

MANDATORY STUDENT FEES: FORCING SOME TO PAY FOR THE FREE SPEECH OF OTHERS

ROY WHITEHEAD, JR.*
WALTER BLOCK**

I. INTRODUCTION

Higher educational institutions typically compete for student enrollment by disclosing rudimentary facts such as the costs of tuition and room and board. However, most universities and colleges are less inclined to advertise mandatory assessment of student fees, which are used to subsidize various academic, infrastructure, and student activities. For example, student fees are typically collected for funding new chemistry labs, libraries, computer labs, new campus buildings, student health services, athletics, and student organizations. Thus, the mandatory assessment student fees are usually approved and justified by the governing board as being relevant to students' overall educational experience, because the fees promote campus diversity and extracurricular activity.

The student fees, even when employed to fund student organizations that support on and off-campus political activity, are said to be germane to the university's educational mission. Some governing boards contend that denying mandatory fees to student organizations that promote on campus and off-campus political activity would violate an organization's freedom of speech. But, what of the freedom of speech of students who object to their hard-earned money being used to

* Associate Professor of Business Law, University of Central Arkansas. J.D., LL.M., University of Arkansas, Fayetteville.

** Professor of Economics and Finance, University of Central Arkansas. M.A., Ph.D., Columbia University.

subsidize ideological or political views that they find offensive or disagreeable? Must they pay for speech that they find objectionable? Is their objection and attempt to withhold their support somehow an infringement on the student organization's right to free speech? Is forcing students who object to paying for another student's speech somehow germane to the university's educational mission? Finally, does the First Amendment require one student to pay for another's speech?

This article reviews a long line of cases where university administrators demonstrate an embarrassing ignorance towards the proscriptions of the First Amendment.¹ In particular, this article will analyze *Southworth v. Grebe*,² and several of its predecessors, as a framework for discussing these issues and demonstrating the court's methodology in reconciling the competing interests. This article will then suggest ways for universities to resolve these issues. Next, this article will propose conservative measures for universities in their attempt to resolve these issues. Finally, this article concludes with a more radical philosophical perspective on free speech and private property rights.

II. BACKGROUND

Full-time enrollees at the University of Wisconsin-Madison must pay a mandatory student activity fee of \$165.75 per semester.³ This fee is compulsory "because students who refuse to pay cannot receive their grades or graduate."⁴ Wisconsin law gives both the Board of Regents and the students control over funds generated by the mandatory student fee.⁵ "The Regents classify a portion of the student fees as non-allocable," which they control, "and a portion as allocable."⁶ "The non-allocable fees [not in issue here] cover expenses such as debt service, fixed operating costs," student health services, and the recreational

1. *UWM Post, Inc. v. Board of Regents*, 774 F. Supp. 1163, 1172 (E.D. Wisc. 1991); *Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E.D. Mich. 1989). In both cases the courts found the speech codes vague and overbroad because they might prohibit protected student speech. The words, "stigmatize" and "victimize" are general terms that lack precise definitions. The *Doe* court noted the fact that words might stigmatize or victimize someone does not strip away their First Amendment protection. 721 F. Supp. at 867.

2. 151 F.3d 717 (7th Cir. 1998), *cert. granted sub nom. Board of Regents v. Southworth*, No. 98-1189, 1999 WL 42270 (Mar. 29, 1999).

3. *Id.* at 719.

4. *Id.*

5. WIS. STAT. ANN. § 36.09 (West 1997).

6. *Southworth*, 151 F.3d at 719.

sports budget.⁷ On the other hand, the Associated Students of Madison (ASM), the representatives of the student body, has complete authority over distribution of most of the allocable funds.⁸

The ASM-controlled fees fund the General Student Service Fund (GSSF) and the Associated Students of Madison budget.⁹ “[B]oth the GSSF and the ASM distribute the mandatory student fees to other private organizations”¹⁰ The GSSF’s portion “is distributed to private organizations by a committee of the ASM, called the Student Services Finance Committee (SSFC).”¹¹ “Registered student organizations, university departments, and community-based service organizations qualify for funding from the GSSF.”¹² To obtain money, the requesting organization must apply to the SSFC.¹³ The SSFC reviews the application and “determines whether to grant or deny the request.”¹⁴ “The SSFC also determines the amount of funding the private organization will receive.”¹⁵ “During the 1995-1996 school year, the SSFC distributed about \$974,200 in student fees to private organizations.”¹⁶

“In addition to obtaining money from the GSSF and the ASM budget, a registered student organization may seek funding through a [campus] referendum.”¹⁷ Here, the students vote at large on whether or not to approve an assessment for a student group.¹⁸ “The Wisconsin Student Public Interest Research Group (WISPIRG) obtained \$49,500 in student fees during the 1995-96 academic year”¹⁹ Once the ASM and SSFC have made their funding decisions, the decisions are sent to the chancellor and the Board of Regents for their review and approval.²⁰

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 720.

