THE LINK BETWEEN STUDENT ACTIVITY FEES AND CAMPAIGN FINANCE REGULATIONS

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INTRODUCTION

Consider two seemingly diverse scenarios recently addressed by the U.S. Supreme Court: Fundamentalist Christian students sue their universities for giving some of their mandatory activity fees to ideologically liberal student organizations;[1] politicians and political action committees across the ideological

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1. *See* Southworth v. Grebe, No. 98-1189, 2000 U.S. LEXIS 2196 (Mar. 22, 2000), *rev'g* 151 F.3d 717 (7th Cir. 1998); *see also* Anne-Marie Cusac, *Suing for Jesus: A New Legal Team Wants to Cleanse the Campuses for Christ*, THE PROGRESSIVE, Apr. 1, 1997, at 30 (describing the *Southworth v. Grebe* litigation, noting that all three plaintiffs are fundamentalist Christians and that the litigation is funded by the Alliance Defense Fund, which in its newsletter noted that student fee funding of "groups that advocate radical feminism, abortion, and homosexuality" is objectionable

spectrum challenge restrictions on the way they can collect and spend their money.[2] The link between these two types of claims has not been obvious, but indeed exists at a fundamental level. The question central to resolving both types of claims is the scope of the government's discretion to redistribute speech resources for the purpose of creating a public forum.[3] The Court identified this question in resolving the recent student activity fee challenge,[4] but not in addressing campaign finance issue.[5] The linkage between the claims thus remains unnoted.

One aspect of this linkage is the government purpose. In both types of cases the government can claim that its purpose is not only consistent with, but affirmatively serves, free speech clause values. Universities across the country "operate against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[6] They thus view it as their "business . . . to provide that atmosphere which is most conducive to speculation, experiment and creation."[7] The purpose of the student activity fees funding mechanism is to promote diversity of expression on campus by making it possible for a broader range of speakers to participate than could if their speech

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because the groups "promote values and take actions contradictory to Christian beliefs").

2. *See* Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897 (2000) (Republican candidate for state auditor and a political action committee that wanted to contribute more to him sued to enjoin enforcement of a campaign contribution limit). Similar cases have involved different plaintiffs. *See, e.g.*, California Prolife Council Political Action Comm. v. Scully, 989 F. Supp. 1282, 1286 (E.D. Cal. 1998) (listing plaintiffs as including the California Democratic Party, the California Republican Party and numerous unions, as well as the named political action committee), *aff'd*, 164 F.3d 1189 (9th Cir. 1999). These and other challenges to campaign contribution limits occur against the background of the Court's decision in *Buckley v. Valeo*, 404 U.S. 1 (1976), which interpreted the Constitution to permit some contribution limits but generally not to permit restrictions on expenditures.

3. *See* Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032, 1040 n.5 (9th Cir. 1999) (deciding in a student activity fees challenge whether "a public university may . . . constitutionally establish and fund a limited public forum for the expression of diverse viewpoints."); C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 33 (1998) (arguing that the Supreme Court's decision in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), "implicitly accepts the view that campaign speech is part of a legally structured, institutional realm in which speech can be regulated—in this case, a sphere that can be opened to the views of people but (partially) closed to those of corporations—in order to improve the democratic character of elections").

4. *See Southworth*, 2000 U.S. LEXIS 2196, at *31 (university through fee funding mechanism "may create what is tantamount to a limited public forum").

5. *See Shrink*, 120 S. Ct. at 905-09 (addressing government purpose of preventing corruption and the appearance of corruption).

6. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 836 (1995).

