"Fee Speech": First Amendment Limitations on Student Fee Expenditures

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"Fee Speech": First Amendment Limitations on Student Fee Expenditures

INTRODUCTION

A number of college campuses are currently experiencing a student uprising. The rebellion is less visible than the violent demonstrations of the turbulent sixties, yet no less significant. It attracts less attention because the battlefield is now a courtroom rather than a campus lawn. Tear gas, billy clubs, and stones have been replaced by cunning attorneys and sharp legal reasoning. Many people are unaware of the controversy, yet it is of intense interest to all concerned about higher education. The outcome could have a significant effect on the functions of public colleges and universities.

The confrontation involves a number of college students enrolled in state institutions1 who challenge the policy of using mandatory student fees2 to finance political or ideological activities. These students consider such expenditures analogous to compelled subsidization of views they consider repugnant. Allegedly this practice violates the dissenter's freedom of speech3 and the corresponding right not to speak,4 as guaranteed by the first

1. In deciding if a constitutional issue is in fact present, it must be determined if the act in question involves a state action. The two pronged test for identifying a state action is: "[a] the entity must be endowed with governmental powers such that it performs a state function or exercises state authority, and [b] there must be a close nexus between the government and the challenged action such that the action 'may be fairly treated as that of the state itself.'" Foster v. Ripley, 645 F.2d 1142, 1146 (D.C. Cir. 1981) (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

This Comment deals with state institutions which levy tuition and fees pursuant to state statute and are subsidized by state budget allocations, thereby clearly within the meaning of a state action.

2. "Fee" defined: "a charge fixed by law or by an institution (as a university) for certain privileges or services." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 833 (1971). Student fees are levied upon students as a means of financing a variety of services including health centers, entertainment and athletics. This article focuses on fees appropriated for politically oriented campus activities.

3. Less frequently advanced is the argument that a particular fee usage is in violation of a state statute. Such an argument in California, for example, would likely call attention to the California Administrative Code section 42403 which states: "Funds of an auxiliary organization shall be used for purposes consistent with Board of Trustees and campus policy, and shall not be used: (1) To support or oppose any candidate for public office, whether partisan or not, or to support or oppose any issue before the voters of this state or any subdivision thereof . . . ." CAL. ADMIN. CODE title 5, R. 42403(c) (1981).

This Comment focuses on the constitutional rather than legislative challenges.

4. This interpretation can be traced back to the works of Thomas Jefferson and James Madison. See infra note 92 and accompanying text; Steier v. New York State

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amendment to the Constitution of the United States. The activities vary, but they have a common denominator. They all advocate a political or ideological philosophy. For example, student dissenters frequently challenge campus newspapers, guest speaker programs and special-interest organizations. They urge that political views expressed must be funded by voluntary contributions not involuntary remittances.

This Comment examines the plausibility of the students' constitutional challenges as measured against the constitutional rights of universities to present controversial ideas for consideration by the academic community. Included is an analysis of relevant appellate court decisions which have applied varying analyses while consistently holding for the universities. Following this discussion is a proposed analytical scheme which is more comprehensive than any employed by the courts to date. The proposal is derived from a recent United States Court of Appeals decision, and is offered in an attempt to initiate discussion from which an analysis capable of consistent use by the courts and litigants might emerge. The Comment continues with an analysis of a recent California Court of Appeal decision upholding the use of student fees to provide abortion services to students. Finally, to measure its versatility and limitations, the proposed analytical scheme is applied to the facts of this unusual case.

Educ. Comm'r, 271 F.2d 13 (2nd Cir. 1959); see also Gibbs & Crisp, The Question of First Amendment Rights vs. Mandatory Student Activities Fees, 8 J. L. & Educ. 185 (1979) [hereinafter cited as Gibbs & Crisp].

5. The first amendment to the United States Constitution states as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

The first amendment is made applicable to the states via the 14th amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925). It need be noted that this issue is independent of the broader issue regarding the constitutionality of compelling students to pay activities fees in general, irrespective of their ultimate use. For a discussion of this issue; see Gibbs & Crisp, supra note 4, at 185-86.


8. Considered will be state and federal cases from a variety of jurisdictions, including California. References are to California statutes which sufficiently reflect state statutes regarding student fees.

I. THE IMPOSITION OF STUDENT FEES

At the commencement of each academic term, students must pay an activities fee\(^{10}\) as a precondition to enrollment.\(^{11}\) The fees are imposed in order to finance a variety of extracurricular activities, thereby providing students a diversified education.\(^{12}\) State colleges and universities are given broad latitude by legislatures to accomplish this objective, including the power to impose mandatory student fees.\(^{13}\)

In California, for example, the state legislature has enacted a series of statutes mandating the collection of student fees for specific uses.\(^{14}\) These statutes supplement other laws which authorize college and university governing boards to implement programs and policies to further efficient use of the campus.\(^{15}\) The California Constitution limits this power only to the extent it exceeds the law.\(^{16}\) Fees allocated for extracurricular activities are distributed regardless of whether the students desire to financially support the activities.\(^{17}\)

11. California Education Code section 89300 provides in pertinent part:
   Payment of membership fees pursuant to this section shall be a prerequisite to enrollment in the college or university, except that if sufficient funds are available any state college or university student may at his option and subject to the regulations of the trustees establishing standards in that regard, agree to work off the amount of the fee . . . .
15. The California Education Code section 72233 authorized the governing board of any community college district to act in any manner not inconsistent with the law or the purposes for which school districts are established. CAL. EDUC. CODE § 72233 (Deering 1978).
16. The California Constitution empowers the board of regents to act as it deems appropriate to effectuate the administration of its trust. The board of regents is a corporation having full powers of organization and government. CAL. CONST. art. IX, § 9.
17. The Constitution of California states: "The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established." CAL. CONST. art. IX, § 14.
18. Arrington V. Taylor, 380 F.Supp. 1348, 1351-52 (M.D. N.C. 1974). At the University of North Carolina, for example, student activities fees are collected and disbursed in the following manner:
Constitutional challenges to a university's discretionary power require special care. Courts are presented with the delicate task of balancing two competing interests: on one hand, the traditional desire for a collegiate atmosphere of learning, debate, dissent, and controversy; on the other hand, the right of the individual to be free from compelled support of a cause which is distasteful. One court described the delicacy of the balance: "If we allow mandatory financial support to be unchecked, the plaintiffs' rights may be meaningless. On the other hand if we allow dissenters to withhold the minimal financial contributions required we would permit a possible minority view to destroy or cripple a valuable learning adjunct of university life."

The "valuable learning adjunct of university life" alluded to by the court concerns student exposure to an infinite range of ideas, theories, and beliefs in an arena designed for this very purpose. The university as defendant seeks to protect this valuable learning experience from possible decay caused by a rash of dissenter challenges.

II. THE UNIVERSITY POSITION

The philosophy embraced by universities is that he who "seeks knowledge and truth must hear all sides of a question." Arguably, our educational, political, and legal systems operate on the premise that truth emerges from the zealous advocacy of conflicting ideas. Defendant universities perceive their purpose to be the advancement of this principle, thereby justifying any incidental impact upon the dissenter's rights due to student fee usage.

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Each student is billed for the mandatory Student Activity Fee along with his other obligations to the University. As payments are made by students, the collections are deposed by University employees in the North Carolina National Bank in a Student Activity Fee account. A separate bank account is maintained... for the proceeds of the Student Activity Fees which were appropriated by the Campus Governing Council and its predecessor, the Student Legislature. When employees or vendors are to be paid from the Student Activities Fee proceeds in accordance with an appropriation of the Campus Governing Council, a requisition is signed by the fiscal representative of the organization on whose behalf payment is being made, and a check payable to the employee or vendor is drawn by the Director of the Student Activities Fund Office on the Student Government account... [the account] is then reimbursed...

20. Id. at 104-05, 542 P.2d at 768.
21. Id. at 105, 542 P.2d at 768-69.
Some argue that great deference need be given to university officials in determining policies to effectuate this purpose. The United States Supreme Court decisions in Tinker v. Des Moines Independent Community School District and Healy v. James support the proposition that students possess the constitutional right of free expression. The exercise of this right was recognized by the Court as important to the free exchange of ideas. These cases seemingly support the need of undisturbed university policy aimed at ensuring exchanges of opinion on campus.