18. *Id.*

19. *Id.*

20. *Id.*

III. THE COMPLAINT

Several students sued the university objecting to funding of organizations engaging in political and ideological activities with fees collected from students who object to such activities.²¹ The plaintiffs presented evidence of eighteen organizations that received student fees and engaged in political and ideological activities.²² The organizations included the Wisconsin Student Public Interest Research Group; the Lesbian, Gay, Bi-Sexual Campus Center; the Campus Women's Center; the University of Wisconsin Greens; the Madison AIDS Support Network; the International Socialist Organization; the Ten Percent Society; the Progressive Student Network; Amnesty International; the United States Student Association; Community Action on Latin America; La Colectiva Cultural De Aztlan; the Militant Student Union of the University of Wisconsin; the Student Labor Action Coalition; Student Solidarity; Students of National Organization for Women; and the Madison Treaty Rights Support Group.²³

The monies were used in various ways. For example, WSPIRG contributed its money directly to its off-campus parent organization for use in lobbying Congress and developing candidate and voter guides.²⁴ They "also published a voter's guide, which ranked congressional candidates based on their views on various pieces of federal legislation."²⁵ "The University of Wisconsin Greens . . . lobbied the Wisconsin state legislature and encouraged legislators to introduce three bills . . . limit[ing] mining in the state."²⁶ They also distributed literature for the Green Party and campaign literature for Ralph Nader during his bid for President on the Green Party ticket.²⁷ "[T]he International Socialist Organization advocated the over-throw of the government," and, along with other groups, sponsored a partisan rally at the state capitol near a congressman's office.²⁸ "The Campus Women's . . . Center used its bi-monthly newsletter to advocate its political and ideological views."²⁹ For example, they "published a lengthy article opposing the Informed

21. *Id.*

22. *Id.* at 718.

23. *Id.* at 720.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 721.

Consent Bill,³⁰ which proposed certain state regulations o[n] abortion.”³¹ The article urged people to contact the Campus Women’s Center to learn how they could work against the legislation. The Ten Percent Society used its funding to establish an Internet home page, where it advocates legislation authorizing same sex marriages, and, in no uncertain terms, condemned attempts by the Wisconsin Legislature to ban them. Amnesty International worked publicly for the abolition of the death penalty.³²

Properly, the Board of Regents did not deny that these and other organizations engaged in political or ideological speech. The Regents, instead, argued that the First Amendment protects the rights of the organizations to engage in such speech.³³ Indeed it does, but, as we shall see, the issue is whether objecting students can be compelled, for example, to pay for the speech of the Ten Percent Society. The plaintiffs contended they were not asking to *restrict* the speech of any of the student organizations, they were merely asserting that they should not “be forced to financially *subsidize* speech with which they disagree[d].”³⁴ Instead, they argued the First Amendment does not guarantee that the government will subsidize speech because there is no right to have speech subsidized by the Government.³⁵

IV. THE ISSUE

The question for the appellate court was whether the Regents can force objecting students to fund private organizations that engage in political and ideological activities, speech, and advocacy.³⁶ Compulsory fees, applied by organizations presenting objectionable viewpoints to the students forced to pay such fees, raise concerns about expression. Naturally, the First Amendment is implicated.

The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people to peaceably assemble, and petition the government for any

30. 1995 Wis. Legis. Serv. 309 (West).

31. *Southworth*, 151 F.3d at 721.

32. *Id.*

33. *Id.*

34. *Id.* (emphasis added).

35. *Federal Election Comm’n v. Massachusetts Citizens for Life*, 479 U.S. 238, 256 (1986). “There is no right to have speech subsidized by the government.” *Id.*

36. *Southworth*, 151 F.3d at 722.

regress of grievances."³⁷ The Supreme Court has long recognized two necessary corollaries to the First Amendment as a result of the right to free speech: the right not to speak³⁸ and the right not to be compelled to subsidize the speech of others.³⁹

The Supreme Court has never determined whether or not these First Amendment corollaries protect objecting students from being forced by state universities to subsidize private, political, and ideological organizations. In *Rosenberger v. Rector and Visitors*,⁴⁰ however, the high court did provide guidance on the appropriate analysis for such a challenge. In that case, the university used student fees to pay for printing costs for non-religious newspapers, but denied the plaintiff's request to fund their newspaper's religious viewpoint.⁴¹ The Justices felt the student activity fees created a fora of money, and once established, the fora had to be made available on a viewpoint neutral basis.⁴² Because the University of Virginia discriminated on the grounds of the religious viewpoint of the newspaper, it violated the First Amendment.⁴³

Rosenberger did not directly consider the question of forcing objecting students to fund private organizations; however, the court briefly discussed the issue.⁴⁴ Justice O'Connor indicated, "[f]inally, although this question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student, that she should not be compelled to pay for speech with which she disagrees,"⁴⁵ citing *Keller v. State Bar*⁴⁶ and *Abood v. Detroit Board of Education*.⁴⁷

In *Abood*, employees of the Detroit Board of Education challenged the constitutionality of an agency-shop agreement requiring non-union teachers to pay a service fee to the union.⁴⁸ The teachers

37. U.S. CONST. amend. I.

38. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Were this to be followed in a logically consistent manner, it would vitiate against laws compelling cigarette manufacturers to carry health warnings on their products.

39. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar*, 496 U.S. 1 (1990).

40. 515 U.S. 819 (1995).

41. *Id.*

42. *Id.*

43. *Id.* at 825-27.

44. *Id.* at 819.

45. *Id.* at 850.

46. 496 U.S. 1 (1990).

47. 431 U.S. 209 (1977).

48. *Id.*

argued that the mandatory fee violated their First Amendment rights of free speech and free association.⁴⁹ The Court held that the board of education could compel non-union teachers to pay the service fee explaining that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."⁵⁰ Thus, so "long as they act to promote the cause that justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy."⁵¹ In the decision, the Court recognized the "common cause" of both the union and nonunion teachers. The *Abood* Court continued:

[w]e do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as a collective bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will.⁵²

Thirteen years later, in *Keller v. State Bar*,⁵³ the Supreme Court revisited the issue of compelled funding. Here, a group of lawyers challenged the use of mandatory state bar dues to fund lobbying on social issues.⁵⁴ In *Keller*, the Supreme Court said *Abood* meant unions could not expend the dissenting individual's dues on ideological activities not germane to the purpose for which the compelled association was justified: collective bargaining.⁵⁵ The court in *Keller* said that the compelled association and integrated bar was justified by the state's interest in regulating the legal profession and improving the quality of legal services.⁵⁶ "The State Bar may, therefore, constitutionally fund activities germane to the common purposes of regulating the bar and improving legal services out of the mandatory dues of all members."⁵⁷

49. *Id.* at 212.

