

FREQUENTLY ASKED QUESTIONS

Because the law involving mandatory student fees has been expounded almost exclusively in the realm of public colleges and universities, most of these questions are posed only in that context. Private colleges and universities that claim or wish to extend to their students the same rights that public colleges and universities *must* extend under the Constitution should adopt the same policies. That is a vital moral issue. The Bill of Rights limits the power of government over free individuals and groups. It also reflects moral values that are desirable ends in themselves. If a private college or university is going to extend fewer rights and protections to its students than a public institution constitutionally must extend, it certainly should make that fact clear to applicants, students, and donors.

My public university functions as if mandatory student fees were the only way to fund campus organizations. May a public university or college choose to fund campus organizations with funds other than those exacted by a mandatory student fee?

Yes, most definitely. Students are not the only source of funding for campus organizations. Universities that desire to foster expression of diverse views on campus may choose to stimulate debate by funding controversial campus organizations in a variety of ways. Universities may seek voluntary contributions from alumni, foundations, corporations, labor unions, the general public, and individual students themselves. Student organizations are also free to apply to such outside sources, and may well find that they learn valuable lessons about the “real world” if they have to convince people to contribute voluntarily to them. Also, public universities and colleges can avoid the moral and legal problems that come with requiring students to pay funds to groups they find objectionable by obtaining funding from alternative sources and making payment of the student activities fee optional.

May a college allow students to opt out of funding groups that they find objectionable?

Yes. A college or university is free to recognize the rights of conscience of individual students, allowing them to opt out of funding groups that these students find objec-

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tionable. This can be done administratively without a lawsuit or court order. For example, the University of Minnesota has established a procedure for students to receive refunds of their funding of MPIRG (Minnesota Public Interest Research Group). Institutions of higher learning would be respecting the highest principles by not forcing unwilling students to fund groups they find objectionable. On the other hand, there are those who argue, with some force, that because the function of a liberal arts university is to promote the free marketplace of ideas, a large number and variety of student-funded organizations contribute to the intellectual diversity on the campus. In this way, they argue, the imposition on students to fund organizations whose ideological agendas they disagree with is a minimal intrusion, as long as funding is distributed in a viewpoint neutral manner. The argument, in short, is that students of the widest possible diversity of beliefs benefit from having both their own and others' views represented among campus organizations. This question—whether it is better to deny all mandatory funding or to allow mandatory funding in a viewpoint neutral manner—is a personal and philosophical one on which reasonable people may disagree. However, the Supreme Court has spoken, and it has insisted that if public colleges and universities choose mandatory funding, they must follow a policy of viewpoint neutrality.

At my public university, we decide to fund campus organizations through a referendum. Is that constitutional?

No. In *Southworth*, the Supreme Court ruled that referenda to decide funding would almost certainly violate the principle of viewpoint neutrality. If a power oversteps constitutional limits, it does not matter whether it is a minority or a majority that exercises that power. A referendum invites a majority of voting students to violate viewpoint neutrality. Referenda offer no protection from the tyranny of the majority in matters of mandatory fees and the allocation of funding. State universities may not force students to fund groups that win funding through a referendum, nor may they deny a group funding solely because it does not receive sufficient support in a referendum.

My public college forces me to contribute to the local PIRG, and the PIRG then claims that I am a member because of my compelled contribution. Is that constitutional?

No. A state university cannot compel you to “join” a private organization that advocates ideas you oppose as a condition of attending and graduating from that institution. Although a university is able to compel funding of such a group if it is funded through a viewpoint neutral process, the university violates the Constitution if it allows the funded organization to count all of the com-

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pelled contributors as “members” of the organization. Such a requirement violates an individual’s rights of conscience and association, because membership indicates that the individual voluntarily chose to join the group. The university might fund a pro-life and a pro-choice student group; it may not compel you to be a member of either.

At my state university, an official policy prohibits funding of student organizations that are “religious or politically partisan.” Is that unconstitutional viewpoint discrimination?