7. *Rounds*, 166 F.3d at 1038 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12 (a statement of a conference of Senior scholars from South Africa))).

opportunities depended solely on the money they could generate in the private economic market.[8]

Similarly, federal and state governments are charged with structuring and running elections that comport with constitutional and democratic ideals.[9] Full expression from a wide range of speakers about self-government issues is at the core of free speech clause protection.[10] To the extent that campaign finance regulations could seek to "restrict the speech of some elements of our society in order to enhance the relative voice of others"[11] their purpose would be to promote a more full exposition of viewpoints on electoral issues than occurs in a speech market that mirrors the distribution of money in the private economy.[12] This Article argues that recognizing the government's purpose as creating and structuring a public forum means that such an equalizing purpose could comport with the free speech guarantee.

Another aspect of this linkage is the nature of the free speech clause claim. In both the student activity fees and campaign finance challenges the claim was that the Constitution limits the government's ability to redistribute speech resources even for a purpose that may seem to serve free speech clause values.[13] In the fee redistribution context, students unsuccessfully argued that such "life-support" for groups that "cannot survive in the marketplace of ideas" violated their free speech rights.[14] In the campaign finance context, the Court has held that regulations aimed at "equalizing the relative ability of individuals and groups to influence the outcome of elections" violate the Constitution because "[t]he

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8. *See Rosenberger*, 515 U.S. at 834 (stating that the purpose of student activity fees forum is "to encourage a diversity of views from private speakers").

9. *See* Burson v. Freeman, 504 U.S. 191, 198-99 (1992) (recognizing State's compelling interests in "[p]rotecting the right of its citizens to vote freely for the candidates of their choice" and "protect[ing] the right to vote in an election conducted with integrity and reliability").

10. *See id.* ("Whatever differences may exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966))).

11. *Id.* at 48-49. The Supreme Court has interpreted the Constitution to forbid such an equalizing purpose. *See id.* at 49-50. *But see* Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 912 (2000) (Breyer, J., concurring) (arguing that *Buckley*'s words "cannot be taken literally" because "[t]he Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many.").

12. *See* Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994) (arguing for an "equal-dollars-per-voter" rule because "wealthy citizens should not be permitted to have a greater ability to participate in the electoral process simply on account of their greater wealth.").

13. *See* Southworth v. Grebe, No. 98-1189, 2000 U.S. LEXIS 2196, at *26 (Mar. 22, 2000) (noting "the important and substantial purposes of the University, which seeks to facilitate a wide range of speech"), *rev'g* 151 F.3d 717 (7th Cir. 1998); Buckley v. Valeo, 424 U.S. 1, 48 (1976) (rejecting "ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" as a justification for expenditure limits).

14. Cusac, *supra* note 1, at 30.

First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."[15] Despite the different results, however, the basic outline of the claimed individual speech right in both instances is the same: that the free speech guarantee grants individuals speech power in the "marketplace of ideas" in proportions that mirror their shares of economic resources in the private financial market.[16] To the extent that this claimed right is indeed contained within the Constitution, it would allow individuals to veto collective action aimed at augmenting speech opportunities by equalizing them.

This link between the issues—the common government purpose and the same claimed individual right to thwart it—sheds new light on both of them. Crucial to understanding both is a definition of the scope of the government's discretion to choose to regulate individuals' money for the purpose of creating and structuring a public forum. This Article provides such a definition.

Part I spells out the boundaries of the controversies that underlie the recent cases, noting that they raise the same fundamental constitutional question of the government's ability to redistribute speech resources to create a public forum. Part II examines the specifics of this linkage. Part II.A notes that in both controversies the claimed individual speech right depends upon equating government regulation of money with such regulation of speech. Part II.B identifies the common government purpose of creating and structuring a public forum. Part II.C examines the different government means of compelling as opposed to restricting spending. This subpart concludes that while the means may make some difference in the constitutional inquiry, they are not the crux of the analysis.

Part III identifies and examines the factors relevant to resolving the appropriate scope of government action in both contexts. Part III.A looks at the government purposes that can justify speech market adjustment. Subparts examine the government purposes to encourage diverse expression, to promote fair deliberation and decision making, and to protect disfavored speakers, concluding that each of these purposes can justify redistributing private speech resources. Part III.B spells out effects that can invalidate speech-conscious governmental action. Subparts discuss the dangers of government favoritism, distorting public perceptions, and silencing speakers in the process of encouraging greater participation in the speech market. While all of these dangers are real and may exist intolerably in any particular case, these subparts note that both student activity fee distribution systems and campaign finance regulations can be structured to minimize these effects and thus enhance the constitutionality of the government action.