50. *Abood*, 431 U.S. at 222.

51. *Id.* at 223.

52. *Id.* at 235-36. This ignores the issue that some members of unions are coerced into joining these organizations themselves.

53. 496 U.S. 1 (1990).

54. *Id.* at 1.

55. *Id.* at 13.

56. *Id.*

57. *Id.* at 14.

It may not do so, however, in such manner as to fund activities of an ideological nature, such as lobbying the state legislature on social issues like gun control or nuclear weapons initiatives, which falls outside of the scope of those common activities.⁵⁸ These issues clearly fall at the extreme end of the spectrum, not germane to the bar's common cause.⁵⁹

From *Keller's* holding, "the State Bar may therefore constitutionally fund activities germane to those goals . . .,"⁶⁰ and *Abood's* qualification, the constitution requires that expenditures for ideological causes not germane be financed by voluntary funds, the courts have named the analysis born from *Abood* as the "germaneness analysis."⁶¹ Sadly, the holding in *Abood* did not provide much guidance on how to apply the test. *Keller*, however, did more, by setting forth guidelines for deciding permissive expenditures. In *Keller*, the guiding standard is "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the state."⁶²

Beyond *Abood* and *Keller*, the Supreme Court has addressed the issue of germaneness in several other cases. The most important is *Lehnert v. Ferris Faculty Association*,⁶³ where the Supreme Court considered the constitutionality of various union expenditures under the germaneness analysis originating in *Abood* and *Keller*. *Lehnert*, however, went further, by explaining that the analysis required a three-step process. The three steps, or prongs, for determining whether union expenditures violate the objecting employees' First Amendment rights are:

1. The expenditure must be "germane to collective bargaining";
2. Justified by the government's vital policy interest in labor and avoiding "free riders" and,
3. Not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.⁶⁴

The court announced that *Lehnert's* three-prong analysis is the test that it would follow in deciding the *Southworth* case.⁶⁵ The Su-

58. *Id.* at 1.

59. *Id.* at 13-14.

60. *Id.* at 14.

61. *Southworth v. Grebe*, 151 F.3d 717, 723 (7th Cir. 1998).

62. *Keller*, 496 U.S. at 14.

63. 500 U.S. 507 (1991).

64. *Id.* at 519.

65. *Southworth*, 151 F.3d at 724.

preme Court recently reaffirmed this test in *Air line Pilots Ass'n v. Miller*,⁶⁶ where it again followed the *Lehnert* test to determine if pilots were entitled to a refund of part of their agency fees.⁶⁷

V. GERMANENESS

Under the *Lehnert* test, the question is whether the challenged activity is germane to the Regent's asserted interest.⁶⁸ The Regents asserted an interest in education by contending that funding private organizations engaging in political and ideological activities is germane to education because it allows for more diverse campus expression and this, in turn, is educational.⁶⁹ The Court, however, indicated that "germaneness" cannot be read so broadly as to justify funding of private organizations that engage in political or ideological advocacy, activities, or speech.⁷⁰ In *Keller*, for example, the State Bar defended its funding of lobbying on nuclear weapons, abortion, and prayer in public schools arguing that it was authorized to fund those activities "in all manners pertaining to the science of jurisprudence or to the improvement to the administration of justice."⁷¹ The Supreme Court rejected such an over-encompassing reading of germaneness, holding instead that expenditures "to endorse or advocate a gun control or nuclear weapons freeze initiative," clearly fall at the "extreme end of the spectrum" of expenditures not germane and, therefore, unconstitutional.⁷²

In *Lehnert*, the Supreme Court again rejected a broad interpretation of "germaneness."⁷³ *Lehnert* involved a challenge to the union's use of dues to fund lobbying related to financial support of public employees in general. The Court held that when "the challenged lobbying activities relate not to the ratification or implementation of the center's

66. 523 U.S. 866 (1998).

67. *Id.*

68. *Southworth v. Grebe*, 151 F.3d 717, 724 (7th Cir. 1998).

69. *Id.*

70. *Id.* Even if the Regent's view of germaneness were upheld, this would still not account for the left wing ideological bias of the funding at the University of Wisconsin. In other words, given that politics and ideology is germane to the educational mission, why should this be almost totally confined to one end of the political economic philosophical spectrum. Why, that is, should there not be equal funding for groups such as the National Rifle Association, Phyllis Schlafley's Eagle Forum, The Mises Institute, the Libertarian Party, the Four H Clubs, the Boy Scouts, the Young Republicans, the American Conservative Union, the Objectivist Society, etc.

71. *See Southworth*, 151 F.3d at 725.

72. *Keller v. State Bar of Cal.*, 496 U.S. 1, 15-16 (1990).

73. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 557 (1991).

collective bargaining, but to financial support of the employee's profession or of public employee's generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees."⁷⁴ It concluded that "the state constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation."⁷⁵ In *Keller* and *Lehnert*, the Supreme Court rejected arguments that political and ideological speech is germane to the union contract interest involved.⁷⁶ In fact, in *Lehnert*, the Supreme Court specifically stated that germaneness cannot be read so broadly in the context of a private sector union as to "include political and ideological activities."⁷⁷

To justify compelling objecting students to fund private organizations, the Regents pointed to the expansive government interest they had in education, as compared to the limited union representation interest involved in *Abood's* and *Keller's* collective bargaining and bar oversight.⁷⁸ They argued that educational interests are "so broad, that more activities are germane, including political and ideological activities."⁷⁹ This is not unreasonable, in that, just about everything is in a sense educational.⁸⁰ However, when presented with a similarly expansive interest in *Keller*, the advancement of law, the Supreme Court rejected such a broad meaning of germaneness.⁸¹ In *Keller*, the Court indicated that germaneness cannot be so broadly construed as to include forced funding of private, political, and ideological groups.⁸² The Court pointed out that many of the campus groups mirror organizations that exist outside the university setting, whose primary goal is promotion of ideological beliefs.⁸³ The Court considered any educational benefit that comes from this outside activity as secondary, and therefore not sufficiently germane to overcome the objecting student's constitutional rights.⁸⁴ The Court forcibly stated that the mere incantation of the rubric "Educational Profession" cannot justify a tactic, repugnant to the

74. *Id.* at 520.