Yes. A formal policy excluding campus organizations from receiving funding because of the views they advocate is a classic form of viewpoint discrimination and was found unconstitutional by the United States Supreme Court in *Rosenberger*. No campus organization may be categorically denied funding by university policy because of the views it espouses. Further, a state university may not create restrictions on funding for some groups, based on the viewpoints they advocate, while not similarly restricting groups that espouse other ideas. Legal equality among viewpoints is the rule of thumb here. For example, it is unconstitutional to prohibit religious and political groups from using their grants to fund guest speakers while allowing other campus groups to do so. The golden rule applies here.

Is it constitutional for my public college or university to prohibit student groups from receiving funding or meeting on campus unless they sign a statement pledging not to discriminate?

This is an area of law that is only now being explored by the courts, but certain aspects of this issue seem clear. First, if student organizations are private, voluntary groups, state universities and colleges might well be violating the students' freedom of association by requiring such groups to sign antidiscrimination statements. It would be unconstitutional, for example, for a state university to require a student organization to accept members or leaders who disagree with the basic tenets of the organization. The campus vegetarians could not be compelled to have butchers and hunters join their ranks, or the campus gay group to allow students who oppose homosexuality. The libertarians could not be kicked off campus because they refuse to allow communists to become members (or vice-versa). If such groups could not organize around their common beliefs and purposes, there could be no organizations devoted to those beliefs and purposes. However, a university could probably require that the ski club or chess club not discriminate on the basis of race or religion, because the prohibited categories do not infringe on the purpose that caused the organizers to form the private group. A university nondiscrimination policy raises significant and obvious First Amendment concerns when it would violate the

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organization's rights to freedom of speech, association, and the free exercise of religion. For example, a Jewish, Christian, Muslim, or atheist organization on campus should be permitted to require that its leaders be, respectively, Jewish, Christian, Muslim, or atheistic, because Judaism, Christianity, Islam, or atheism is the set of ideas around which each group formed. To force a religious antidiscrimination rule on a religious group would eliminate most religious groups' foundational beliefs, imposing on all faiths the religious view of the group that believed that "all roads lead to God." If controversial, even despised groups may not express their views in the marketplace of ideas found on a university campus, then freedom of expression is in serious jeopardy.

Are you saying, then, that colleges and universities must tolerate "discriminatory groups" on campus?

The central problem here is that a practice that a college or university might deem "discrimination" is, to a student group, necessary to preserve the group's identity. A case involving that question arose recently at Tufts University, a private institution. The student government denied funding (and recognition) to the Tufts Christian Fellowship (TCF) for refusing to promise an openly lesbian member who believed that Scripture held a favorable view of homosexuality that it would not take her views into account when considering her for a leadership position. In Tufts' initial view, the TCF was guilty of dis-

crimination on the basis of sexual orientation. After many contentious hearings and considerable outside publicity, TCF prevailed on the ground that it would have violated the religious freedom of TCF's members if they were forced to accept a leader who openly espoused views that their chosen religion deemed sinful. Supporters of TCF asked if the campus Gay, Lesbian, Bisexual, and Transgendered Alliance would have to choose as a leader someone who believed that homosexuality was a sin. Tufts eventually understood that every group's freedom depends on the right of individuals to come together around a shared cause or purpose. Colleges and universities that trample, in the name of diversity, the right of organizations to form around a common nucleus of ideas end up by destroying all possibility of diversity.

How would I wage a successful campaign against non-viewpoint-neutral funding at my public university?