In Tinker, a group of parents and teenage school children coalesced to publicize their objections to the Vietnam conflict. In protest, these individuals wore black armbands during the 1965 Christmas holiday season. The principals of the Des Moines community schools became aware of the plan and adopted a policy that any student wearing an armband to school would be asked to remove it. Refusal would result in suspension until the student returned without the armband. Several students were suspended under this policy. The federal district court upheld the constitutionality of the school principals' actions, concluding that the policy was a reasonable method to prevent disturbances of school discipline. The decision was upheld on appeal. The United States Supreme Court reversed, holding the wearing of armbands to be closely akin to "pure speech" which is entitled to comprehensive protection under the first amendment. Thus the school regulation prohibiting armbands violated the students' rights of free speech. Presumably, this finding of free

27. Id. at 171.
28. Tinker, 393 U.S. at 504.
29. Id.
34. This freedom is not absolute. Had the principals reason to anticipate interference with the rights of other students, the action would likely have been upheld. However, fear or apprehension of disturbance was held insufficient to overcome the right to freedom of expression. In the words of the Court: "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in
speech implies an extension of this right to college students as well. Both groups of students have the same right to express their views in school.35 This was the express holding of the Court in 
_Healy v. James_36

In _Healy_, a number of college students organized a local chapter of Students for a Democratic Society (SDS) and filed a request for official recognition as a campus organization.37 Despite a college committee’s recommendation for approval,38 the college president rejected the application. The president disapproved of the organization's publicized philosophies and protests, considering them to be antithetical to the college's policies.39 In its landmark decision the Court held that nonrecognition of a student organization may not be based on mere disagreement with the philosophies of the particular student group.40 The Court reiterated its earlier finding that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”41

The proper limitations of students’ freedom of expression are clearly enunciated in _Healy_. The Court considered it perfectly

the forbidden conduct would ‘materially and substantially interfere with the requirements [of] proper discipline in the operation of the school,’ the prohibition cannot be sustained.” _Tinker_, 393 U.S. at 509 (citing Burnside v. Byars, 363 F.2d 744, 749 (1966)). See, _Burnside_ 363 F.2d at 749 wherein the Fifth Circuit Court of Appeals ordered high school authorities be enjoined from enforcing a regulation forbidding students to wear “freedom buttons.”

35. W. MILLINGTON, _supra_ note 22, at XXVIII.
37. Case law indicates that it is constitutionally permissible for colleges to require a student organization to apply for official recognition. Typical requirements include: (a) statement of purpose of the organization, and (b) names of its officers and assurance that the organization will abide by reasonable college regulations. American Civil Liberties Union v. Radford College, 315 F. Supp. 893, 896 (W.D. Va. 1970); Eisen v. Regents of the University of Cal., 269 Cal. App. 2d 696, 75 Cal. Rptr. 45 (1968). The _Healy_ Court reiterated this principle. _Healy_, 408 U.S. at 188.
38. The Student Affairs Committee, composed of four students, three faculty members and the Dean of Student Affairs, voted six to two to recommend recognition.
39. _Healy_, 408 U.S. at 187.
40. _Id._ at 187, 188. The opinion was authored by Powell, J., who expressed the view of eight members of the Court. Justices Douglas and Rehnquist and Chief Justice Burger wrote separate concurring opinions.

The Court quoted from the dissent written by Justice Black in _Communist Party v. Subversive Activities Control Bd._, 367 U.S. 1, 137 (1961) (Black, J., dissenting): “I do not believe that it can be too often repeated that freedoms of speech, press, petition and assembly . . . must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.” _Id._

41. _Id._ at 180 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)). The Court stated the frequently quoted passage: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” First amendment rights must always be applied “in light of the special characteristics of the . . . environment.” _Id._ (citing _Tinker_ v. _Des Moines Indep. School Dist._, 393 U.S. 305, 506 (1969)).
proper for a college administration to prohibit any activity which interrupts classes, incites eminent unlawful action, or in any way interferes with the rights of other students to obtain an education.\textsuperscript{42} The burden of proof, however, lies squarely on the shoulders of the college to justify the rejection of an application for recognition.\textsuperscript{43}

Universities rely heavily on these and other cases which stress the value of the exchange of ideas both in and outside the classroom. This line of argument, however, begs the question. The desirability of an exchange of beliefs and ideas is not at issue here. Dissenting students have not argued that the university should not be a "marketplace of ideas" as envisioned by the \textit{Healy} Court.\textsuperscript{44} On the contrary, these students often participate in campus activities.\textsuperscript{45} Their concern regards the practice of using their fee money against their wishes to promote political activity. Freedom to associate\textsuperscript{46} and advocate views is arguably different from compelling individuals to support these views with their money, albeit indirectly. Professor Tribe, in examining a similar issue involving labor union dues, suggested "[a] better solution might well be to require ideological activities . . . to be financed from voluntary contributions . . . ."\textsuperscript{47} The dissenting students could argue that organizations wishing to advocate philosophies are not burdened by requiring their activities to be funded by donations from mem-

\textsuperscript{42} \textit{Id.} at 189. The Court stated: "[T]he critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not." \textit{Id.} at 192.

\textit{See also} Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976) wherein the court stated: "[A]sociations devoted to peaceful advocacy . . . or social acceptance of sadism, euthanasia, masochism, murder, genocide . . . to list a few, must be granted registration, upon proper application and indicated compliance with reasonable regulations, if [the public college] continues to 'register' associations." \textit{Id.} at 167 (Markey, C.J., concurring).

\textsuperscript{43} \textit{Healy}, 408 U.S. at 184. In discussing the burden of proof, the Court noted that this precise issue had not come before it previously. It therefore analogized by discussing guilt by association cases in which the burden is on the government in "establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." \textit{Id.} at 186 (footnote omitted).

\textsuperscript{44} The Court noted: "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." \textit{Id.} at 180, 181 (citations omitted).


\textsuperscript{46} The right of people to assemble peaceably or to associate together is protected against federal action by the first amendment and against state action by the 14th amendment. NAACP v. Alabama, 357 U.S. 449 (1958). The freedom of "association" is not specifically protected, but it has developed as part of the first amendment freedoms which lie at the foundation of a free society. DeJonge v. Oregon, 299 U.S. 353 (1937).

\textsuperscript{47} L. Tribe, \textit{American Constitutional Law}, § 12-4 n.5 (1978).

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bers and sympathizers. Such a requirement would permit a marketplace of ideas that does not compromise the rights of those who choose not to participate. In response, the university could point out that a voluntary funding scheme would decrease available funds, thereby causing a marked reduction in campus advocacy, a detriment to all concerned.

The United States Supreme Court has not yet confronted the problem of student activities fees.\textsuperscript{48} It has ruled, however, on the constitutionality of labor union expenditures of mandatory dues on political activities unrelated to its primary role as collective bargaining agent for its membership.\textsuperscript{49} The student dissenters have contended that the facts involved in the labor union context are analogous to the student fee issue, thereby warranting a similar result.\textsuperscript{50}

III. THE STUDENT DISSENTERS' POSITION

It is difficult to estimate the popularity of the student dissenters' position among student populations generally. Most students simply pay their fees with little concern over the subsequent use of the money. Nevertheless, even if only a small minority object, the United States constitutional guarantees are invoked.\textsuperscript{51} The first amendment would have little meaning if its guarantees were available only to the majority or substantial minority.\textsuperscript{52} The true value of the first amendment is its protection of sentiments unacceptable to the majority.\textsuperscript{53}

In challenging the constitutionality of certain student fee ex-

\textsuperscript{48} Consideration has been limited to the right of organizations to be recognized for the sole purpose of access to campus meeting facilities and media communication. On this point, the Court noted: "If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students."\textsuperscript{50} Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). The Court held that the first amendment prohibited unions from requiring contributions for support of an ideological cause to which the union member might be opposed. See infra note 82 and accompanying text.

\textsuperscript{49} See also infra note 82.

\textsuperscript{50} Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983).

\textsuperscript{51} Dept' of Educ. v. Lewis, 416 So. 2d 455 (Fla. 1982).

\textsuperscript{52} Id. at 461. See also Kingsley Int'l. Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684 (1959), in which Justice Stewart stated: [Freedom of speech] "is not confined to the expression of ideas that are conventional or shared by a majority."\textsuperscript{53} Id. at 689.