Part IV applies the analysis to both issues. Part IV.A discusses student

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15. *Buckley*, 424 U.S. at 48-49.

16. *See id.* at 50 (rejecting expenditure limits as inconsistent with the free speech guarantee); Cusac, *supra* note 1, at 30, 32 (quoting the president of the Alliance Defense Fund, which financed the *Southworth* litigation, as stating that groups threatened by a loss of student activity fee funding "ought to get better at the marketing business").

activity fee funding mechanisms, explaining the multiple reasons why the fact that fees are distributed to a wide range of student groups strongly supports the constitutionality of the mechanism. Part IV.B discusses campaign finance regulations. It notes that the government purpose of structuring full and fair debate on electoral issues should be strong enough in theory to support both contribution and spending[17] restrictions. Problems will most likely be in the proof. The government must prove a purpose to enhance free speech clause values, as opposed to thwart them by, for example, covertly favoring the incumbents who usually must participate in enacting the regulations. It also must address the difficult question of what level of restriction serves its diversity and fair deliberation purposes while not squelching expression in the process, although it should have some discretion to choose what this point is.

I. THE CONSTITUTIONAL ISSUES

A. Mandatory Student Activity Fees

In addition to tuition, which is mandatory and funds the many aspects of classroom learning, most universities also require students to pay "activity fees."[18] The purpose of such additional assessments is to fund activities outside the classroom that further the universities' educational missions.[19] Although the specifics of the amounts and methods of distribution vary,[20] such fees typically provide funds to run student government,[21] to create and circulate student

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17. The Court has upheld contribution limits as justified by other government purposes relating to corruption and the appearance of corruption. *See* Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 902 (2000); *Buckley*, 424 U.S. at 27. Thus the primary application of this alternate public forum purpose is to justify expenditure limits which require more compelling justification than contribution limits. *See Nixon*, 120 S. Ct. at 904. Nevertheless, the public forum purpose should serve as an additional justification for contribution restrictions as well. *See id.* at 911 (Breyer & Ginsberg, JJ., concurring) ("[B]y limiting the size of the largest contributors, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process.").

18. *See* DAVID L. MEABON ET AL., STUDENT ACTIVITY FEES: A LEGAL AND NATIONAL PERSPECTIVE 24 (1979) (90% of universities fund student activities with mandatory fees).

19. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 824 (1995) ("[T]he purpose of the [University of Virginia Student Activities Fund] is to support a broad range of extracurricular student activities that 'are related to the educational purpose of the University.'" (quoting App. to Pet. for Cert. 61a)).

20. *See* Southworth v. Grebe, No. 98-1189, 2000 U.S. LEXIS 2196, at *10-11 (Mar. 22, 2000) (student activity fee for the 1995-1996 academic year was $331.50; Regents control distribution of one portion, student body controls distribution of the portion to student groups, subject to Regents' approval), *rev'g* 151 F.3d 717 (7th Cir. 1998); *Rosenberger*, 515 U.S. at 824 (student activity fee is $14 per semester; student council has initial authority to disburse funds, but its actions are reviewable by a faculty body).

21. *See, e.g.*, *Southworth*, 151 F.3d at 717 ("[F]ees fund . . . the Associated Students of Madison budget."); Smith v. Regents of the Univ. of Cal., 844 P.2d 500 (Cal. 1993) (noting that

publications,[22] and to pay for some or all of the activities conducted by a range of student organizations.[23]

The organizations funded are typically composed of students united by a common interest or pursuit.[24] These unifying features may include academics,[25] recreation,[26] religious belief,[27] recognition and celebration of culture,[28] ethnicity,[29] or sexual orientation,[30] or discussion and advocacy with respect to particular social issues.[31] Some of these student groups are affiliated with state, national, or international organizations.[32]

The recent case before the Court centered around a university's authority to allocate a portion of mandatory student activity fees to student groups that

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proceeds of University of California student fees "support a wide variety of activities in addition to student government").