One way to protect funding decisions from ideological abuse is for the university to spell out clear, neutral, non-ideological standards as the sole conditions for receiving funding. As noted earlier, in the second *Southworth* decision (2002), the U.S. Court of Appeals for the Seventh Circuit ruled that the U.S. Constitution requires state universities to spell out clear standards in order to restrain the unbridled discretion of student government

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officials to fund or defund groups according to their ideological viewpoints. If an applicant meets those standards, the group would be entitled to funding. This limits the discretion of the student government or officials who allocate the money and ensures that they do not bias their funding decisions based on their ideological agendas (which could change, of course, over time). Colleges and universities have convinced the Supreme Court that compulsory systems are justified because they enlarge the range of opinions to which students are exposed and thus enhance the college's educational mission. That is so, however, the Court ruled, only if viewpoint neutrality prevails. A public college or university cannot impose or use mandatory fees to create a system in which students at one end of the political or religious spectrum are forced to fund ideas with which they disagree while never allowing them to fund ideas with which they agree. That would be a fair rule, as well, for private colleges or universities that do not advertise a particular religious or secular sectarian mission. Under the system approved by the Supreme Court, any student organization would be entitled to funding if it met specific and objective non-ideological standards. Recall also, and use to your rightful advantage, that in the case of *Southworth v. Board of Regents of the University of Wisconsin System* (2002), the Court insisted that a truly neutral system would also deny the unbridled discretion to make funding decisions

to student government members or school officials. A system that passed constitutional scrutiny would forbid policies that deny funding to groups simply because of what they advocate. It would not allow viewpoint to form any part of a policy placing limits on a group's ability to seek funding. These rules also should apply at private institutions that wish to enjoy the same range of protections from arbitrary power. Urge officials at your school to adopt a policy that allows dissenting students to opt out of funding groups of which they disapprove. Also urge university officials to seek other sources of funding for student organizations (alumni, foundations, corporations, and so on), freeing unwilling students from being compelled to fund groups that they find objectionable.

How should I respond when my public university or college claims that it is under no obligation to fund my worthwhile cause?

The stated goal of mandatory fee systems is to fund a wide spectrum of viewpoints and voices on campus. If a group meets reasonable and neutral criteria—for example, that it have at least five members, that all its members be students, that it meet on campus at least once a month during the school year—then the group would be automatically entitled to a set amount of funding, possibly based on how many students are members. If a university is “under no obligation” to fund a particular

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group, then that university should not be allowed to force unwilling students to fund the groups the university does choose to fund. Otherwise, a university could pick and choose which groups receive money, favoring viewpoints it supports and denying funding to ideas it does not like. Most campus organizations, in fact, do not receive funding from mandatory student fees. For example, during the 1995-96 academic year at the University of Wisconsin, at the height of the *Southworth* litigation, only 183 of the 623 registered student groups on campus (29%) received money collected from the mandatory student fee. During the 1990-91 academic year at the University of Virginia, while the *Rosenberger* litigation was pending, only 118 out of a total of 343 student organizations (34%) received funding from the mandatory student fee. If a university funds only about one third of all student groups, this creates a great temptation to fund only the organizations whose views it favors. This danger is eliminated if all student groups can receive funding if they meet neutral and reasonable criteria.

What is the best way to request funding for my organization?

Follow every requirement, file every requested form, meet every deadline, and attend every hearing that you are supposed to attend. Student government members and university officials may be wary of funding a new

organization. Be prepared to apply several years in a row before you receive funding. However, if the student government at a public college or university consistently denies funding to a certain controversial group, that organization may consider contacting an attorney to look over the documents for a possible violation of the First Amendment.

When does too little funding constitute a repression of speech?

Unequal treatment—usually referred to in the law as “disparate treatment”—is the key here. If an organization is denied funding because it did not comply with obscure provisions of the application process, but the same requirements are waived for other groups, it is time to start asking questions about disparate treatment. The same principle is true in the case of inequalities in funding. If the funds from student fees flow primarily to liberal and leftist organizations, or to conservative and right-wing organizations, ask how that could be so. Does something in the funding procedure favor only certain ideological groups in terms of positive responses and amounts awarded? Apply two years in a row to see if a pattern of discrimination exists. Make certain that younger members of your organization receive and maintain the records of older and graduating members. If you can demonstrate that you have been the recipient

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of repeated questionable funding decisions, you will greatly strengthen your case. Many universities have mechanisms that allow student groups to appeal funding decisions. If you believe that the student government is refusing to fund your group because of your viewpoint, you can appeal through formal university channels. The process may or may not be stacked against denied applicants, or conservatives, or liberals, and so on. Overall, though, the appeals process may grant you quicker relief than going to court. Form coalitions with groups denied adequate funding on seemingly similar discriminatory grounds. Expose the abuses. Always remember and apply the profound saying of Supreme Court Justice Louis Brandeis: “Sunlight is the best disinfectant.”