\textsuperscript{53} The First Amendment even protects the right to express the view that our constitutional form of government should be overthrown by illegal means."\textsuperscript{55} See also McNamara, 2000 FAMOUS LEGAL QUOTATIONS 224 (1967).
penditures, some dissenters contend that the United States Supreme Court has never permitted an entity to collect compulsory fees for political or ideological purposes without the knowing consent of the contributor.54 Indeed, the Constitution does prohibit the government from prescribing what is orthodox in politics, religion, or other matters of opinion.55

Appellate courts have upheld a university's discretionary implementation of academic policy.56 The courts' attitude has generally been one of judicial nonintervention.57 Litigation over student fee expenditures has reflected this attitude.58 As a result, student litigants typically seek support from case law involving analogous factual situations outside the academic community. Most often relied upon are labor union cases decided by the United States Supreme Court.59 When examined as a series, these holdings reveal a tendency by the Court to protect fee payors from compelled support of political activities that are not germane to the union's central purpose as a collective bargaining agent for the rank and file.60 The student dissenters hope to persuade various state and federal appellate courts to apply these decisions by analogy and thereby similarly protect their interests.

The United States Supreme Court first encountered the issue in the 1961 companion cases, *International Association of Machinists v. Street*61 and *Lathrop v. Donohue*.62 The constitutionality of the controversial expenditures, however, remained unresolved until 1977 when the Court decided *Abood v. Detroit Board of Education*.63

In *Street*, the union used a portion of mandatory union dues, over employees' objections, to support candidates for the offices of President and Vice President of the United States, as well as a number of congressional seats.64 Those funds were also used to propagate political and economic doctrines and to promote legis-

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54. Brief for Appellant at 10, Galda v. Bloustein, 686 F.2d 159 (3d Cir. 1982). The argument continues that compulsory collections are limited to the advancement of a legitimate government interest, and the proceeds are not used for political purposes.
57. *Id.*
59. See infra notes 61-63 and accompanying text.
64. *Street*, 367 U.S. at 744 n.2.
relative programs which were opposed by the plaintiffs. The authority to collect dues was derived from a union shop agreement negotiated pursuant to the Railway Labor Act. Dissenting employees asserted that use of dues in this manner violated their constitutionally guaranteed freedom of speech.

The United States Supreme Court invalidated the expenditures, but not on constitutional grounds. It held when an employee gives the union notice of his opposition to certain political causes, the union may not spend the employee's dues money to support those causes. The Court considered it unnecessary to determine the constitutional question since the Railway Labor Act could reasonably be construed as denying the union authority to override the employee's objection. In so doing, the Court invoked the principle that "[w]hen the validity of an act of the Congress is drawn in question . . . this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

The Court determined that using dues to support candidates for

65. Id. at 745 n.2.
66. A "union-shop agreement" is one under which affected employees are not required to actually become members of the union, but are required to pay "service fees" bearing a relationship to union dues to help defray the collective bargaining costs of the agent-union which acts as the exclusive bargaining agent of all affected employees, union members and non-members alike. See 48 Am Jur 2d Labor and Labor Relations §§ 12-20, at 355-56, 361 (1967); Falk v. State Bar of Mich., 411 Mich. 63, 90 n.12, 305 N.W. 2d 201, 205 n.12 (1981).
68. The trial court concluded that the exactation and use of the dues money violate[s] the United States Constitution which in the First, Fifth, Ninth and Tenth Amendments thereto guarantees to individuals protection from such unwarranted invasion of their personal and property rights, (including freedom of association, freedom of thought, freedom of speech, freedom of press, freedom to work and their political freedom and rights) under the cloak of federal authority.

Street, 367 U.S. at 745 n.3.

The Georgia Supreme Court likewise viewed the issue as a constitutional one. International Ass'n of Machinists v. Street, 215 Ga. 27, 43-44, 108 S.E.2d 796, 807 (1959).
69. Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961). See Validity and Construction of 1951 Amendment to Railway Labor Act, Annot., 6 L. Ed. 2d 1559, 1565. The Court noted that the support of political causes "[i]t is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes . . . ."
70. Street, 367 U.S. at 750. See also Merrill, Limitations Upon the Use of Compulsory Union Dues, 42 J. Air Law & Comm. 711, 714-15 (1976) [hereinafter cited as Merrill].
71. Street, 367 U.S. at 749 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1931)). Justice Black, in dissent, viewed the Railway Labor Act as authorizing union expenditures of the kind objected to in the instant case, declaring that the statute, as so interpreted, violated the freedom of speech guaranteed by the first amendment: "The First Amendment . . . deprives the Government of all power to make any person pay out one single penny against his will to be used in any way to advocate doctrines or
public office was beyond the union's authority as accepted by Congress. The Railway Labor Act was interpreted as authorizing dues expenditures solely to defray expenses incurred while negotiating collective bargaining agreements or settling grievances and disputes. The Court concluded that Congress authorized union shop agreements with only these expenditures in mind.

In Lathrop the United States Supreme Court attempted to resolve the question of whether the freedom of speech of a disserter is violated when mandatory dues are used to advance views to which he is opposed. The disserter in this instance was an attorney who opposed the use of state bar association dues to fund the lobbying efforts of the Wisconsin Bar Association (WBA). The WBA sought to promote law reform by lobbying for changes in statutory and constitutional provisions.

The plaintiff protested a court order which required membership in the state bar association as a condition to practicing law. He asserted that the requirement violated his freedom of association while the dues expenditures violated his freedom of speech. The Court rejected the freedom of association claim, since the plaintiff was not actually required to participate in bar association activities. The Court reasoned that the costs of improving the profession should be shared by the beneficiaries of the improvements. More relevant to student fee litigations is the freedom of speech claim which the Court failed to decide.

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views he is against, whether economic, scientific, political, religious or any other." Id. at 791 (1961) (footnote omitted) (Black, J., dissenting).

72. Id. at 768-69.

73. Id. at 768-70. A collective bargaining agreement is an agreement between an employer and a labor union which regulates terms and conditions of employment. The joint and several contract of members of a union made by officers of the union as their agents. BLACK'S LAW DICTIONARY 239 (rev. 5th ed. 1979).

74. Street, 367 U.S. at 768.


76. Id. at 822.

77. The Wisconsin Supreme Court integrated the Wisconsin Bar by an order which created the State Bar of Wisconsin on January 1, 1957 under rules and bylaws promulgated by the Court. The rules and bylaws require mandatory membership. In re Integration of the Bar, 273 Wis. 281, 77 N.W.2d 602 (1956).

78. See supra note 46 and accompanying text.

79. Lathrop, 367 U.S. at 843. For a discussion of the right of association as applied to labor unions, student associations and other groups; see The Supreme Court and the First Amendment Right of Association, Annot. 33 L. Ed. 2d 865.

80. Lathrop, 367 U.S. at 843.

81. Only five justices treated the issue. Of these five, three Justices Harlan, Frankfurter, and Whittaker, upheld the constitutionality of using compulsory dues to finance the Bar Association's legislative activities. Justice Harlan argued that holding the defendant would bring into doubt the constitutionality of government enactments such that even federal income tax would be suspect. Two Justices, Black and Douglas, upheld the constitutional freedom of speech. Justices Brennan, Clark, and Stewart and Chief Justice Burger concluded that the issue was not ripe for decision. The
Sixteen years later the United States Supreme Court finally settled the issue of union dues expenditures in \textit{Abood v. Detroit Board of Education},\textsuperscript{82} the leading case in this area of law. In 1969, the Detroit Board of Education and the Detroit Federation of Teachers\textsuperscript{83} consummated a collective bargaining agreement. Included within its provisions was an "agency-shop" clause.\textsuperscript{84} In protest, two class actions were filed in state court by groups of teachers against the board and union. The actions were eventually consolidated by the Michigan Court of Appeals. The plaintiffs refused to pay dues, protesting the unconstitutional use of dues for political, ideological, and religious activities unrelated to collective bargaining.\textsuperscript{85} The complaint prayed the agency-shop clause be declared invalid under the Constitution on grounds it violated their first amendment freedom of association.\textsuperscript{86}

In its consideration of the freedom of association claim, the Court recognized the constitutional liberties at stake when one is compelled to financially support an opinion. Justice Stewart, writing for the majority,\textsuperscript{87} stated:

\begin{quote}

The fact that the appellants are \textit{compelled} to make, rather than \textit{prohibited} from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.\textsuperscript{88}

\end{quote}

The Court went on to identify two general categories of dues expenditures, those which are related to the union's role as a collective bargaining agent, and those which are unrelated to such a role.\textsuperscript{89} It held that the policy of using mandatory dues to finance

\begin{itemize}

\item record did not show what specific measures were opposed by the plaintiff, or the extent to which the State Bar utilized dues for specific purposes to which he had opposed. The Court eventually discarded this required showing in its decision in \textit{Railway Clerks v. Allen}, 373 U.S. 113 (1963).

\textsuperscript{82} 431 U.S. 209 (1977).

