92, at 296-97.

212. See *Carroll v. Blinken*, 957 F.2d 991, 998 (2d Cir. 1992) ("The fact that appellants' student activity fee will also compel them to speak through a number of other campus groups in addition to NYPIRG in no way heals the constitutional infirmity; it simply means that students must fund more than one unwanted view."); Bauer, *supra* note 100, at 183 ("If *Abood* applies to the university fee setting at all, the dissenting student must have the right not to associate . . . with any political group funded from the student activity fee . . . . [T]he fact that all groups exist within the forum does not make forced association any more constitutional.")

213. See, e.g., Cantor, *supra* note 60, at 12 (1983) ("*Abood* made a quantum leap by connecting forced fees payments to a service institution with impermissible, compelled-ideological association."). Cantor argues that *Abood* is an improper extension of the compelled-association doctrine, which was meant to protect people from having a message attributed to them they did not wish to convey—a risk that does not exist in the union dues situation. See *id.*

214. See *supra* note 75 (listing cases further affirming and defining *Abood*).

215. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990) (applying *Abood's* germaneness test to the state bar association).

216. The services provided are union negotiation, regulation of the legal profession, and education of students, respectively. For the Supreme Court's comparison of union services to bar association services, see *Keller*, 496 U.S. at 12.

217. See *id.* (discussing need to prevent "free riders" in union and bar as-

Finally, in each case, the government has a sufficient interest in compelling funding for expenses *related to those services* to justify infringement on speech rights.<sup>218</sup> Thus, it is appropriate for courts in the student-fees cases to apply the *Abood* germaneness test and determine for which funded activities "the incidental benefit to students' education will not justify the burden on the dissenting students' constitutional rights."<sup>219</sup>

While there has been some confusion over what standard of review *Abood* and its progeny require,<sup>220</sup> and while most fees cases have not addressed the appropriate standard of review,<sup>221</sup> the analysis will be similar under either strict or intermediate scrutiny.<sup>222</sup> This is because the university's educational interests are strong enough to survive either standard of review, and because both standards require an ends-means fit between the interest and the challenged activity.<sup>223</sup> The compelling or important state interest is analogous to *Abood's* requirement that there be a "vital policy interest,"<sup>224</sup> while the ends-means fit is carried out through *Abood's* germaneness requirement.<sup>225</sup>

sociation contexts).

218. The government has an interest in promoting labor peace, regulating the legal profession, and education.

219. *Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. LEXIS 20980, at \*23 (W.D. Wis. Nov. 29, 1996) (citing *Smith v. Board of Regents of the Univ. of Cal.*, 844 P.2d 500, 511 (Cal. 1993)).

220. See *Smith*, 844 P.2d at 522-23 (Arabian, J., dissenting) ("Neither *Abood* nor *Keller* addressed directly the constitutional standard to be applied . . ."). But see *id.* at 507 (citing *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986) for application of strict scrutiny).

221. See *supra* note 104 (noting the *Carroll* court was the first to assign a standard of review). This was a major point of contention between the majority and dissenting opinions in *Smith*. See generally *Waring, supra* note 120, at 606-13.

222. Compare *Carroll v. Blinken*, 957 F.2d 991, 1002 (1992) (striking down funding for off-campus political activity under intermediate scrutiny test because it "stretches the nexus between the extracted fee and [the university's] educational interests too far"), with *Smith*, 844 P.2d at 511 (applying strict scrutiny and citing *Carroll*, *inter alia*, as support for striking down funding for activities when "the educational benefits that a group offers become incidental to the group's primary function of advancing its own political and ideological interests").

223. Strict scrutiny is said to require that the activity be the least restrictive means, while intermediate scrutiny demands narrow tailoring. But even under intermediate analysis, the challenged activities must be "necessarily or reasonably incurred." *Smith*, 844 P.2d at 523 (Arabian, J., dissenting).

224. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991).

225. See *id.* In *Lehnert*, the Court also required that the funded activity not "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* This provides further support for



It was germaneness that the *Smith* and *Southworth* courts struggled to define in the student-fees context. Both courts acknowledged that universities are entitled to a great deal of deference in their educational decisions,<sup>226</sup> yet that fact needed to be balanced against the fact that students don't "shed their constitutional rights at the schoolhouse gate."<sup>227</sup> The *Abood* Court was concerned with compelled (and unjustified) funding of political or ideological causes.<sup>228</sup> Accordingly, *Abood* prohibited such compelled funding except where it was germane to the state's "vital policy interest." In the fees context that interest is education. Thus, the distinction the courts drew between educational and political or ideological activities was a reasonable extension of *Abood*. Even at a university and even within a public forum, some limits need to be drawn. Otherwise, a fees-funded public forum could extend to all kinds of political activity with very little nexus to the educational interests of the university.<sup>229</sup>

Nevertheless, the remedy imposed by the *Smith* and *Southworth* courts has generated criticism as being ambiguous and inappropriate to the university environment.<sup>230</sup> Additionally, the courts' application of the distinction has been criticized for its

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the argument that student-fee systems must be narrowly tailored to meet the university's interest.