22. *See, e.g.*, *Rosenberger*, 515 U.S. at 822 (describing the university's authorization of "the payment of outside contractors for the printing costs of a variety of student publications"); Kania v. Fordham, 702 F.2d 475, 476 (4th Cir. 1983) (student fees fund *The Daily Tar Heel* at the University of North Carolina).

23. *See Southworth*, 2000 U.S. LEXIS 2196, at *11 (during the 1995-1996 school year fees funded 623 groups); Rounds v. Oregon State Bd. of Educ., 166 F.3d 1032, 1034 (9th Cir. 1999) (fees fund "[o]ver eighty University organizations, including athletic, culturally-oriented, and political group's").

24. *See* Dave Newbart, *College Student Fees Face First Amendment Test*, CHI. TRIB., June 4, 1997, § 1, at 17 ("[F]ees . . . go to special-interest groups such as chess clubs, black student unions, Asian-American associations and food science clubs.").

25. *See Smith*, 844 P.2d at 504 ("Most of the registered student groups [funded with activity fees] are devoted to academic, cultural, or recreational pursuits. The Physics Students Society [is a] random, typical example[].").

26. *See Southworth*, 151 F.3d at 719 (nonallocable portion of student fees cover "the first and second year of the Recreational Sports budget"); *Smith*, 844 P.2d at 504.

27. *See Rosenberger*, 515 U.S. at 847 (interpreting Constitution to require university to fund *Wide Awake: A Christian Perspective at the University of Virginia* when the university funded a wide range of other student publications); *Rounds*, 166 F.3d at 1039 (organizations funded include the Muslim Student Association and the Jewish Student Union).

28. *See Smith*, 844 P.2d at 504 ("typical student group" is the Spanish Club); *Rounds*, 166 F.3d at 1034 ("culturally-oriented" student groups receive fee funding).

29. *See* Newbart, *supra* note 24, at 17 (groups funded include "black student unions [and] Asian-American associations").

30. *See Southworth*, 151 F.3d at 720 (the Lesbian, Gay, Bisexual Campus Center receives fees funding); *Smith*, 844 P.2d at 504 (Gay and Lesbian League receives fees funding).

31. These causes vary widely and can include such causes as environmental preservation, *see Smith*, 844 P.2d at 504 (student affiliates of the Sierra Club), AIDS awareness, *see Southworth*, 151 F.3d at 702 (fees fund the Madison AIDS Support Network), and to promote "sensitivity to and tolerance of Christian viewpoints," *Rosenberger*, 515 U.S. at 826-27 (noting that this is the purpose of Wide Awake Productions, a student group entitled to funding by student fees).

32. For example, student organizations such as Amnesty International, Greenpeace, and the National Organization for Women have national affiliates.

engaged in "political or ideological" expression that conflicted with the personal beliefs of the student plaintiffs forced, through the fee mechanism, to fund it.[33] On the one hand, the Court had held that in some instances universities must fund student groups' ideological speech.[34] Specifically, where a university funds a wide range of student publications, the free speech clause of the First Amendment prohibits the school from discriminating against those that express a religious ideology.[35] On the other hand, in the context of compulsory union security fees[36] and attorney bar dues,[37] the Court had interpreted the Constitution to place limits on the government's use of dissenters' fees to fund special activities. Specifically, in both of those instances, the Court had held that the Constitution limits the use of mandatory monetary exactions from individuals to expressive activities "germane" to the government's purpose for creating the organization and compelling the payments to it.[38] These decisions, in turn, were extensions of the Court's holding that the First Amendment "freedom of speech" guarantee includes the right not to speak.[39] As the right to "contribut[e] to an

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33. *Southworth*, 2000 U.S. LEXIS 2196, at *19 (citing *Southworth*, 151 F.3d at 731, 735).