\textsuperscript{83} The Detroit Federation of Teachers was certified as the exclusive representative of all teachers employed by the Board of Education. The union was certified in 1967 pursuant to \textit{Michigan Comp. Law} § 423.211 (1970).

\textsuperscript{84} \textit{See supra} note 66 regarding the agency shop clause.

\textsuperscript{85} \textit{Abood}, 431 U.S. at 213. The nature of these activities and the objections to them were not described in detail in the amended complaint.

\textsuperscript{86} The right of people to assemble peaceably or to associate together is protected by the first amendment against federal action and by the 14th amendment "due process" clause against state action. \textit{See supra} note 46.

\textsuperscript{87} Justice Stewart was joined by Justices Brennan, White, and Marshall. Justices Rehnquist and Stevens wrote separate concurring opinions. Justice Powell wrote a concurring opinion in which Chief Justice Burger and Justice Blackmun joined.

\textsuperscript{88} \textit{Abood}, 431 U.S. at 234-35 (emphasis added) (footnote omitted).

\textsuperscript{89} \textit{Id.} at 235-36. The court considered it unnecessary to the disposition of the
activities unrelated to collective bargaining was improper. The Court considered the practice coercive since the union members were not free to withhold their dues without fear of dismissal. The Constitution was interpreted as requiring these activities be financed only by the dues of those members who consent to such. Student fee dissenters rely on Abood because the Court acknowledged the serious constitutional infringement and its preference for voluntary contributions.

The United States Supreme Court upheld the policy of imposing mandatory dues for use to finance the union’s collective bargaining functions. The dissenters attempted to invalidate the policy on the ground that it compelled them to associate with the union. The argument was rejected for the same reason that it failed in Lathrop v. Donohue. The Court reiterated the congressional policy that labor peace is promoted by requiring employees who obtain the benefit of union representation to share in its cost. An argument can be made that the United States Supreme Court’s rationale in Lathrop and Abood defeats a student dissenter’s free speech claim. These cases seemingly suggest the costs of implementing a “marketplace of ideas” should be distributed among all students since all conceivably benefit. One significant distinction, however, hinders this contention. Clearly, union members directly benefit to some degree from collective bargaining. They enjoy increased wages and improved working conditions due to the union’s efforts, which are financed by union

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90. Abood, 431 U.S. at 235-36.
91. The agency shop agreement provided that a teacher who failed to fulfill his dues obligation was subject to discharge. Id. at 212.
92. Id. at 234-36. The Court considered the following statements. James Madison: “Who does not see . . . [that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" Thomas Jefferson: “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.” Id. at 234 n.31.
93. Id. at 234-35.
94. Id. at 235-36.
95. Id. at 213.
96. [These costs] entail [the] expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged “fairly and equitably to represent all employees . . . union and non-union,” within the relevant unit. Id. at 221 (citation omitted).
97. Id. at 221-22. Int'l Assoc. of Machinists v. Street, 367 U.S. 740 (1961); Railway Employees Dep't v. Hanson, 351 U.S. 225 (1956).
The college student, however, does not stand to automatically benefit from a high volume of advocacy on campus. Many students limit their involvement to classroom instruction. The benefits to those who choose to participate are remote and less concrete than the benefits received by employees. Thus it appears students do not stand in the same shoes as their labor union counterparts. Therefore, this theory of cost distribution may be inappropriate in the university context.

The delicacy of the student dissenter's position becomes evident at this point. On the one hand, they need to distinguish their situation from that of union members in order to avoid the application of the cost distribution theory. On the other hand, they need to demonstrate the strength of a labor union-university analogy as a prerequisite to applying the favorable dicta of Abood.

Clearly, comparisons exist between these two groups. For example, both union members and college students are required to pay a sum as a condition for participation. For the union member, participation is in the form of employment. For the student, it is the opportunity to matriculate as a student in good standing. In both situations, the tendered fee has been used to advocate political views over the objection of the payors. Finally, in both settings, the dissenter is without recourse other than discontinued participation. Despite the similarities, there are numerous distinctions between labor and higher education which cast doubt on the appropriateness of applying labor union cases by analogy.

IV. The Utility of the Labor Union-University Analogy

Generally, one first amendment case is distinguished from another by the particular facts involved. An act which is protected in one context might not warrant protection in another, even where there is consistency in the acts. A comparison of labor unions and universities reveals distinctions that hinder the dissenting students attempt at drawing an analogy.

The labor union and university are markedly different in sev-

98. Less direct are the benefits enjoyed by Bar Association members. The Supreme Court in Lathrop v. Donohue denied a freedom of association claim, considering it a legitimate state policy to require the costs of improving the quality of legal service to be incurred by "the subjects and beneficiaries of the regulatory program, [namely] the lawyers . . ." Lathrop, 367 U.S. at 843. The Court did not elaborate on how attorneys would benefit.
99. See supra note 91 and accompanying text.
100. See supra note 11 and accompanying text.
101. MILLINGTON, supra note 22, at xxix.
102. Id.
eral significant respects. Perhaps foremost is the distinction in purpose. The union's existence is based upon the role of bargaining agent for its membership. Its primary objective is to negotiate with management in an effort to obtain improved working conditions and better wages for members. A related function is providing assistance in settling grievances and disputes. The university, by contrast, is a cultivator of ideas and philosophies. It has, as its primary objective, the acquisition, dissemination and interpretation of knowledge.\textsuperscript{103} It offers to students the opportunity to prepare for productive, rewarding participation in society. The university normally does not act as an agent or representative for students or faculty.

A second fundamental difference between labor unions and universities is their respective structures. The labor union is an association.\textsuperscript{104} Membership is generally homogeneous. It typically consists of individuals employed in the same vocation or profession who possess similar values and interests.\textsuperscript{105} Solidarity is the union's strength. To perpetuate solidarity, union membership is normally a requirement for participation.\textsuperscript{106} The university is contrapositive to the labor union. The typical campus consists of students and faculty representing a broad spectrum of values, philosophies, and cultures. Perhaps the sole common objective is participation in the education process. Additionally, a university, unlike a labor union, may not compel membership in an association.\textsuperscript{107}

\begin{footnotesize}
\begin{enumerate}
\item Most recently the Fourth Circuit Court of Appeals rejected a student dissenters' argument in Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983). The court distinguished the central purposes of the union and university and decided "that funding by mandatory student fees is the least restrictive means of accomplishing an important part of the University's central purpose, the education of its students." \textit{Id.} at 480. \textit{See also} Larson v. Board of Regents, 189 Neb. 688, 690, 204 N.W.2d 568, 570 (1973).
\item An association is a term of vague meaning used to indicate a collection or organization of persons who have joined together for a certain or common object. \textit{Black's Law Dictionary} 111 (rev. 5th ed. 1979).
\item Some unions are industrial unions, composed of workers in a particular industry; others are craft unions of specialized workers or associations of highly skilled artists and professionals. Although varying significantly in size, power, age, character and historical significance, each exercises a degree of sovereignty over a particular group of workers. \textit{The Greenwood Encyclopedia of American Institutions—Labor Unions} xi (G. Fink ed. 1977).
\item Where union membership is not a requirement, Congress has established a policy that peaceful labor relations are promoted by requiring non-union members, receiving benefits created by union efforts, to share in the costs. Thus the concept of "agency-shop fee." \textit{See supra} note 66 and accompanying text.
\item Assuming, arguendo that students were members of an association by requirement, an argument could be advanced that the views adopted by the association to which the dissenting member is opposed are imputed upon him in violation of his freedom of speech. This argument was criticized in Arrington v. Taylor. The court stated:
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A further impediment to the student dissenter is the possibility that these same labor union cases relied upon by the students can likewise be used as authority for the universities' premise. The United States Supreme Court in Street and Abbood determined the constitutional limitations on union dues expenditures by first defining the purpose of unions and then judging the use of dues on the basis of its relation to this purpose. Expenditures of dues on political activity not directly related to collective bargaining were deemed unconstitutional if involuntary. The Court logically concluded that if one can be compelled to share in the cost of collective bargaining in order to enjoy the benefits derived therefrom, those costs should be limited to those activities directly responsible for producing the benefits.

This rationale when applied to politically related student fee expenditures seemingly supports the university. Student fees are collected to finance extracurricular activities and facilities. The objective is to provide students an opportunity to engage in a number of organizations and activities which are closely related to the regular instructional program. Academicians consider this extracurricular involvement an integral part of quality post-secondary education, to which students arguably possess a property

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The difference in degree between, on the one hand, being required to affirm a belief or a particular position and adopt that belief as one's own and, on the other hand, being required to contribute dues to an association which may ultimately adopt views as a group contrary to those held by the dues payor, is of such a magnitude as to amount to a difference in substance.