75. *Id.* at 522.

76. *Id.* at 516; *Keller*, 496 U.S. at 1.

77. *Lehnert*, 500 U.S. at 516.

78. *Southworth v. Grebe*, 151 F.3d 717, 725 (7th Cir. 1998).

79. *Id.*

80. *Id.*

81. *Keller*, 496 U.S. at 15-16.

82. *Id.* at 14.

83. *Southworth*, 151 F.3d at 725.

84. *Keller*, 496 U.S. at 14.

constitution, of requiring objecting students to fund private, political, and ideological organizations.⁸⁵

VI. THE GOVERNMENT'S VITAL POLICY INTERESTS

The second prong under *Lehnert* considers whether the compelled fee is justified by a vital policy interest of the government.⁸⁶ In the context of unions, those policy interests include labor peace and avoiding free riders, and with the bar, "the state's interest in regulating the legal profession and improving the quality of legal services."⁸⁷ The Court indicated that there can be no doubt that there is a vital interest in education, and in allowing students to share in the governance of the university system.⁸⁸ For the vital policy interests, however, to survive scrutiny under *Lehnert*, they must justify compelled funding of the private or quasi-private activity involved,⁸⁹ like the advancement of partisan political and ideological causes.

In *Lehnert*, a plurality of the Supreme Court analyzed the policy interest involved (labor peace and providing representation for free riders) and concluded that "labor peace is not especially served by . . . charging objecting employees for lobbying, electoral or other political activities that do not relate to their collective bargaining agreement."⁹⁰ *Lehnert* further stated that the cause of labor peace would not be advanced: "Because worker and union cannot be said to speak with one voice, it would not further the cause of harmonious industrial relations to compel objecting employees to finance union political activities as well as their own."⁹¹

This quotation illustrates the importance of a common cause for justifying compelled funding. In the context of labor cases, if the union and non-union members share a common cause, such as negotiating the terms and conditions of employment, a common vital policy interest may justify compelled funding.⁹² But where that was missing, as in

85. *Southworth*, 151 F.3d at 725.

86. *Lehnert*, 500 U.S. at 520.

87. *Keller*, 496 U.S. at 13-14.

88. *Southworth*, 151 F.3d at 727.

89. *Id.* at 724.

90. *Lehnert*, 500 U.S. at 521.

91. *Id.*

92. It is not necessarily true that union and non-union members share the common cause of negotiating pay scales and working conditions. Assuming this to be true implies unions are necessary and/or sufficient to better the lives of workers. But remuneration and safety protection are rising in such industries as computers, banking and

Lehnert,⁹³ or when union funds are used solely for partisan campaign contributions, the expenditure cannot be justified. In the case of compelled student funding, while there may be a common educational cause in shared governance, there is certainly no common cause between private organizations that rightly engage in highly emotional, political, and ideological speech, such as advocating same sex marriages, informed consent laws, or overthrow of the government; and the objecting students. The *Southworth* Court could discover no vital policy interests supporting compelled funding of these private organizations.⁹⁴ The Court, citing *Lehnert*, said, "And we might even conclude that far from serving the school's interest in education, forcing objecting students to fund objectionable organizations undermines that interest."⁹⁵

The next concern dealt with the "free-rider" problem. The *Southworth* Court indicated that universities are unlike unions, which have the duty to represent fairly all employees, including those who do not belong to the union.⁹⁶ The Court said that the union's common cause of collective bargaining often "entails expenditure of much time and money"⁹⁷ on non-members (free riders). Conversely, in the university context, the private organizations to which the students object to funding, do not act in a representative capacity for the students (because there is no common cause) and have no obligation to fairly represent the students, as the union does for non-union members.⁹⁸ The Regent's policy allows non-students to join student organizations and attend campus activities, in fact, "[f]ree riders' might accurately describe those organizations that receive a share of the mandatory fees."⁹⁹ Also, "many of the ideological and political activities and speech to which the students objected occurred off-campus, further limiting any possible

insurance, which have never been unionized, and falling in such smoke-stack and rust belt industries as steel, autos, and rubber, which are unionized. Moreover, as wages and working conditions in the U.S. have been improving, the rate of unionization has been falling.

93. *Lehnert*, 500 U.S. at 521.

94. *Southworth*, 151 F.3d at 728.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

benefit to objecting students.”¹⁰⁰ The Court found that the union free rider¹⁰¹ concern was inapplicable in a student-funding situation.