34. *See Rosenberger*, 515 U.S. at 834 ("University may not discriminate based on the viewpoint of private persons whose speech it facilitates" when it "expends funds to encourage a diversity of views from private speakers.").

35. *See id.* at 819 (invalidating a prohibition on funding a publication that "'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality'" as discriminatory when university funds wide range of other publications (quoting App. to Pet. for Cert. 61a)).

Prior to the recent decision, courts had differed on the extent to which the Constitution prohibited mandatory student fees to be used to fund educational activities that include political or ideological speech. *Compare* Rounds v. Oregon State Bd. of Educ., 166 F.3d 1032, 1038 (9th Cir. 1999) (use of student activity fees at University of Oregon to fund Oregon Student Public Interest Group Education Fund (OSPIRG EF) is constitutional where funding creates a "diverse . . . limited public forum" and separate education fund "limits university funding to educational activities," which may include political speech, rather than the "legislative lobbying and more overtly political action" engaged in by the parent, nonstudent OSPIRG), *with Southworth*, 151 F.3d at 732 ("The First Amendment is offended by the Regents' use of objecting students' fees to subsidize organizations which engage in political and ideological activities" regardless of whether the funding is germane to the universities' mission in that it creates a public forum for diverse expression.").

36. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

37. *See* Keller v. State Bar of Cal., 496 U.S. 1 (1990).

38. *Id.* at 13.

> *Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which compelled association was justified: collective bargaining. . . . The State Bar may therefore constitutionally fund activities germane to [its] goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 13-14 (quoting *Abood*, 431 U.S. at 235).

39. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 634 (1943) (rejecting the

organization for the purpose of spreading a political message is protected by the First Amendment,"[40] so, too, is the right to refrain from making such contributions.[41]

Because of the similarity of compelled contributions, courts had applied the analysis drawn from the union and bar due cases to answer the student activity fees controversy,[42] reaching conflicting results.[43] The conflicts illustrated that the germaneness test is not self-defining.[44] Rather, it requires a judgment about the closeness of the relationship between an organization's activities and its legitimate mission.[45] Moreover, because there are degrees of "germaneness,"[46] this judgment must include an assessment of the free speech clause interests on both sides of the controversy.[47] The problem with lifting the analysis from the previous mandatory payment cases and applying it to the student fees issue is that the surface similarity between the cases obscures constitutionally significant differences between the types of cases.

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proposition that "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."); Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (quoting *Barnette*, 319 U.S. at 637)).

40. *Abood*, 431 U.S. at 235 (citing Buckley v. Valeo, 424 U.S. 1 (1976)).

41. *See id.* ("The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights.").

42. *See, e.g.*, Rounds v. Oregon State Bd. of Educ., 166 F.3d 1032, 1036-37 (9th Cir. 1999) ("We do not confront these issues in a vacuum, for the Supreme Court has already constructed the analytical framework for our examination," citing the germaneness test from *Abood* and *Keller*); Southworth v. Grebe, 151 F.3d 717, 723 (7th Cir. 1998) (noting the need to apply a "germaneness analysis"), *rev'd*, No. 98-1189, 2000 U.S. LEXIS 2196 (March 22, 2000).

43. *See Southworth*, 2000 U.S. LEXIS 2196, at *20 (noting "conflicting results" in lower courts); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 851 (1995) (O'Connor, J., concurring) (noting "a split in the lower courts" with respect to the application of the Abood/Keller analysis to student activity fees).

44. *See Southworth*, 2000 U.S. LEXIS 2196, at *27 (noting that "it is difficult to define germane speech with ease or precision where a union or bar association is the party, [and] the standard becomes all the more unmanageable in the public university setting."); *see also Rounds*, 166 F.3d at 1037 ("These principles are easily described in theory: application is a more operose task."); *Southworth*, 151 F.3d at 723-24 ("*Abood* did not provide much guidance as to its actual application . . . . *Keller* still left many lines to be drawn.").