226. See *Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. LEXIS 20980, at \*25 (W.D. Wis. Nov. 29, 1996) (affirming the *Smith* Court's weighing of the interests involved); *Smith*, 844 P.2d at 505.

227. *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

228. This fact is reinforced by the Court's recent decision in *Glickman v. Wileman Bros. & Elliott*, 117 S. Ct. 2130 (1997), in which the Court refused to extend *Abood's* protections to a fruit grower who had been compelled to support state-wide fruit advertising. See *id.* at 2139-40; see also *supra* notes 78-80 and accompanying text (discussing the Court's decision in *Glickman*).

229. Most universities do not fund "partisan" organizations, such as the Young Republicans or College Democrats. See *Newbart*, *supra* note 22, at 17 (stating that UW-Madison does not fund these groups); *Bauer*, *supra* note 100, at 135 n.1. However, as the *Smith* Court pointed out, there is very little difference between the activities of these groups and some of the student organizations that are funded by the fees. See *Smith*, 844 P.2d at 513. But see Justice Adams's *Galda* dissent, in which he draws a distinction between "partisan" and "political" speech, concluding that it is permissible to exclude the Young Democrats and Republicans, while including the PIRG. See *Galda v. Rutgers*, 772 F.2d 1060, 1077 n.13 (3d Cir. 1985).

230. See, e.g., *Waring*, *supra* note 120, at 625 (highlighting the ambiguity of the "educational" versus "political" dichotomy in *Smith*); *Smith*, 844 P.2d at 518 (Arabian, J., dissenting) (arguing political or ideological speech is "not the 'price' students pay for a university education, it is the very essence of that education").

potential to shift the First Amendment infringements to other students.<sup>231</sup>

The *Smith* court, seeming to acknowledge the difficult line it had asked the university to draw, allowed that the university could choose to adopt a voluntary system of funding, "that avoids the constitutional defects identified."<sup>232</sup> One of the plaintiffs in the *Southworth* case has said he hopes that is the ultimate result of the fees challenges.<sup>233</sup> While elimination of the forum would be permissible under the limited public forum and compelled-speech doctrines, a court could not order the elimination of the forum without infringing on the academic freedom of the university.

### C. ACADEMIC FREEDOM AND THE RIGHT TO CREATE A PUBLIC FORUM FOR EDUCATIONAL PURPOSES

There is no explicit protection for academic freedom in the Constitution, but the Supreme Court has held that the freedom is protected by the First Amendment.<sup>234</sup> While the Court developed its protection for academic freedom in cases dealing with individual faculty members,<sup>235</sup> it spoke in broad terms about the freedom of universities to determine how best to educate. For instance, in *Keyishian v. Board of Regents*<sup>236</sup> the Court struck down as vague and overbroad New York laws barring "subversive" persons from employment as applied to college professors.<sup>237</sup> The Court has since recognized academic freedom as the "right . . . 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'<sup>238</sup>

231. See Wiggins, *supra* note 120, at 2030-37; see also *supra* Part II.A (critiquing the *Southworth* decision).

232. *Smith*, 844 P.2d at 514.

233. See Newbart, *supra* note 22, at 17 (stating the plaintiffs think the groups should raise their own funds); Cusac, *supra* note 16, at 32 (stating the plaintiffs say there is no justification for university "life support" if groups cannot support themselves in the marketplace of ideas).

234. See J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 256 (1989). Byrne notes that academic freedom is linked to the First Amendment explicitly or implicitly in numerous judicial opinions, but that none of them explains how, why or to what extent the First Amendment protects academic freedom. See *id.* at 252-53.

235. See *id.* at 256-68.

236. 385 U.S. 589 (1967).

237. See *id.*

238. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263, 277 (1957) (Frankfurter, J., concurring)).

Each of the courts addressing the compelled-speech question in the student-fees context has recognized that the universities must be accorded deference to determine what is educational.<sup>239</sup> The *Smith* court claimed to accord deference in both weighing the interests involved and determining a remedy.<sup>240</sup> It is appropriate for courts dealing with mandatory fees cases to recognize the rights of academic freedom and accord universities an appropriate amount of deference in that regard. Thus, it would be inappropriate to deny the university the discretion to create a public forum unless it is the only constitutional solution to the compelled-speech problem.<sup>241</sup> Academic freedom must be viewed in context with public forum and compelled-speech rights involved.