VII. BURDENING FREE SPEECH

The third prong of *Lehnert* recognizes that any time the government forces individuals to fund private organizations, a burden on free speech and association may incidentally result, but that burden may be justified by an important governmental interest.¹⁰² In *Lehnert*, the Court explained that “although first amendment protection is in no way limited to controversial topics or emotionally charged issues, the extent of one’s disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will affect.”¹⁰³ The Court explained:

[t]he burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing the petitioner’s funds for political lobbying and to garnish support of the public in its endeavors, the union would use each dissenter as an instrument for fostering public adherence to an ideological point of view he finds unacceptable.¹⁰⁴

The First Amendment protects the individual’s right of participation in these spheres from precisely this type of invasion.¹⁰⁵ “When the subject of compelled speech is the discussion of governmental affairs, which is a core of our First Amendment freedoms, the burden upon the dissenters’ rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.”¹⁰⁶

In *Southworth*, the students objected to speech concerning “such emotionally charged issues as abortion, homosexuality, and the United States’ democratic system of government.”¹⁰⁷ The source of the plain-

100. *Id.*

101. For a critique of the free rider concept, particularly as the justification for public policy, see HANS-HERMANN HOPPE, *Fallacies of the Public Goods Theory and the Production of Security*, in *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY* (1993); HANS-HERMANN HOPPE, *THE PRIVATE PRODUCTION OF DEFENSE* (1998); HANS-HERMANN HOPPE, *A THEORY OF SOCIALISM AND CAPITALISM* (1989).

102. *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 521 (1991).

103. *Id.* at 521-22.

104. *Id.*

105. U.S. CONST. amend. I.

106. *Southworth v. Grebe*, 151 F.3d 717, 729 (7th Cir. 1998).

107. *Id.*

tiffs' disagreement . . . was their deeply held religious and personal beliefs.¹⁰⁸ Consequently, *Lehnert's* common cause requirement makes clear that the Regent's funding policy cannot stand. The *Southworth* Court said that the burden on the objecting students' speech is "particularly great" because of their deeply held beliefs.¹⁰⁹ The funded organization's use of the funds to "garnish support of the public in its endeavors," and as "an instrument for fostering public adherence and ideological view," which the students find objectionable, offends the First Amendment.¹¹⁰

The Regents attempted to justify forcing the objecting students to fund these organizations because "hateful speech has a place in our society too."¹¹¹ However, while hateful speech is indeed protected, the Constitution does not mandate that objecting citizens pay for it. According to James Madison, "to compel a man to furnish contributions and money for the propagation of opinions which he disbelieves is sinful and tyrannical."¹¹² The students, like "the objecting union members in *Abood*, have a First Amendment interest in not being compelled to contribute to an organization, whose First Amendment protected expressive activities conflict with one's 'freedom of belief.'"¹¹³

One of the Supreme Court's recent cases, *Glickman v. Wileman Brothers & Elliott*,¹¹⁴ confirms the *Southworth* approach. *Glickman* involved Department of Agriculture regulations that imposed assessments on growers for the costs of administrative expenses for marketing orders.¹¹⁵ Among the expenses were the costs of generic advertising of California peaches and plums.¹¹⁶ The growers contended that the compelled funding abridged their First Amendment rights.¹¹⁷ The Supreme Court, citing *Abood* and *Keller*, found that unlike those cases, the administrative fees did "[n]ot compel the producers to endorse or

108. *Id.*

109. *Id.* at 717.

110. *Id.* at 729.

111. *Id.* See *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983) (holding that the Constitution does not confer an entitlement to funds that might be necessary to realize all the advantages of free speech). It is ironic that a school with a "hate speech" code advances a "hateful speech" argument.

112. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 234-35 n.31 (1977) (quoting IRVING BRANT, *JAMES MADISON: THE NATIONALIST* 354 (1948)).

113. *Southworth*, 151 F.3d at 730.

114. 521 U.S. 457 (1997).

115. *Id.* at 460.

116. *Id.*

117. *Id.* at 460-61.

finance any political or ideological views.”¹¹⁸ In approving the assessment, the Court said, “[t]he germaneness test is clearly satisfied because the generic advertising is unquestionably germane to the purposes of the marketing orders” and “[i]n any event, the assessments are not used to fund ideological activities.”¹¹⁹ The marketing orders, at least in the Court’s view, benefited all the growers, including the Wileman brothers.¹²⁰

On petition for rehearing, the dissent claimed that *Southworth* was wrongly decided because diversity of views are important on campus and because dues only go to the student government, not directly to the organizations.¹²¹ Judge Rovner wrote that the only “direct” speech being funded is that of the student government.¹²² He said, under *Rosenberger*, the radically different views of the listed organizations cannot be attributed to the student government.¹²³ “Indeed, the student government constitutionally must determine funding in a content-neutral manner.”¹²⁴ He says, “because the ‘speech’ of the individual groups cannot be attributed to the student government, it necessarily cannot be attributed to the students paying the fees to the student government.”¹²⁵

Diversity of views on a college campus is important, but so is the First Amendment. The objecting students do not contest the First Amendment’s importance of contrasting views. They simply contend,

118. *Id.* at 469-70.

119. *Id.* at 473.

120. There are problems with this finding, however. If these expenditures really benefited the Wileman brothers, why did they object? Their objection constitutes evidence that they did *not* benefit. Suppose A takes a shower and bills B, his neighbor, for the soap costs on the ground that B benefits. Should B be compelled by a court to pay A? Not in a court of law that recognizes private property and contract rights. Under such jurisdictions, B is forced to pay only for goods and services he *agreed to purchase*, not for those who in the view of third parties, even Supreme Court judges, he benefits. Were we to extend the doctrine that free riders must be forced to pay for their alleged benefits to its logical conclusion, we would open up a Pandora’s Box. Anyone, pretty much, could charge anyone else for services rendered. If we brush our teeth and drink our milk and take our vitamins, this presumably benefits many people. Were we to attempt to charge them for these services, we would be laughed out of any rational court. Thank goodness this pernicious doctrine has not been carried out consistently through our legal system.

121. *Southworth v. Grebe*, 157 F.3d 1124, 1125 (Rovner, J., dissenting).

122. *Id.* at 1125 (Rovner, J., dissenting).