110. Id. at 235-36. The Court's ruling applies only to those political expenditures that are unrelated to collective bargaining. The Court stopped short of drawing the hazy line between collective bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited. The Court describes the intricacies of drawing this line:

  The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process. We have no occasion in this case, however, to try to define such a dividing line.

Id. at 236.

111. The Court considered the underlying objective of the union shop arrangement: "A union-shop arrangement has been thought to distribute fairly the cost of these activities [collective bargaining] among those who benefit, and it counters the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation . . . ." Id. at 222; and concluded that activities unrelated to collective bargaining could not constitutionally be funded by mandatory dues without the consent of the dues payor. See id. at 234-36.

112. See supra notes 6, 14 and accompanying text.

113. Id.
right. The United States Supreme Court’s analysis of the union dues expenditures seemingly suggests, by analogy, that the student dissenter needs to demonstrate the challenged fee use to be noneducational or in some way outside the purpose of the university. It might be argued an expenditure designed to promote an exchange of ideas lies within the purpose for which fees are collected.

Under this analysis, proving a campus activity to be outside the scope of the university purpose poses an arduous task to the dissenting student. It has yet to be determined whether this one step approach most fairly resolves the question of limitations on student fee usage. With the exception of the nonintervention policy, courts have not developed a framework which thoroughly examines the controversy. Guidelines capable of consistent application have yet to be devised. A new approach is needed in which the rights of each party are clearly defined prior to applying guidelines to determine which rights are superior. The analysis would allocate burdens of proof in a manner specific to the student fee controversy. The practical effect of such an approach would be to give courts and potential litigants the guidance needed to evaluate the merits of arguments before proceeding with an adjudication.

V. TRADITIONAL APPROACHES

The need for a new approach becomes readily apparent upon surveying past appellate decisions regarding the controversial policy of using student fees for political advocacy. The courts have used a variety of analyses in reaching conclusions favoring the university. The decisions arguably contain both strengths and weaknesses. A new approach would ideally remedy the weaknesses and incorporate the strengths.

In Veed v. Schwartzkopf a student brought suit against the University of Nebraska, protesting the use of fees to pay for guest


115. In Galda v. Bloustein, the Third Circuit Court of Appeals reiterated this requirement: "[P]ersons objecting to the fee must establish that the challenged group functions essentially as a political action group with only an incidental educational component." 686 F.2d 159, 166 (3d Cir. 1982).


117. See infra notes 143-151 and accompanying text for the development of a new approach.

speakers and to finance the collegiate newspaper. The plaintiff sharply disagreed with philosophies expressed by many of the speakers, and the editorial philosophies adopted by the newspaper. He argued these expenditures were violative of his rights to freedom of speech, religion and association. The district court was not persuaded. It held the university was entitled to provide a forum of widely divergent opinions in a structure deemed appropriate by the Board of Regents. This discretion is “subject only to the limitations that the determination be not arbitrary or capricious . . . [or] imposing upon the student the acceptance or practice of . . . views repugnant to him or chilling his exercise of constitutional rights.”

The court concluded no constitutional infringement occurred, since the plaintiff remained free to associate himself with those philosophies which conformed to his own. It suggested that only where “the university assumes the role of advocate for the particular philosophy expressed by the speakers and the newspaper” would a constitutional question be raised.

A major weakness in Veed was the failure to recognize any infringement of the plaintiff’s rights. The decision strongly suggests that in the absence of demonstrating direct control by university officials over the fee use, no constitutional defect exists. This conclusion is inapposite with Abood v. Detroit Board of Education. Abood subsequently determined that compelled political contributions do have a direct impact upon a dissenter’s constitutional right to refrain from contributing, which falls within the penumbra of freedom of speech guarantees. To be consistent with the Abood analysis, the infringement of the plaintiff’s rights needs to be recognized before determining whether the infringement is justifiable. The court in Veed determined that an in-

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119. “Throughout the academic year, speakers are invited to appear at the university to speak on a wide range of topics. Funds to pay the fees and expenses of these speakers are provided from the mandatory student fees,” Veed, 353 F. Supp. at 151.
120. The Daily Nebraskan is substantially supported by student fee payments although some of its operating revenue comes from the sale of advertising space.
121. For example, the speaking engagement of columnist Jack Anderson, in which he addressed the candidacy of Carl T. Curtis for U.S. Senator. Veed, 353 F. Supp. at 151.
122. Id. at 152.
123. Id.
124. Id.
125. Id. To demonstrate advocacy on the part of the university, the court suggested a showing of significant control over the activity by the university administration. The plaintiff did not present evidence demonstrating such control.
126. Id.
128. Id. at 235-36.
129. Id. at 222.
fringement did not exist. Whether this conclusion would be different if made subsequent to Abood is, of course, conjecture. Nonetheless, in order to resolve this issue the analysis employed should recognize the rights of all parties before determining which rights are superior.

A second weakness in Veed is the uncertainty inherent in the "university-as-advocate" criteria suggested by the court. Again, the court held that in the absence of the university assuming the role of advocate for the political view under challenge, no violation of the dissenter's right could be found. The meaning of "assuming the role of advocate" is unclear and might possibly be interpreted in varying ways by the courts.

For example, the Veed court suggests that significant control over the fee-funded activity, such as selecting the guest speakers, or the editors of the campus newspaper, or perhaps controlling the newspaper's content would raise serious constitutional questions. These obvious examples aside, the court was not clear in drawing the line between those forms of control which constitute advocacy on the part of the university, and those which do not. A test which determines the extent of an individual's rights should be free from uncertainty.

Arrington v. Taylor involved facts similar to those in Veed. Students insisted their first amendment right of free speech was abridged by the imposition of fees that were ultimately used to fund the campus newspaper. The plaintiffs excepted to the newspaper's advocacy of views contrary to their own. The federal district court held against the students, concluding the subsidization did not violate their constitutional rights. It denied the presence of an infringement upon the plaintiff's rights since no evidence was presented which indicated the university acted as an advocate.

The true significance of Arrington lies in its depth of analysis. Rather than simply dismissing the students' claim as being subservient to the interest of the university, the court chose to discuss conceivable infringements on the dissenter's rights. For example, the court acknowledged that a dissenter could plausibly argue that

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130. Veed, 353 F. Supp. at 152.
132. Id. at 1360. The Daily Tar Heel is the student newspaper published at the university. The editor and other employees are paid by the Publications Board (a student government agency) from funds derived wholly or partly from university student activities fees.
133. Id. at 1363.
134. Id.
the challenged fee uses operate to drown out the convictions of individuals. In other words, student fees both increase the quantity of opinions conveyed on campus while simultaneously reducing the individual’s economic resources that could be used to advance the causes of his or her choice. The court dismissed this contention on two grounds. First, any reduction in one’s economic resources was incidental, therefore, insufficient to render the fee unconstitutional. Secondly, and more importantly, the campus newspaper under attack provided a needed “forum of expression” in which the dissenter was invited to participate.

The court emphasized that an open forum for the exchange of ideas is “at the core of the educational process.” By focusing on the concept of a “forum” the court succinctly identified the conflicting rights of free speech involved: the right to free expression versus the right to be free from compelled expression. From that point forward, the concept of the “open forum” would remain an integral part of any analysis of the student fee issue.

The Arrington court concentrated its attention on the newspaper. The opinion did not include discussion of the concept of a “forum” in relation to other student activities. Undoubtedly, a typical newspaper is an open forum. In addition to printing news items, it normally presents a cross section of opinions in the “editorial” and “letter to the editor” sections. However, student special interest groups which advance specific ethics are seemingly not forums. Therefore, criteria based upon this interpretation of a forum would deny fee allocations to special interest groups.

The universities might suggest an alternative to this interpretation of “forum.” Perhaps a forum need not be contained within each organization or activity. Instead, the concept of “forum” might encompass the entire campus community, with individual organizations as merely components. According to this scheme, the organizations as units would arguably have the right to advocate their philosophies.

The Nebraska Supreme Court decision in Larson v. Board of Regents suggests the contrary interpretation. Involving facts al-

135. Id. at 1361. A similar argument in the labor union context was recognized by the Ninth Circuit in Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1004 (9th Cir. 1970).
137. Id.
138. Id. at 1363. The court explained that the newspaper exposes “the student body to various points of view on significant issues, and (allows) students to express themselves on those issues.” Id. at 1362. See also, Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983).
140. 189 Neb. 688, 204 N.W.2d 568 (1973).
most identical to *Veed* and *Arrington*, the court rejected student challenges to the policy of allocating mandatory fees to the student newspaper and the visiting speakers program. The court, however, warned that if an entire activity has been directed toward a particular point of view, then a violation of constitutional rights might exist.\(^1\) \(^{141}\) *Larson* applied this test to the specific activities under attack rather than to student activities as a whole. This implies that each fee funded program standing alone need provide an open forum. Such an interpretation favors dissenters who take aim at a specific fee funded activity or a special interest organization that does not itself provide an open forum for opposing views.