### III. A PROPOSAL TO BETTER BALANCE THE INTERESTS INVOLVED

#### A. ACTIVITIES-BASED EXCLUSIONS

Where fundamental rights conflict, there are no absolutes.<sup>242</sup> Rather, the courts must balance the rights involved. When they fail to do so, they risk further constitutional violations as well as circular litigation. The courts need to develop a solution to the fees challenges that better balances the rights of all those involved and gives clear indications to universities about what groups or activities may permissibly be funded through mandatory fees. This proposal argues that solution should concentrate on excluding certain types of activities—such as lobbying and ballot initiatives—from compelled funding rather than excluding certain groups.

While the *Smith* and *Southworth* courts were ambiguous about how universities should apply their commands that only primarily educational groups be funded through mandatory stu-

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239. See, e.g., *Larson v. Board of Regents*, 204 N.W.2d 568, 570 (1973).

240. See *Smith v. Board of Regents of the Univ. of Cal.*, 844 P.2d 500, 505, 513-14 (Cal. 1993).

241. See *Wells*, *supra* note 18, at 369-70 (arguing that elimination of mandatory funding for political groups does not fully recognize the university's interests). This is not to argue the university could use its academic freedom to exempt itself from laws otherwise applicable to it, e.g., a desegregation order or an affirmative action ban. Rather, this Note argues that courts should seek solutions to constitutional problems that accord the greatest amount of deference to the universities.

242. See *Galda v. Rutgers*, 772 F.2d 1060, 1077 (3d Cir. 1985) ("As is so often the case in the First Amendment field, we are confronted with competing interests, not absolute rights.").

dent fees, the courts seemed concerned with both political activities and advocacy in general.<sup>243</sup> Because the decisions are vague and seem to ban funding any group that acts as a political advocate, the courts' remedy encourages viewpoint discrimination within a limited public forum.<sup>244</sup>

A better-balanced remedy would concentrate on excluding political speech *activities* not germane to the university's educational interests. An activities-based remedy likely would exclude political or ideological activities that are directed outside the university, such as lobbying, proposing legislation, or letter-writing campaigns to legislators. This approach would ensure that all voices are allowed to participate in the fees-funded forum and at the same time protect dissenters from being compelled to pay for speech not justified by the educational interests. Finally, it would preserve for the university the academic freedom to create a public forum to foster debate.<sup>245</sup>

The activities-based exclusion could survive forum scrutiny because it does not exclude perspectives in conversations otherwise permissible in the forum.<sup>246</sup> Rather, the exclusion is a permissible content-based exclusion intended to limit the nature of a limited public forum. The University of Virginia fees policy contained a similar regulation—excluding electioneering and lobbying—at the time of *Rosenberger*, which the Supreme Court seemed to believe was distinguishable from the religious speech exclusion because the former was not directed at suppressing particular viewpoints.<sup>247</sup> Additionally, political speech exclusions

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243. See *supra* text accompanying notes 139-145 (describing the groups that the *Smith* and *Southworth* courts held should be excluded from the forum).

244. See *supra* Part II.A (critiquing the *Southworth* approach).

245. This activity-based proposal draws heavily from the *Carroll* majority and the *Smith* dissent. See *Carroll v. Blinken*, 957 F.2d 991, 1002 (2d Cir. 1992) (allowing funding for activities directed toward campus but not for those directed off-campus); *Smith*, 844 P.2d at 527-28 (Arabian, J., dissenting) (arguing the forum should be allowed, but should not include funding for political candidates, ballot initiatives, or off-campus speech activities).

246. While it is possible to argue under *Rosenberger* that some people might respond to an on-campus film or speaker by lobbying the state government, the prohibition on certain political *types* of speech is less likely to skew the debate than the prohibition of all political or ideological speech. It is skewing debate within the forum that the public forum doctrine is intended to prevent.

247. The Court distinguished the "political activities" because it was, by university policy, "not intended to preclude funding of any otherwise eligible student organization which espouses particular positions or ideological viewpoints, including those that may be unpopular or are not generally accepted."

that have been upheld in other contexts have concentrated on *activities* rather than viewpoints.<sup>248</sup> Even if the activities-based restriction were subjected to strict scrutiny accorded those content-based restrictions not intended to limit the forum, it should be upheld as the appropriate balance between public forum and compelled-speech rights.