123. *Id.*

124. *Id.*

125. *Id.*

and rightly so, that they should not have to pay for them.¹²⁶ Does the First Amendment require Democrats to contribute to Republicans so they can deliver their message? Obviously not. Additionally, to say the student fees only fund the student government is disingenuous. The money flows through the student government and would not be available to the International Socialist Organization, for example, absent the mandatory fees. As has already been established in *Abood*, there is no requirement that the dues be "earmarked" to the organizations, or that the organizations purport to speak for all students.¹²⁷ "Therefore, whether or not the student fees directly fund the political or ideological activities is irrelevant; the First Amendment is offended by the Regents use of objecting students' fees to subsidize organizations which [sic] engage in political and ideological activities."¹²⁸ To hold otherwise would, in effect, allow money laundering, that is prohibited in, for example, campaign finance laws.

Finally, on appeal to the U.S. Supreme Court, the Regents will argue that *Southworth* deprives University students of a diversity of viewpoints and violates the First Amendment because *Rosenberger*¹²⁹ required the University of Virginia to fund a student newspaper with a religious viewpoint.¹³⁰ Again, the Regents' attempt to shoehorn this case into *Rosenberger* is misplaced because, in that case, the Supreme Court made it clear it was only considering the issue of the constitutionality of "content-based" regulations in ruling that the newspaper had to be funded.¹³¹ The Court made it abundantly clear that compelled funding of views that students disagreed with was not an issue.¹³²

VIII. PHILOSOPHICAL CONSIDERATIONS

These issues can be considered from a more philosophical point of view, one best grounded on the rights found in private property and contract; e.g., libertarianism. This is the view that all human interac-

126. *Southworth*, 151 F.3d at 718.

127. *Abood*, 431 U.S. at 237 n.35.

128. *Southworth*, 151 F.3d at 732.

129. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 845 (1995).

130. Patrick Healy, *U. of Wisconsin Will Ask Supreme Court to Uphold Broad Use of Mandatory Student Fees*, THE CHRON. HIGHER EDUC., Nov. 9, 1998, at 7.

131. *Rosenberger*, 515 U.S. at 849.

132. *Id.* at 851. (O'Connor, J., concurring). "Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student, that she should not be compelled to pay for speech with which she disagrees." *Id.*

tions should take place on a voluntary basis, with no force or fraud committed against individuals who are themselves non-aggressing.¹³³

Suppose the authors of the present article set up a new entirely private institution, Block Whitehead University¹³⁴ (BWU) and charge a certain amount for tuition. The hypothetical institution also imposes a student fee. As in the case of the University of Wisconsin-Madison, part of this is non-allocable, and non-contentious.¹³⁵ But, the other part is indeed allocable, and goes, via the hand-picked pet student government, to a whole host of feminist, socialist, multicultural, homosexual, minority racist, deconstructionist, "peace," and Marxist groups.

The university attracts thousands of paying customers to the esteemed establishment under these conditions, whereupon a few students protest that their payments are going toward the promotion of ideas they find detestable. Would it be proper for a court to find in their favor and overturn a leftish brainwashing scheme? The answer is "No."

The university hypothesized above is a private one. Nobody need enroll lest he agrees to be bound by all university rules and procedures. Such a high profile program allocates a hefty portion of the students' fees to these outside activities in the name of diversity. If a student does not wish to have his money spent for such purposes, he has an easy remedy. He should enroll elsewhere. This university can do anything it wishes¹³⁶ to, and with, its students, provided only that they agree to enroll under the conditions it sets down. For example, BWU could demand that the students recite the Declaration of Independence, or the Lord's Prayer, before every class. That such a requirement may lead the university directly to bankruptcy is entirely another matter. Certainly, BWU may expose its students to a series of biased and one-sided outside speakers, and use their money to finance its own pet projects, as is done in Wisconsin.¹³⁷

How, then, can this position be reconciled with the authors' claim that the case of the Wisconsin student plaintiffs should be upheld? It is simple. BWU is a private venture, while the Wisconsin institution of

133. See MURRAY N. ROTHBARD, FOR A NEW LIBERTY 202-18 (1973); MURRAY N. ROTHBARD, THE ETHICS OF LIBERTY (1982); HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS AND ETHICS (1989); HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993).

134. Known, affectionately, as "Blockhead U."

135. See discussion *supra* Part II.

136. Subject, of course, to the usual proscriptions against murder, fraud, etc.

137. See discussion *supra* Part II.

higher learning is a public one. A public university is an exercise in coercion. A large part of its revenues come not from willing customers, but from compulsory levies. In the libertarian view, such enterprises should not exist at all—they should be privatized.

The authors of the present paper are both employees of a public university. Is it hypocritical for us to advocate that our, and all other such institution(s), be privatized, while continuing to work for one of them? If so, then we admit to hypocrisy, not only for education, but also for numerous other institutions we come into contact with virtually every day, such as streets, highways, sidewalks, post offices.¹³⁸

That is one way to look at this matter. But there is another entirely different interpretation. Under this view, we are not at all hypocrites. Consider a libertarian living under a totalitarian regime, such as Cuba, North Vietnam, or the former Soviet Union (USSR). If he wants to eat, he must work, but the only jobs legally available are those offered by the government, which he opposes on philosophical grounds. Nevertheless, he becomes an employee of the state, while still maintaining his libertarian principles. In so doing, he is not hypocritical, but rather in the position of a victim of an armed robbery who gives up his money rather than being shot, but still cleaves to the view that the entire enterprise of theft is illegitimate.

Were total educational privatization to occur, the solution to the problem of forcing tax-paying students to yield part of their college fees for the promotion of ideas they find abhorrent would be simple.

