FEES AND FUNDING AT PRIVATE COLLEGES AND UNIVERSITIES: A Question of Contract

Private universities and colleges stand in a different relation to the Constitution than governmental institutions such as public universities and colleges. The Constitution limits only government action. Because a private college or university is not a governmental entity, it does not have to obey the First Amendment. Voluntary associations in the private society are a vital part of American freedom. The fact that a private institution is not bound by the Constitution, however, does not mean that it is not bound by the rule of law. Many private schools choose by their own formal and advertised policies to hold themselves to certain standards regarding freedom of speech, due process, diversity of opinion, academic freedom, and the protection of individual conscience. A private school that claims to adhere to such policies may be required under state laws that apply to contract or
fraud to live up to its own internal standards—in this case, the protection of freedom of speech. Such policies might compel a private college or university to distribute student fees in a viewpoint neutral manner or prevent it from ordering a controversial student group to disband because the school objects to the views expressed by the group. The law does not permit breach of contract or fraud. This model might apply to private universities and colleges that promote no distinct ideological or religious belief system, or, above all, that promise certain standards of nondiscrimination, legal equality, and academic freedom. An institution that induces students to attend by promising legal equality, variety of viewpoints, and nondiscrimination may not break those promises with impunity.

By contrast, if a private college or university is organized around a specific set of ideological or political beliefs, then the First Amendment protects its right to require students to fund speech that promotes the beliefs of the college. Students attending a private school established around a clear system of belief have no legal right to demand that the school allow dissenters to express conflicting views on campus. The First Amendment’s right of association protects the right of those private schools to promote their specific ideological or religious beliefs. A private college or university may not in good faith present itself as a secular liberal arts institution that guarantees a student’s right to free expression but then,
in practice, further a particular ideological or religious agenda by funding only organizations that promote that agenda. Such a practice would arguably violate the contractual obligation that the institution has undertaken to the student to whom it has promised a liberal arts education in a setting in which the free marketplace of ideas prevails. (When a vendor advertises one product but then offers a different one in its place, that is known as “bait and switch.” When a vendor claims to sell you one product but secretly substitutes another, that act is known as “fraud.”)