The activities-based exclusion also appropriately recognizes compelled-speech rights. *Abood* requires not that there be no infringement on compelled-speech rights,<sup>249</sup> but rather that any infringement on these rights be germane to a "vital policy interest." Under the activity-based exclusion, dissenters are required to fund only that speech necessary to the government's interest. While the university's interest in creating a public forum is recognized and sufficiently important, its means still must be narrowly tailored to meet that interest. Preserving uncensored discussion and debate—even political or ideological debate—within the university forum is narrowly tailored to meet this interest. Supporting political or ideological activities outside of the forum is not so closely tailored. There are alternative ways for students to become involved in lobbying and political campaigns,<sup>250</sup> but there is no other way for the university to ensure that students are exposed to a campus-wide public forum for discussion and debate.

Finally, the activities-based exclusion leaves the university more discretion than group-based exclusions to fund those activities it feels will best supplement education. Within the *activity* restrictions prescribed by the courts, the universities remain free to recognize whatever *groups* they feel will best supplement classroom education. In fact, many universities have similar limitations already.<sup>251</sup> In sum, the universities would maintain the flexibility to create a public forum (or not) and to choose what groups (within the commands of *Rosenberger*) it is most

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Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510, 2514-15 (1995) (quoting University of Virginia's guidelines).

248. See *supra* notes 185-190 and accompanying text (describing restrictions on political speech that the court upheld).

249. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991). In fact, *Abood* and its progeny specifically acknowledge there is some infringement inherent in serving the state's interest. See *id.*

250. See *Galda v. Rutgers*, 772 F.2d 1060, 1065-66 (3d Cir. 1985) (recognizing students could learn the same skills offered by off-campus PIRG through permissibly funded on-campus activities).

251. See *supra* note 247 and accompanying text. While many schools enforce their partisan speech exception only against groups like the Young Republicans and College Democrats, see *Newbart*, *supra* note 22, at 17, it would not be difficult to expand this exception under the activities-based exclusion.

beneficial to include in that forum. Finally, the university would not be precluded from giving students exposure to more political activities through curricular experiences such as seminars, internships, and independent studies.

#### B. APPLICATION OF THE ACTIVITIES-BASED REMEDY

Courts should leave it within the universities' discretion to apply the activities-based exclusion. Universities need only ensure that mandatory student fees not be used for nongermane political or ideological activities, even temporarily. The universities could choose to base their funding allocations on the activities themselves. Under this method, all activities directed toward campus could be funded, regardless of in what other activities the groups might engage. The universities also could choose to fund those groups that engage in activities within the forum and require those groups to keep an accounting demonstrating that the funds were used only for permissible speech activities. Finally, the university could require those student groups wishing to participate in the forum as well as engage in activities not funded through the forum to create two separate student organizations, one which would be eligible for funding and one which would not. All of these methods would satisfy *Abood*.

While the *Southworth* court suggested that *Abood* and its progeny require that no organization be funded for permissible activities if it also engages in impermissible activities,<sup>252</sup> this was an inaccurate application of *Abood's* requirements. Rather, *Abood* prohibited a situation where all would contribute equally to the union, and then the dissenters' money would be used to fund only germane activities, thereby freeing more of the non-dissenters dues for nongermane activities.<sup>253</sup> The Court instead required that each dues-paying member pay a pro rata share of the germane costs.<sup>254</sup>

In each of the methods suggested above, the dissenters will pay only their pro rata share of germane activities within the forum. Any additional, nongermane activities the groups wish to engage in must be funded through voluntary funds. Thus, through any of these applications, the activities-based exclusion

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252. See *supra* note 145 and accompanying text.

253. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977).

254. See *id.* at 238 n.35.

will ensure an appropriate balance of the public forum, compelled association, and academic freedom.<sup>255</sup>

### CONCLUSION

Mandatory student fees implicate three distinct First Amendment interests that, when considered individually, often will lead courts in conflicting directions. Because fees systems create limited public fora, student groups have a right not to be excluded on the basis of their messages. Conversely, dissenting students have a right against compelled funding of political or ideological speech with which they disagree. Finally, universities—under the theories of academic freedom—have rights to create fees-funded fora to supplement the educational experiences of their students. These conflicting rights must be balanced carefully by the courts in fees cases.

No satisfactory approach to this balancing 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. While the public forum and compelled speech issues would be nonissues if the universities funded no speech, this solution does not adequately recognize the academic freedom of the universities.

The courts need to acknowledge all three of these interests and balance them carefully. The best balance can be achieved by an activities-based exclusion, which would allow all groups to be eligible for funds, but would exclude certain political activities from funding. This approach would promote the greatest access to the forum while excluding from funding those *activities* most offensive under the compelled-association doctrine. Finally, it would allow the universities to continue—with the most possible discretion—to supplement classroom activities with a public forum that they have found beneficial to students' educational experiences.

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255. See 957 F.2d 991, 1002 (2d Cir. 1992).