138. On the case for road privatization, see Walter Block, *Public Goods and Externalities: The Case of Roads*, 7 THE J. LIBERTARIAN STUD. 1 (1983); Walter Block, *Congestion and Road Pricing*, 4 J. LIBERTARIAN STUD. 299 (1980); Walter Block, *Free Market Transportation: Denationalizing the Roads*, 3 J. LIBERTARIAN STUD. 209 (1979); Michelle S. Cadin & Walter Block, *Privatize Public Highways*, FREEMAN, Feb. 1997, at 96-97; Gerald Gunderson, *Privatization and the 19th-Century Turnpike*, 9 CATO J. 191 (1989); Daniel B. Klein, *The Voluntary Provision of Public Goods? The Turnpike Companies of Early America*, 28 ECON. INQUIRY 788 (1990); Daniel B. Klein et. al., *Economy, Community and the Law: The Turnpike Movement in New York, 1797-1845*, J. ECON. HIST., Mar. 1993, at 106-22; Christopher T. Baer et. al., *From Trunk to Branch: Toll Roads in New York, 1800-1860*, 11 ESSAYS ECON. & BUS. HIST. 191 (1993); Daniel B. Klein & Gordon J. Fielding, *Private Toll Roads: Learning from the Nineteenth Century*, 46 TRANSP. Q. 321 (1992); Daniel B. Klein & Gordon J. Fielding, *How to Franchise Highways*, 20 J. TRANSPORT ECON. & POL'Y 133 (1993); Daniel B. Klein & Gordon J. Fielding, *High Occupancy/Toll Lanes: Phasing in Congestion Pricing a Lane at a Time*, POLICY STUD., Nov. 1993 No. 170; GABRIEL ROTH, THE PRIVATE PROVISION OF PUBLIC SERVICES IN DEVELOPING COUNTRIES (1987); GABRIEL ROTH, PAYING FOR ROADS: THE ECONOMICS OF TRAFFIC CONGESTION (1967); GABRIEL ROTH, A SELF-FINANCING ROAD SYSTEM (1966); MURRAY N. ROTHBARD, FOR A NEW LIBERTY (1973); WILLIAM C. WOOLDRIDGE, UNCLE SAM, THE MONOPOLY MAN (1970).

Since there would be no public universities, the entire problem would evaporate. That is, given that while fully private but not public colleges may engage in such brainwashing activities, and that there are none of the latter, there will arise no issue of the illegitimacy of forcing some students to pay to promote the views of others. The only time something of this sort could arise would be in a private school. This, as we have already seen, would be entirely legitimate because although a given student finds a specific allocation of his money to be untoward, he has consented to the entire process, by enrolling in that private institution of higher learning in the first place.

There is an argument that a student, as a United States citizen, has implicitly agreed to certain duties, such as paying taxes based on our democratic institutions. Taxes for, amongst many other uses, institutions of higher learning, have been determined through legitimate procedures and it has been determined that part of student fees financially support ideas that some find unwelcome. Such disbursements are every bit as voluntary as those occurring in a purely private setting. In other words, these payments are akin to club dues, only the "club" is now the United States.

There are grave problems with this contention. First, and most superficially, nowhere does the Constitution provide for public education.¹³⁹ Some might say the Constitution speaks of the general welfare,¹⁴⁰ but nowhere does it specifically mention public education.¹⁴¹ Indeed, public education has been the exception rather than the rule for most of our history. This being the case, public education is usurpation, similar to nationalizing, for example, the steel works or auto plants. This may be appropriate under a communist regime, but certainly not in the "land of the free."

Second, and more basically, no living person signed the Constitution. Therefore, it cannot be used as evidence of agreement, albeit indirectly, for the program of paying for the free speech of some at the expense of others.¹⁴² As for student fees as voluntary club dues, this is

139. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding that education is not a fundamental right).

140. U.S. CONST. art. I, § 8, cl. 1.

141. *Rodriguez*, 411 U.S. at 37 (holding that education is not a fundamental right).

142. See Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law Without Government*, 9 J. LIBERTARIAN STUD. 1 (1989); Lysander Spooner, *No Treason*, Larkspur, Colorado, (1870) 1966; MORRIS & LINDA TANNEHILL, *THE MARKET FOR LIBERTY* (1984); MURRAY N. ROTHBARD, *FOR A NEW LIBERTY* (1973); MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* (1982); HANS-HERMANN

how Joseph Schumpeter reacted to such a contention: “[t]he theory which [sic] construes taxes on the analogy of club dues or of the purchase of the services of, say, a doctor only proves how far removed this part of the social science is from scientific habits of mind.”¹⁴³

But state universities obviously do exist. How does one analyze their actions from the libertarian perspective? What is proper public policy given that there are government universities that compel some students to pay for the “free speech” of others?

One scenario, propagated by Milton Friedman in many areas of public policy, is that the goal is to make the particular government enterprise as efficient as possible, not to end it.¹⁴⁴ For example, Mr. Friedman favors school vouchers, rather than the complete, total, and immediate privatization of public education.¹⁴⁵ Mr. Friedman suggests, for example, the negative income tax instead of the elimination of welfare; flexible exchange rates and a three-percent rule for monetary expansion in preference to market money (a gold standard); and the voluntary military during the Vietnam War as an alternative to ending hostilities.¹⁴⁶

Mr. Friedman argues that such initiatives will not only lead to full economic freedom, but also that they are the best means toward this end. But it is not clear how making a government enterprise more efficient (e.g., more market “based,” as opposed to genuinely an aspect of the market) will lead to its demise. One would have thought that an efficient state corporation is far more stable than an inefficient one.

How would these Friedmanite solutions apply to the issue at hand? There might be a “voucher” set up on campus whereby each student is able to earmark his student fees for the outside speaker or program of his choice. The only restriction would be that the part of

HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS AND ETHICS (1989); HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND PHILOSOPHY (1993); RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW (1998).

143. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 198 (1942).