Unfortunately, *Veed, Arrington*, and *Larson* raised the constitutional issue without resolving it satisfactorily. The ideal analytical approach must consider these unanswered questions. It would contain guidelines whereby only those situations which truly violate a dissenter's rights would be identified. To ensure this, it would assign burdens of proof in a manner certain to recognize the rights of each party. Most importantly, the analysis would focus on the allocation of fees, and the extent to which an "open forum" for expression is reflected in that allocation. In 1982, the Third Circuit Court of Appeals contributed significantly to the development of a workable framework in *Galda v. Bloustein*.\(^1\) \(^{142}\)

**VI. Galda v. Bloustein: A Workable Analysis Emerges**

The complexity of the student fee issue requires constructive analytical reasoning. *Galda v. Bloustein* stands in the forefront due to the fresh, systematic approach employed by the Third Circuit Court of Appeals. The court treated a number of component issues which, when considered together, suggest a viable analytical scheme. Because the scheme may conceivably favor a dissenter's freedom of speech in certain situations, *Galda* represents a departure from the policy of judicial nonintervention in the area of academic affairs.

The *Galda* court did not couch its analysis in terms of reform. The end result, however, was the emergence of an approach that has since been acknowledged with favor.\(^1\) \(^{143}\)

Although the facts in *Galda* are unique, the analysis is adapta-

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1. Id. at 690-91, 204 N.W.2d at 571. The court commented in regards to the speaker program that "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 no violation of the constitutional rights of the plaintiffs." Id.

2. 686 F.2d 159 (3d Cir. 1982).

ble to facts typically involved in earlier cases. In *Galda*, student newspapers and guest speaker programs were not the activities in controversy. Nor was the collection and allocation of the general student fees being challenged. What was challenged by several Rutgers University\(^\text{144}\) students was the collection of a mandatory fee\(^\text{145}\) for the express purpose of financing the activities of the politically active student run New Jersey Public Interest Research Group (NJPIRG).\(^\text{146}\) The NJPIRG fee was listed separately from other charges on the student term bill.

The plaintiffs contended that NJPIRG should not be entitled to student fee funding because it is a political organization.\(^\text{147}\) In fact, all the parties to the litigation agreed that NJPIRG, in addition to its educational function,\(^\text{148}\) also functions as a political, ideological student group.\(^\text{149}\) This being established, the students

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\(^\text{144}\) Rutgers University is the State University of New Jersey. Plaintiffs brought suit individually and upon behalf of all others similarly situated. Joining as defendants were Dr. Edward J. Bloustein, President of Rutgers University; Dr. T. Edward Hollander, Chancellor of Higher Education of the State of New Jersey; Walter K. Gordon, Dean of Rutgers Camden College of Arts and Sciences; and members of the Board of Governors.

\(^\text{145}\) Until 1978, the New Jersey Public Interest Research Group (NJPIRG) fee was $1.50 each semester. It was subsequently raised to $2.50 which amounted to approximately $100,000 annually for NJPIRG. 686 F.2d at 162 & n.6 (1982).

The authority of the University to impose such fees is derived from the New Jersey Statute which provides: "The board of governors shall have general supervision over and be vested with the conduct of the university. It shall have the authority and responsibility to: . . . (c) Disburse all moneys appropriated to the university by the Legislature, moneys received from tuition, fees, auxiliary services and other sources . . . ." N.J. STAT. ANN. § 18A:65-25 (West Supp. 1983).

\(^\text{146}\) NJPIRG is a non profit, politically unaligned corporation directed by students, employing non-student professionals such as lawyers and scientists on a full-time basis, and devoting its efforts to "constructive social change" by studying and working for change in such areas as consumer protection, environmental protection, occupational health and safety, and housing to name a few. [Among the states in which PIRG operates include] Arizona, California, Connecticut, Iowa, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, Pennsylvania, Ohio, Oregon, Texas and Vermont.


\(^\text{147}\) NJPIRG is not eligible for student activity funds because of its independent status. However, in March, 1972, Rutgers adopted a policy for funding student sponsored programs and organizations such as NJPIRG that would otherwise not qualify for university financial support. The policy was adopted after intense lobbying efforts by NJPIRG. See *Galda*, 686 F.2d at 161-62 for a discussion of the requirements for special funding.

\(^\text{148}\) The educational function is described as involving students in real life learning experiences by exploring the possibilities and difficulties of legal social change. *Id.* at 161.

\(^\text{149}\) Specifically, it is alleged that NJPIRG is an organization founded for the primary purpose of advocating specific ideological and political positions before the United States Congress and the legislature of New Jersey. Indicative of this is the NJPIRG brochure which includes in its list of accomplishments, the following:
alleged the disbursement of fees to and for NJPIRG required them to financially support views which they did not advocate, thereby violating their first and fourteenth amendment rights. In response, the university justified the expenditures by stressing NJPIRG's "legislatively recognized educational contribution to the university and its students." The case was ultimately remanded to provide the district court an opportunity to apply the standards developed by the court of appeals. These standards represent the important contribution toward the development of a reliable analytical scheme. They shall next be discussed before testing the overall scheme on a recent fact situation.

A. Establishing A Prima Facie Case

Fortunately, the Galda court chose to expressly assign the burdens of proof. Past decisions do not include this discussion and as a result potential litigants have not been given the guidance needed to assess the strength of their cases.

The court first noted with approval that the university has broad latitude in providing students with an opportunity to participate in, or oppose, the expression of a broad spectrum of ideology. Rather than holding for the university on the basis of this

-testifying before the Board of Public Utilities to oppose Jersey Central Power and Light's request to charge consumers for $113 million in costs resulting from the Three Mile Island accident.

—lobbying extensively for the Federal Middle Income Student Assistance Act. Galda, 686 F.2d at 161 n.5.

150. The students interpret the first amendment violation as follows: "The first amendment exists to protect the political right of the minority to be free from the dictates and the potential tyranny of the majority. The sole freedoms at risk are those of the 'minority' to be free from compelled support of NJPIRG and free from the burdens of repetative 'affirmative obligation' and self-identification." Brief for Appellant at 25, Galda v. Bloustein, 686 F.2d 159 (1982). The student plaintiffs continued:

such a [funding] scheme is unconstitutional because it compels students to support the political view of others. Infringement of this basic personal freedom is not justified, nor could it be, by any compelling government interest. Rather, the funding policy gives one political philosophy an unjustified advantage; the imprimatur of governmental approval . . . Brief for Appellant at 9, Galda v. Bloustein, 686 F.2d 159 (1982).

151. Galda, 686 F.2d at 164. Another argument advanced by Rutgers, and adopted by the district court was that the fee is not a condition of matriculation because no sanctions are imposed upon those that withhold their fee. The student response was that Rutgers represents the fee as one that is required for enrollment. Students, respecting the authority of Rutgers, pay the fee. Brief for Appellant at 12 n.1, Galda v. Bloustein, 686 F.2d 159 (1982).

152. Galda, 686 F.2d at 166.

policy alone, however, the court continued to outline the method by which the parties' claims should be evaluated.

The initial burden is upon the student dissenter to overcome the presumptive validity of the university's judgment that an organization contributes to the academic community and is thus deserving of fee funding. The court indicated that to accomplish this, "[t]hese persons objecting to the fee must establish that the challenged group functions essentially as a political action group with only an incidental educational component." The university would then be afforded an opportunity to counter this showing. Should the university fail, the student will have stated a claim for relief under the first and fourteenth amendments. The university, however, is given an opportunity to demonstrate an overriding state interest which would justify the infringement on the rights of the students. The state interest most typically asserted is the need for creating a diversified educational environment. If the university's contention cannot be sustained, the controversial expenditure is deemed unconstitutional.

This method of allocating burdens of proof is by no means unique. No court, however, faced with the student fee issue has elected to expressly apply it. This evidences the past unwillingness by most courts to recognize even the possibility of an infringement on the dissenter's free speech rights.

