The Journal of Law and Education

Volume 28 | Issue 1 Article 7

1-1999

Are Mandatory Student Activity Fees Really Mementos of the Past Counterpoint

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Are Mandatory Student Activity Fees Really Mementos Of The Past?

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In the Fall 1996 issue of JLE, Maxine Schmitz, a Spokane, Washington county prosecutor, charged that a state supreme court decision, *Smith v. University of California,* [1] was poorly reasoned. More specifically, she argued that *Smith*, threatens the university's discretionary power to determine the best way to implement its educational mission and that it deferentially accords dissenters the equivalent of a line-item veto over any group funding decision they consider ideologically or politically objectionable. [2]

The *Smith* court focused on a long-standing conflict between several students and the University of California at Berkeley. The students brought suit against UC-Berkeley, claiming that (a) the university did not have the authority to collect a student activity fee, and (b) the university's use of student activity fees to subsidize student groups that were devoted to political and ideological causes constituted compulsory political expression and, thus, violated their rights to free speech. [3] The trial court had denied the students' claims, so they appealed. The California Court of Appeals upheld the trial court. The California supreme court determined the university did have the authority to collect a student activity fee but overruled the appellate court on the second claim, which addressed compulsory political expression, and required the university to provide a partial fee refund to students objecting to the use of their fees for political and ideological activities. [4]

The *Smith* opinion, just as any legal case, can be read and interpreted in many ways.This particular decision may not be as detrimental to the university and its use of mandatory student fees as Schmitz feared. Perhaps the real impact of the *Smith* court is that *now* the university simply has to determine

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1. 844 P.2d 500 (Cal. 1993), *cert. denied*, 114 S. Ct. 181 (1993).

2. Maxine G. Schmitz, Mandatory Student Activity Fees in Public Colleges and Universities: The Impact of Smith v. University of California, 25 J.L.& EDUC. 602, 634 and 636 (1996).

3. 844 P.2d at 508 and 506.

4. Schmitz, *supra* note 2, at 634.

which student groups provide educational benefits that relate directly to the institutional mission. [5] The necessity for such action on the part of university administrators does not necessarily imply that their "discretionary power to determine the best way to carry out the university's educational purpose is threatened," [6] as Schmitz anticipated, but rather that definitive leadership is required to determine and communicate to students, as well as the entire university community, what constitutes educationally germane activities. University administrators possess the knowledge to do this task, and the *Smith* court gives high priority to such administrative practice.

In considering the issues presented by the students, California's highest court weighed two important principles: (a) that the government may not compel a person to contribute money to support political or ideological causes and (b) that the university must have considerable discretion in determining how best to implement the university's educational mission. [7] The court concluded that a state college or university may support student groups and organizations through mandatory fees because such funding can be germane to the educational purpose of the institution. However, the court emphasized that the educational benefits a group offers may become incidental to the group's primary function of advancing its own political and ideological interests. Funding such an organization or group may provide some educational worth, "but the incidental benefit to education will not usually justify the burden on the dissenting students' constitutional rights." [8] The university may require students to support an organization if there is a sufficiently compelling reason to do so, but "the organization's use of those mandatory contributions must be germane to the purposes that justified the requirement of support." [9]

Even when a state university has a sufficiently compelling educational reason to require its students to subsidize an organization against their will, according to the California Supreme Court, the resulting infringement on freedom of association necessitates procedures designed to minimize the constitutional infringement. Such procedures would require that institutional administrators: (a) identify any organizations that are ineligible for mandatory funding under the constitutional standard (i.e., that the government not force persons to contribute money to support political or ideological causes) and (b) provide dissenting students the opportunity to deduct a corresponding amount from the mandatory fee or receive a refund. [10]

5. 844 P.2d at 511.
6. See *supra* note 4.
7. 844 P.2d at 506.
8. *Id.* at 511.
9. *Id.* at 508.
10. *Id.* at 502.

And here, undeniably, is where the UC-Berkeley administrators erred. They failed to provide appropriate safeguards and procedures to minimize the "constitutional infringement" for students who might object to such use of their fees. Higher education institutions' long tradition of using student activity fees to support their student organizations is characterized by immense success and overwhelming approval of most students. [11] This financial support has been so positive, in fact, that institutions are not accustomed to some of their students being offended or claiming that their constitutional rights have been invaded. Such circumstances, however benign, do not excuse administrators' inappropriate actions. The *Smith* court, in essence, "slapped the wrists" of institutional officials and told them how to undue their mistakes. This action does not imply or "show a lack of deference to the university's educational judgment," as Schmitz characterized it, but instead, the court called for the university to implement its educational mission within appropriate constitutional parameters.