144. See generally, MILTON FRIEDMAN, *The Role of Government in Education*, in CAPITALISM AND FREEDOM 85-107 (1962).

145. See Marilyn Brown, *Brogan Pushes School Vouchers During Debate*, TAMPA TRIB., Feb. 26, 1999, at 2.

146. See generally, FRIEDMAN, *supra*, note 144; MILTON FRIEDMAN, MONEY MISCHIEF: EPISODES IN MONETARY HISTORY (1992); MILTON FRIEDMAN, THE OPTIMUM QUANTITY OF MONEY, AND OTHER ESSAYS (1969); MILTON FRIEDMAN ET AL., POLITICS AND TYRANNY: LESSONS IN THE PURSUIT OF FREEDOM (Pacific Institute for Public Policy Research 1984); MILTON FRIEDMAN, THERE'S NO SUCH THING AS A FREE LUNCH (1974); MILTON & ROSE FRIEDMAN, TYRANNY OF THE STATUS QUO (1994).

these payments allotted for extracurricular academic programs are spent in some manner for this purpose. The same "economic freedom" argument applies to public education. If public education is the ultimate evil, then removing the burr under its saddle (e.g., the plaintiff students) will hardly render it more likely to fail.

This voucher plan would render it more difficult for the administration and the highly politicized students to impose their views of a proper extracurricular education on the majority. However, if we assume the legitimacy of their ideological views, why shouldn't they be imposed on the entire student body? And if we do not, why should they be able to dispose of not only the student fees for these programs, but of all the tax revenues, which now flow into their control?

Framing our questions differently allows a varying approach to the solutions. Should public elementary schools require that pupils wear school uniforms? Should public universities have tenure for their professors? Should diversity and multiculturalism be mainstays of education? Should affirmative action be employed in decisions over student admission, faculty hiring, or course coverage?

For the Milton Friedmans of the world, these questions are straightforward, and elucidate answers based on their likelihood of promoting the efficiency of these institutions. They are of course highly complex, and there are great problems of empirical measurement, but at least the research program is clear—engage in these initiatives if they promote societal well being, and eschew them if they do not. As a heuristic device, these questions might almost translate into a query about which policies would maximize revenue, were this industry a private one. Alternatively, they might be asking which policies would maximize gross domestic product or some other measure of wealth.

In sharp contrast, however, matters for the libertarian are quite different. The answer to the question of, "What policies should be pursued by a public educational establishment?" is akin to asking him for day to day advice on how best to run a North Korean steel mill, a Cuban sugar cane plantation, or a USSR automobile factory. The only answer is to privatize these enterprises, and to allow market participants to make these decisions.¹⁴⁷

147. How many free market economists does it take to change a light bulb? None. They leave it to market forces.

This answer seems evasive and is possibly no answer at all. The answer may be Clinton-like, that is, merely avoiding the question. By considering a "taxicab theory" we can refute such a criticism.¹⁴⁸

Suppose you are in the south quadrant of the city and you get into a taxicab, telling the driver to take you to the western sector. He responds, "I can drive from here only to the north or east, but not to the west." What do you do? Do you ask him to take you to the north, as this is closer to your western destination than is your only other option, to the east? Not at all. Instead, you hop out of that cab as quickly as you can, thank your lucky stars you got away from a maniac, and throw in your lot with another driver who will take you where you want to go.

Similarly, when asked how the government can best run steel mills it should not even own or, how public schools can best promote education it should have nothing to do with, the only rational answer is to insist, parrot-like if need be, that it is not a proper role for the government at all. The question is an invalid one, which should not even arise.

However, an objection could be launched against our own opposition to the administration of public universities commandeering student fees and using them to promote ideas and activities detested by the plaintiffs. Why don't we stick to our knitting, and instead of criticizing these practices, content ourselves with calling for privatization? We were happy to remain "above the fray" with regard to the management of unjustified steel mills and universities. Why don't we follow our own advice in the present situation?

The reason is that in the present context we are discussing additional funds, over and above those spent on tuition. In the Wisconsin case, the administrators are appropriating an extra \$165.75 per semester, apart from, and in addition to, the other monies paid by the students for tuition.¹⁴⁹ It is as if the gunman has just stolen \$20,000 from his victim, and now realizes that the latter has another \$165.75 in his back pocket. Should the criminal return to the scene of the crime and relieve the poor unfortunate of those funds as well? We answer in the negative, and in so doing, certainly do not commit ourselves to the legitimacy of the first and larger seizure.

148. The authors wish to express a debt of gratitude to Michael Edelstein and Nando Peluci for this insight.

149. Southworth v. Grebe, 151 F.3d 717, 719 (7th Cir. 1998).

IX. CONCLUSION

We started off this essay by calling into question the propriety of forcing some students to subsidize the carrying out of the free speech rights of others. We ended by calling for the privatization of public universities. How did we get from one point to the other? Why is the second goal an implication of the first?

The point is, there is nothing wrong, *per se*, with “forcing” some students to pay to support the views that others favor. It all depends upon whether there was mutual agreement, on all sides, that this sort of policy be carried out. We demonstrated that when this was done in the context of the purely private college, it was unobjectionable. Surely as part of advanced education, it is totally reasonable for faculties to introduce students to ideas they might at first (and even always) consider abhorrent (which, as it happens, find favor with other students). This is part and parcel of the educational enterprise. No good teacher can shrink from this challenge. What is wrong with doing this is not the act itself, but the fact that the entire educational experience (at least in the public sector) is not one of complete voluntarism. We cannot ignore the more basic underlying issue. We think we have fully considered the relatively more superficial question of student fees being hijacked. The result is consistent under either the First Amendment or free-market approach. The Regents of a public university may not compel one student to pay for another student’s free speech.