1973); Good v. Assoc. Students of Univ. of Wash., 86 Wash.2d 94, 105, 542 P.2d 762, 769 (1975) in support of this proposition.
154. Galda, 686 F.2d at 166.
155. Id.
156. The Court noted: "We do not rule out the possibility that, even in the face of an unrefuted prima facie showing, the university might demonstrate a compelling state interest by establishing the importance of the challenged group's contribution to the university forum." Id. at 166-67.
158. Galda, 686 F.2d at 166.
159. After a long evolution, it is today well established that the United States Supreme Court will apply a strict form of review to any governmental action which limits the exercise of one's fundamental constitutional rights. Included within these rights are the first amendment guarantees. For a discussion of other rights considered fundamental, see Nowak, CONSTITUTIONAL LAW 419, 458-61 (2d ed. 1983).

When it is shown that an infringement of a fundamental right has occurred, the state is required to demonstrate a "compelling" interest whose value is so great that it justifies the limitation of fundamental constitutional values. Id. at 524. The Supreme Court has determined that the state interest in question must be one of "vital importance" in order to justify the infringement. A state interest is not of vital importance if there exists a less drastic means of achieving the same basic purpose. Elrod v. Burns, 427 U.S. 347, 362-63 (1976); In Shelton v. Tucker all teachers in Arkansas were required by statute to provide a list of all organizations and causes to which they contributed over the last five years. The court struck down the disclosure statute because "[i]t went] far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." 364 U.S. 479, 490 (1960).
The *Galda* court did not assess precisely how much of an “educational component” would be necessary to uphold the presumption favoring the university. However, the court did make a significant point while discussing NJPIRG’s political nature. To be sufficiently educational, the activity need be one that is directly connected to the university structure, thus analogous to a classroom function. To illustrate its point, the court noted that if students work for a political action group which is independent from the school, it could not be contended that such a group is entitled to student fees merely because student participants gain education through participation. The court, unfortunately, went no further than this simple illustration in suggesting what is meant by “educational.”

In an attempt to identify the threshold for the status of “educational,” the Attorney General of Maryland has stated that the activity in question must be “necessary and convenient” to promote the “well-being” of the academic community. Using this standard, the Attorney General concluded that state institutions could not impose a mandatory PIRG fee. His opinion, however, does not elucidate the issue because reasonable minds may differ concerning what is “necessary and convenient” or which activities contribute to the “well-being” of the community. Ultimately, it is the university governing board that makes this determination. Thus, the argument is circular: a university may not impose fees for use by groups which do not contribute to the community’s well-being, yet the university has the discretion to determine what constitutes such a contribution. It appears that the term “educational component” remains an ambiguity that is left for future courts to interpret.

Assuming that a student dissenter is successful in establishing a prima facie case, the university will normally attempt to demonstrate an overriding, or compelling interest which would justify the student fee allocation. Again, this generally takes the form of the society’s interest in providing a learning environment abundant in ideas, philosophies, and opinions. Universities maintain that student fee contributions to campus newspapers, speaker pro-

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160. *Galda*, 686 F.2d at 166.
161. *Id*.
163. *Id*.
164. See supra note 156 and accompanying text.
grams, debate panels, and other academically oriented extracurricular activities provide forums for a diverse range of opinion. 165

The Galda court acknowledged the validity of the concept of a "forum" as an overriding interest. Although questioning the analysis employed, 166 the Galda court agreed with the conclusion in Veed v. Schwartzkopf 167 and Arrington v. Taylor 168 that student newspapers and guest speaker programs contributed to a forum for divergent opinion on a number of topics. With the exception of Larson v. Board of Regents, 169 no court had considered whether each student fee funded activity needed to constitute a forum, or whether the collectivity of such activities was sufficient to create a forum.

In Larson, the Nebraska Supreme Court implied that each activity needed to be a forum in itself. 170 The Galda court settled this particular question by examining the nature of the collected student fee. The court concluded that where a standard, lump sum student fee is imposed and subsequently distributed to a variety of groups, the fee can be perceived as providing a general forum. 171 In contrast, a fee segregated from the lump sum fee on the term bill and designated for use by one organization would trigger an independent forum requirement within the recipient activity or organization.

This distinction is critical. It suggests that use of the lump sum fee would insulate universities from constitutional scrutiny, provided the fees are allocated in a nondiscriminatory manner. 172 This is acceptable since student governments at many schools are being given primary responsibility for determining the course of extra curricular activities through appropriations of the lump sum fees. 173 Segregated fees do not have this safeguard and therefore


166. The court noted that Veed and Arrington antedate Aboud.

169. 189 Neb. 688, 204 N.W.2d 568 (1973). See supra notes 140-41 and accompanying text.

170. Id.
171. Galda, 686 F.2d at 166.

172. Id. See also, Healy v. James, 408 U.S. 169, 186 (1972), wherein the Supreme Court held that non-recognition of a student organization could not be predicated solely upon the administration's disfavor of the aims and goals of the organizations national chapter.

173. See generally Smith, Student Rights of Passage: A Full or Limited Partnership in University Governance?, 9 J.L. & Educ. 65, 74-75 (1980); Student Participation in Colleges and University Government, in AAUP POLICY DOCUMENTS & REPORTS 47 (1971); Comment, Challenging Educational Fee Increases, Program Termination and
warrant closer scrutiny. Special interest groups are often unresponsive to opposing viewpoints. NJPIRG's student workers, for example, "are foreclosed from supporting contrary positions unless such support is 'okayed by the state board.'"174 Thus, the use of a segregated mandatory student fee to finance special interest groups seemingly constitutes an infringement on the first and fourteenth amendment rights of those students who oppose such views. If such groups were financed by the lump sum fee, student dissenters would have recourse to appeal to their student government representatives for the financing of opposing views.

The apparently simple solution of switching to lump sum fee financing is not available to some student organizations, which are independent and ineligible for student fees absent a special funding policy enactment by the university.175 In such cases, financing must be through purely voluntary contributions.

In most cases, student activities and organizations are financed by the lump sum fee. Thus, under the Galda analysis the universities will usually succeed in their efforts to demonstrate a compelling interest which overrides that of the student dissenter. Situations such as the one involving PIRG, however, need to be recognized and treated in the manner suggested by the Galda court, thereby minimizing the risk of overlooking a possibly unconstitutional fee expenditure.

C. Examining the Refund as a Possible Remedy

In addition to the compelling state interest argument, Rutgers University contended that the NJPIRG fee was constitutional because the group afforded students an opportunity to obtain a refund.176 Thus, the Galda court was faced with the issue of whether a student fee refund mechanism could remedy a potentially unconstitutional fee allocation. Since no court faced with

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174. *Galda*, 686 F.2d at 166. The deposition of plaintiff Joseph P. Galda is enlightening:

Q: Have you ever submitted a project proposal to your local board or to the State board or to any staff members of PIRG?
A: I asked at the State headquarters one of the staff people if they would take a project by a pro-life group, and they said given the organization's feelings about abortion, they would not.

*Id.* at 166 n.12.

175. In March 1972 Rutgers adopted a policy for funding student sponsored programs and organizations such as PIRG, that otherwise would not qualify for university financial support. *Galda*, 686 F.2d at 161.

176. The term bill was accompanied by a flyer describing PIRG; the back of the flyer contained a "refund request" form, which could be completed by the student and submitted to PIRG. *Galda*, 686 F.2d at 162.
the student fee problem had examined this issue, the Galda court surveyed other relevant case law. It found that courts and commentators agree that “a funding system requiring continual payments and subsequent refunds to dissenters may not satisfy the requirements of the first amendment.”

This position was first stated by Justice Stevens when considering a refund mechanism adopted by a labor union. In his concurring opinion in Abod v. Detroit Board of Education Justice Stevens remarked: “[T]he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.” However, this was not the holding of the majority opinion.

More recently, the Sixth Circuit Court of Appeals identified a funding system that survived a first amendment challenge. In Kepac v. Kentucky Registry of Election Finance, employee members of the Kentucky Education Association challenged the constitutionality of a funding system which subsidized a political action committee (KEPAC). The “reverse check-off” system operated by automatically deducting from employee-member paychecks a contribution to KEPAC unless employees affirmatively “checked-off” that they declined to participate. If an individual failed to check-off, but subsequently decided not to participate, the member could stop the deduction and could also obtain a refund for past contributions. The court approved the “reverse check-off” system since dissenters were afforded the opportunity to refrain from contributing at the outset.