Should the UC-Berkley Regents decide to implement educational programs that "entail burdens on constitutional rights" they must ensure that the burdens are justified, and the *Smith* court made it clear that the university made no serious effort to do so. Counsel for the Regents, in fact, argued that such a determination is almost impossible to make because the terms "political" and "ideological" are vague. The court was not impressed and reiterated:

> Legal precedent required labor unions and a state bar association to identify "political" and "ideological" activities that cannot properly be charged to mandatory contributions . . . when a group's educational function has become merely incidental to its political and ideological activities, then the infringement of dissenting students' constitutional rights can no longer be justified by the purported educational benefit. [12]

When courts are called upon to reconcile the rights and responsibilities of universities and their students, administrators sometimes perceive that decisions favorable to dissenting students will "favor" those dissenters over the overwhelming majority of students who do not claim that their rights have been violated. Schmitz apparently shares this concern; she argued that the *Smith* court failed to give proper deference to the university's educational judgment which, in turn, "gives dissenters the equivalent of a line-item veto over any group funding decision they find objectionable on political on political or ideological grounds." [13] The court, however, determined that UC-Berkeley

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11. *See, e.g.*, ROBERT HENDERSON & ANNETTE GIBBS, The College, the Constitution, and the Consumer Student (1986); Annette Gibbs, Reconciling Rights and Responsibilities of Colleges and Students (1992).

12. 844 P.2d at 513.

13. Schmitz, *supra* note 2, at 642 and 645.

did have the power and authority to impose and collect mandatory student activity fees. This fact, in itself, is a tremendous endorsement of the appropriateness for the fee subsidy to the other 136 groups for which students did not object on constitutional grounds. The dissenting students asked for partial refunds pertaining only to 14 groups. In retrospect, it is surprising that these 14 groups, including Amnesty International, Campus Abortion Rights League, Students Against Intervention in El Salvador, and UC-Berkeley Feminist Alliance, were funded in the first place since they are *not* directly germane to the university's mission. Furthermore, some of these organizations were affiliated with outside, state, national, or international groups, much like local chapters of fraternities and sororities that belong to larger "umbrella" organizations.

Clearly, contrary to Schmitz's view, the *Smith* court did not substitute its judgment for the judgment of the university relative to its use of student activity fees for supporting student groups. It merely found that the university erred in implementing its educational prerogatives. Being required by the court to give a partial refund to the dissenting students does not give them undue deference or a line-item veto over any group funding decision they find objectionable. The students who do not object are able to continue their involvement and participation in whichever groups they choose. Moreover, all students — whether or not some are dissenters — are "free to organize, to promote their ideas, and to seek by all legal means to persuade others that their views are correct." [14] Obviously, some of these groups might be funded while others would not qualify, depending upon whether the groups' activities were determined "germane to the university's educational mission." [15]

A deeper look at the intricacies of this decision shows that, contrary to Schmitz' position that the case was poorly reasoned, the court traveled established law paths and arrived at the only logical legal conclusion it could reach. Balancing the rights of dissenting students who objected to being forced to subsidize student groups devoted to ideological or political causes against the university's right to carry out is educational mission was the only choice available to the court. [16] Courts have been applying these balancing tests in college student activity fees cases for over two decades, and the evolving law has been consistent in that, although higher education institutions have the power to impose these mandatory fees, their power is not unlimited. The university's exacting and use of the fees cannot be arbitrary, cannot impose acceptance or practice of repugnant political, religious, or personal views, or cannot chill

14. 844 P.2d at 503.

15. *Id.* at 507.

16. *See generally* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Good v. Associated Students, Univ. of Washington, 542 P.2d 762 (Wash. 1975); Carroll v. Blinken, 575 F. Supp. 772 (S.D.N.Y. 1983) *and* 957 F.2d 991 (2d Cir. 1992).

students' exercise of a constitutional right. [17] The *Smith* court thus balanced the two opposing "rights" in a predictable manner which yielded a predictable decision.

The systematic, yet broad-scope, manner in which the opinion was analyzed and written suggests that the court tried to accommodate *both* the rights of the university and the rights of the students, but it could not rationalize error made by the university for failing to determine which activities were appropriate for funding and which were not. For example, many colleges and universities, for years have excluded social, political, ideological, and religious groups from receiving mandatory student fee subsidies, the reason being that they are not *directly* central to the institutions' education missions.

In conclusion, Schmitz' sense of gloom and doom surrounding *Smith v. University of California* appears groundless; her call for the decision to "be overruled or overturned" [18] is unfounded. The University of California-Berkeley still has a hugely successful student activities program, dissenting students' rights have been accommodated, and the institution's mission remains intact. And perhaps most important for the future, the nation's other 1575 public colleges and universities can be confident that if they follow the *Smith* court's approach for establishing guidelines for implementing their educational missions relative to the collection and distribution of mandatory student activity fees, such fees need not be mementos of the past.

17. *Id.; see also* Veed v Schwartzkopf, 353 F. Supp. 149 (D. Neb. 1973).
18. Schmitz, *supra* note 2, at 602.