My organization applied for funding to counteract the advocacy of various politically activist groups on campus, but the student government and the University denied my funding request because my group does not offer a “service” to students. Is this permitted?

Funding mischief often occurs when student governments fund “student services.” Some universities will fund the overhead expenses of campus groups, but others will give large amounts of money to other groups to provide what are defined as “services” for students. Sometimes, these services are legitimately defined.

Examples of legitimate services include shuttle bus services, study support centers, rape trauma response programs, and so on. However, some universities have defined lobbying and political or ideological advocacy for a specific viewpoint to be a “service” that all students should be required to fund. Between 2000 and 2001, for example, the University of Wisconsin gave approximately \$75,000 to WISPIRG to support its “service” of lobbying the Wisconsin Legislature and advocating its generally liberal viewpoints on campus. When the student government funds advocates of only one side of a debate and deems this advocacy a service to all students, then presumably those advocating contrary viewpoints are performing a “disservice.” To say the very least, that is not constitutionally required viewpoint neutrality. This is how a system of mandatory student fees, however, too often ends up funding groups from one side of a debate and not the other. When the University of Wisconsin gives \$50,000 a year to a campus gay organization to promote tolerance and acceptance of homosexuals, is it paying for a service that students in general can use, or is it amplifying the voice of one side of a controversial debate? Would the student government also give \$50,000 to a group of “ex-gays” offering to help homosexuals who wished to change their sexual orientation? To prevent such abuses, students should work for a definition of “student services” that does not define ad-

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vocacy as a service and that identifies things that truly benefit all or most students. Partisan lobbying and advocacy may be of truly great value to this or that cause, but they are not “student services.”

My environmentally sensitive state university uses mandatory fee money to fund a shuttle bus service and a recycling center for aluminum cans. I think that these are boondoggles, part of an environmentalist political cause, a waste of my money, and a subsidy of people with whom I disagree. Since the university does not fund a “gas guzzler” shuttle system or a throw-away aluminum can service, isn’t it engaging in viewpoint discrimination? May I therefore opt out of funding them?

No. First Amendment protections for students only apply when the university is funding advocacy. The university is free to fund things that do not advocate ideas, and it is free to force unwilling students to fund them. Shuttle services and recycling centers do not advocate viewpoints but, rather, reflect public policy choices. The fact that a student thinks the shuttle service or the aluminum can recycling center are boondoggles does not mean he or she can opt out of funding them. What that student can do, however, is run for student government and work through the political process to defund what he or she sees as “boondoggles.”

A professor at the state university I attend teaches a class in which he voices support for scientific creationism and traditional marriage. Another professor advocates Darwinism and the breakdown of the traditional family. May students who object to those viewpoints opt out of paying the portion of their tuition that provides the salaries of those professors?

No. Classroom situations are very different from the mandatory student fee situation. Tuition helps fund the educational program of a state university, so a professor is part of that educational system. Students who desire a degree from the state university cannot disrupt the official program established by the state. By contrast, campus organizations receiving mandatory student fees are neither controlled by nor affiliated with the government. Therefore, a state university can compel a student to fund a professor in the biology department whom that student finds objectionable, because the student seeks a degree from the university and the professor is part of the university's formal educational process. However, a private campus organization operated independently of university control is quite different.

CONCLUSION

Know and defend your constitutional and moral rights at public colleges and universities, and your moral and contractual rights at private colleges and universities. These issues are not simply topics of constitutional law. They are the stuff of liberty, legal equality, freedom of association, human dignity, and a free society.