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177. Id. at 168.
178. 431 U.S. 209 (1977); See supra note 82 and accompanying text for a further discussion.
179. 431 U.S. at 244 (Stevens, J., concurring).
180. The Abod court explicitly refrained from addressing the question whether a refund mechanism is sufficient to render constitutional a fee collection and expenditure. 431 U.S. at 242 n.43. However, the court enunciated the objective regarding remedies: “[t]o devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.” Id. at 237 (footnote omitted).
181. 677 F.2d 1125 (6th cir. 1982).
183. By contrast, a regular “check-off” system requires one to affirmatively indicate his desire to contribute. For example, the optional one dollar contribution to the election fund as it appears on federal income tax forms. The “reverse check-off” requires one to indicate a desire not to contribute, therefore, inaction results in automatic contribution.
184. Kepac, 677 F.2d at 1128.
185. Id. at 1134. The court relied in part on Federal Election Comm’n v. National Educ. Ass’n, 457 F. Supp. 1102 (D. D.C. 1978) wherein the court invalidated a contri-
In *Galda*, the refund mechanism employed by NJPIRG did not permit students to withhold the NJPIRG fee at the outset.\(^{186}\) Furthermore, students requesting a refund normally had to wait “several months” before receiving it.\(^{187}\) On the strength of the *KEPAC* decision, the court held that the NJPIRG refund mechanism was insufficient to remedy a constitutional defect, should one be found by the lower court on remand.

By so doing, the court implied that had the NJPIRG funding scheme contained a “reverse check-off” option, then it possibly may have cured a constitutional defect. This implication, however, is not immune from a plausible constitutional challenge. Arguably, even the use of a reverse check-off system on a university campus would violate the first amendment rights of unwilling contributors. For example, in *Federal Election Commission v. National Education Association*\(^{188}\) it was noted that in the year following the implementation of an automatic deduction method of contributions, the number of contributors nearly doubled. This suggests that many contributions were involuntary, a suggestion supported by the number of refund requests which followed.\(^{189}\)

Within the university setting, the commencement of an academic term is usually accompanied by a confusing variety of administrative paperwork required of students. As a possible result, uninformed or otherwise involuntary contributions to PIRG could occur whether or not a “reverse check-off” system is provided.

Of course, before this issue can become ripe for decision the more central issue concerning the constitutionality of the fee allocation itself needs to be resolved. The standards set forth in *Galda v. Bloustein* appear suited to this task.

It appears that the new approach, as first enunciated in *Galda*, is applicable to the typical fact situations that have arisen in the past, namely challenging the use of fees for the advocacy of political or ideological ideas. But what of atypical situations—is the *Galda* analysis adaptable to challenges based upon constitutional grounds other than free speech? An application of the analysis to such an atypical set of circumstances indicates that its value is significantly reduced. To illustrate this, a recent California state
court decision will next be examined in light of the *Galda v. Bloustein* decision.

**VII. THE LIMITATIONS OF GALDA**

In *Erzinger v. Regents of the University of California*,\(^\text{190}\) students at the University of California, San Diego refused to pay the portion of the university’s registration fee used for abortion counseling, referral, and abortions.\(^\text{191}\) As a result, the university cancelled the students’ enrollment for reasons of nonpayment.\(^\text{192}\) The students brought suit on first amendment grounds, alleging that the practice of subsidizing abortion services with mandatory student fee revenue interfered with their free exercise of religion. They argued that the policy compelled them to violate their religious beliefs against abortion as a condition for attending the university.\(^\text{193}\)

These rather unique facts are clearly distinguishable from those typically litigated. For example, the challenged fee in *Erzinger* was a registration fee, not an activities fee.\(^\text{194}\) The funds derived were not used to *advocate* abortion. Instead, the university’s objective was to provide comprehensive health services in an attempt to minimize the detrimental effects of students’ health conditions on their academic performance.\(^\text{195}\) This objective is markedly different from the more common university objective of providing a campus “marketplace of ideas” through the vehicle of student fees. Simply stated, subsidizing health services, including abortions, is different from funding extracurricular academic activities, the focus of which is on the advocacy of ideas.

The analytical scheme conceived by the Third Circuit Court of Appeals in *Galda* is most effectively applied to the issue of using mandatory fees to finance the advocacy of ideas. Although the mere availability of abortion services on campus can arguably be considered “advocacy,” this is not the form of direct advocacy addressed by the *Galda* court. Thus, the discussions of the “forum” requirement, the type of fee in issue, lump sum as opposed to segregated, and the concept of the refund as a possible remedy are not dispositive to the situation in *Erzinger*.

The *Erzinger* case was resolved in favor of the university on the grounds that the students failed to allege and prove the university

\(^{190}\) 137 Cal. App. 3d 389, 185 Cal. Rptr. 791 (Ct. App. 1982).
\(^{191}\) Id. at 391, 185 Cal. Rptr. at 792.
\(^{192}\) Id.
\(^{193}\) Id.
\(^{194}\) Id. The court did not address the distinction between fees.
\(^{195}\) Id. at 392, 185 Cal. Rptr. at 793.
coerced their religious beliefs or unreasonably interfered with their practice of religion.196 The students had asserted that their religious beliefs required them not to pay those portions of student fees the university used to provide abortion related services. The court dismissed this by analogizing the issue to the refusal to pay taxes for religious reasons:

[N]othing in the Constitution prohibits the Congress from levying a tax upon all persons, regardless of religion. . . . The fact that some persons may object, on religious grounds, to some of the things that the government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax.197

The courts reliance on this analogy is boldly presented despite the United States Supreme Court decision in *Flast v. Cohen*198 wherein the court held the federal government’s spending powers are limited by the “establishment clause” of the first amendment.199 In that case a federal taxpayer was granted standing to challenge the use of tax revenue to finance the purchase of religious textbooks. The establishment clause, however, was not involved in *Erzinger*, thus the court’s analogy to taxpayers is apparently not affected by the *Flast v. Cohen* decision. The students alleged an interference with their *free exercise* of religion, rather than the university’s *establishment* of religion. The “free exercise clause” of the first amendment has not been identified by the United States Supreme Court as a second limitation on congressional spending power.200

The court, in deciding against the students’ claim, did not refer to *Galda v. Bloustein* or any of the other student fee cases or labor union decisions. This is itself indicative of the distinction between issues, and the inapplicability of the *Galda* approach to student fee cases not involving extracurricular advocacy of ideas, concepts, and convictions.

**CONCLUSION**

Traditionally, judicial interpretation of first amendment protec-

196. *Id.* at 393, 185 Cal. Rptr. at 793-94.
199. The first amendment to the United States Constitution provides in pertinent part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend I.
200. *Flast v. Cohen* focused on the limitation created by the establishment clause. The Court offered no examples of what other types of constitutional provisions would grant standing, and neither have later cases. For a discussion, see NOWAK, CONSTITUTIONAL LAW 80 (2d ed. 1983).
tions has slowly evolved. Determining whether the right of free speech protects public college students who resist the policy of using mandatory student fees for political advocacy has also gradually evolved. The majority of appellate courts have not interpreted the first amendment as affording this protection. The courts have deferred to the expertise and discretionary powers of university administrators for implementing policies that most benefit the academic community.

In defending against claims, universities have stressed the importance of judicial nonintervention. The United States Supreme Court, however, has demonstrated a willingness to intervene to uphold the first amendment rights of students. *Healy v. James* \(^{201}\) protected students' rights to assemble and speak freely by denying a university's attempt to control the expression of views on campus. Universities now cite *Healy* to their advantage. They argue that fee-funded student organizations have an undeniable right to speak out on any issue, political or otherwise.

Student dissenters, in order to fortify their claims, have recently applied by analogy a series of United States Supreme Court cases involving labor unions. In *Abood v. Detroit Board of Education*, \(^{202}\) the Court emphatically acknowledged a freedom from compelled political contributions which falls within the penumbra of free speech protection. Despite the defects in the union-university analogy, this finding suggests the impropriety of the traditional laissez-faire policy adopted by past courts. These decisions have employed various approaches but have consistently held for the universities.

This Comment develops an approach that can be consistently applied to determine when a university's fee policy might be subordinated to the rights of the student fee dissenter. The elements of this approach were identified in *Galda v. Bloustein*, but were not organized into a structured framework. The analysis focuses on the proper allocation of burdens of proof to ensure the rights of both parties will be recognized and zealously advocated in a standard fashion. The ultimate determination of the issue is accomplished by applying these guidelines. If the fee is distributed to provide a diverse forum of views, with access available to dissenters, the expenditures would be constitutional regardless of the political cause to be subsidized. If no such forum exists, dissenters must be afforded an opportunity to withhold contribu-

\(^{201}\) 408 U.S. 169 (1972).
tions. Hopefully, this approach will assist future litigants in case preparation and future courts in resolving the questions presented.

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