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Counterpoint —

Introduction: Mandatory Student Activity Fees: Is *Smith* An Infringement Or An Improvement?

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In the Fall 1996 issue of JLE, [1] Maxine Schmitz, who is a county prosecutor in the state of Washington, criticized the California Supreme Court's decision in *Smith v. University of California*, [2] which, based on an analogy to teacher unions' fair-share and integrated bar associations' membership fees, ruled that public institutions of higher education (IHEs) must provide partial refunds from mandatory student activity fees to students objecting to the use of such fees for activities supporting a single political or ideological viewpoint. Characterizing *Smith* as "poorly reasoned and contrary to settled educational law," Schmitz asserted that "it should be overruled or overturned." [3]

Schmitz specifically argued the inapplicability of the analogy because "the mandatory fees at issue in *Smith* are used to fund the activities of recognized student groups with the purpose of exposing the university community to a potpourri of ideas and viewpoints, not to fund an independent PIRG whose activities are directed to the public-at-large and whose activities provide only incidental educational benefits to university students." [4] Specifically, she distinguished labor unions and integrated bar associations, which focus on employment, from student-IHE relationships, which focus on education, with respect

1. Maxine Schmitz, *Mandatory Student Activity Fees in Public Colleges and Universities: The Impact of* Smith v. University of California, 25 J.L. & EDUC. 601 (1996).
2. 844 P.2d 500 (Cal. 1993).
3. Schmitz, *supra* note 1, at 602 and 645.
4. *Id.* at 625.

to purpose, composition, and funding allocation decision-making. [5] Finally, she criticized *Smith* for providing inadequate guidance to determine which activities are in the refundable area; for having a chilling effect on IHE free speech; for posing practical problems for IHEs in terms of administrative procedures and alternatives; and for deferring to student-objectors rather than academic institutions. [6]

In the accompanying Counterpoint, Annette Gibbs, who directs the Center for the Study of Higher Education at the University of Virginia, defends the *Smith* majority opinion as following settled legal paths, providing appropriate deference to IHE officials, and leaving intact not only a "hugely successful student activities program," albeit with relatively minor modifications, but also the institutional mission at the defendant-IHE. [7] The modifications, as identified by Gibbs, are that administrators at public IHEs need 1) to "determine and communicate to students, as well as the entire university community, what constitutes educationally germane activities"; [8] and 2) "to provide appropriate safeguards and procedures to minimize the 'constitutional infringement' for students who might object to such use of their fees." [9] These modifications, Gibbs avers, constitute only corrections, not substitutions, of the university leaders' judgment, providing accommodations to "*both* the rights of the university and the rights of the students." [10]

In evaluating the respective analyses and arguments of Schmitz and Gibbs, consider too the pertinent judicial opinions pre- and post-*Smith*. Schmitz comprehensively canvasses the earlier case law with a few exceptions. [11] However, neither Schmitz nor Gibbs mentioned three more recent rulings. First, the Second Circuit engaged in further fine-tuning of its original *Smith*-like

5. *Id.* at 626-42.

6. *Id.* at 633-42.

7. Annette Gibbs, *Are Mandatory Student Activity Fees Really Mementos of the Past?*, 28 J.L. & EDUC. 65 (1998).

8. *Id.* at 66.

9. *Id.* at 67.

10. *Id.* at 69.

11. She missed one of the early cases, decided the same year as the Abood v. Detroit Board of Education, 431 U.S. 209 (1977) labor union fair-share fee landmark. Hickman v. Board of Regents, 552 S.W.2d 616 (Tex. Ct. App. 1977). She also missed the subsequent, although not reversing, proceedings of some of the cases. Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986); Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1067 (1993); Arrington v. Taylor, 380 F. Supp. 1348 (M.D.N.C. 1974), *aff'd mem.*, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976); Veed v. Schwartzkopf, 353 F. Supp. 149 (D. Neb. 1973), *aff'd mem.*, 478 F.2d 1407 (1973), *cert. denied*, 414 U.S. 1135 (1974). Finally, she did not cite the related case law concerning mandatory student fees for specific activities. *See, e.g.*, Goehring v. Brophy, 94 F.3d 1249 (9th Cir. 1996); Maryland PIRG v. Elkins, 565 F.2d 864 (4th Cir. 1977), *cert. denied*, 435 U.S. 1008 (1978); Arizona Bd. of Regents v. Zappia, 577 P.2d 735 (Ariz. Ct. App. 1978); Erzinger v. Regents of the Univ. of California, 187 Cal. Rptr. 164 (Ct. App. 1982), *cert. denied*, 462 U.S. 1133 (1982).

order, illustrating the difficulties of drawing the lines for germane activities and proper procedures. [12] Second, the *Smith* remand resulted in a ruling specific to the political activities of the student senate at the defendant-university, [13] which was one of the three fee uses that the plaintiffs challenged. [14] California's intermediate appellate court ruled that a refund procedure for this activity was not constitutionally required, again illustrating the considerable but not insurmountable difficulties in the implementation line-drawing of the *Smith* approach. Finally and more recently than the Schmitz-Gibbs' writings, the Seventh Circuit Court of Appeals adopted a *Smith*-like approach in holding that a public university's use of a portion of mandatory student activity fees to fund private organizations that engaged in political activities, speech, and advocacy violated the free speech rights of objecting students. [15] However, the Seventh Circuit overturned the district court's injunction against such funding, which included detailed administrative procedures, as paritally overbroad; the rejection of a pure rebate approach was appropriate but the coverage of fees and uses to which there had been no objection was beyond the purview of the case, [16] thus underscoring the practical, albeit not insuperable, difficulties of implementing the *Smith*-type analysis.

In the Counterpoint tradition, readers are urged to examine directly the Schmitz and Gibbs analyses as well as the pertinent case law, including the recent rulings, to make their own assessment of whether *Smith* should be followed in other jurisdictions.

12. Carroll v. Blinken, 42 F.2d 122 (2d Cir. 1994)("*Carroll* II").

13. Smith v. Regents of Univ. of California, 65 Cal. Rptr.2d 813 (Cal. Ct. App. 1997).

14. The other two were for student activity groups and the student organization's lobbying efforts. The California Supreme Court ordered a refund procedure with respect to these two uses but ordered further proceedings on this third use. *Id.* at 815 n.1.

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

16. *Id.* at 733-35.