45. *See* Keller v. State Bar of Cal., 496 U.S. 1, 15 (1990) (noting that the germaneness of activities to an organization's purpose will fall on a "spectrum").

46. *See Southworth*, 151 F.3d at 727 (rejecting a "broad reading of germaneness") (citation omitted).

47. *See Rounds*, 166 F.3d at 1039 (noting that in the context of student activity fees the goals of the university in compelling payments "are inextricably connected with the underlying policies of the First Amendment").

The difference relied upon by the Court in rejecting application of the germaneness standard to the student fee context is the "vast unexplored bounds" of the speech public universities seek to encourage.[48] A more precise way of stating this difference between the cases that is crucial to the constitutional analysis is that in previous cases, the government created an organization to serve a primarily nonspeech function.[49] In several ways this primarily nonspeech governmental purpose supported a constitutional interpretation limiting the use of mandatory payments for speech. First, the government did not have positive free speech interests inherent in the collective purpose to hold up against the free speech interests of dissenters.[50] Second, excising some tangential speech activities to serve the interests of individual dissenters did not significantly undermine the collective purpose.[51] Third, because the government purpose was to fund a single organization dedicated to pursuing a nonspeech objective, the speech incidentally funded would be of one viewpoint chosen by those who had majority control of the government-created organization.[52] The effect of compulsory funding of such speech would therefore be to redirect private speech resources from minority to majority viewpoints, skewing the marketplace of ideas in a way most inimical to free speech clause values.[53] This combination of

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48. *Southworth*, 2000 U.S. LEXIS 2196, at *27.

49. *See Keller*, 496 U.S. at 13 ("[T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services."); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 226-27 (1977) (legitimate purpose of union is to engage in "collective bargaining, contract administration, and grievance adjustment").

50. *Compare Keller*, 496 U.S. at 14 ("[T]he guiding standard must be 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.'"), *with Rounds*, 166 F.3d at 1038 ("In assessing purpose, it is of the utmost significance that the organizational speech at issue occurs in an academic setting, for '[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.'" (quoting Sweezy v. State, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting CONFERENCE OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN & THE UNIV. OF WITSWATERRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12 (1957)))).

51. *See Keller*, 496 U.S. at 16 (while "[c]ompulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative[,] . . . petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession."); *Abood*, 431 U.S. at 236 (noting that the constitutional inquiry involves "drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited").

52. *See* Kania v. Fordham, 702 F.2d 475, 480 (4th Cir. 1983) ("In *Abood* the plaintiffs alleged that they had no control over the Union's communications, and that these communications were one-sided presentations of the 'Union's viewpoint.'" (quoting *Abood*, 431 U.S. at 275 (Powell, J., concurring))).

53. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech [because] of disapproval of the ideas

factors—(1) a primary nonspeech collective purpose, (2) speech activities tangentially related to it (and therefore dispensable), and (3) a majority viewpoint-discriminatory speech market impact—explain the existence of the individual right to thwart collective speech activities in the context of organizations that serve nonspeech governmental objectives.[54]

Both the governmental purpose and the marketplace of ideas impact of the speech funded differ in the context of student activity fees. Universities frankly acknowledge that their purpose in compelling fees to support organizations that may engage in political or ideological activities is to create a public forum for speech and debate to supplement that which would exist were student speech to depend solely on private funding.[55] Thus, where creating a public forum is the purpose,[56] funding speech in the university context is not incidental to some other nonspeech objective. Funding speech *is* the objective. While this purpose would render the government action highly suspect if carried out in a way that exhibited official favoritism of particular points of view,[57] the universities argued that the neutral funding of a wide range of viewpoints within the created forums enhances, rather than endangers, free speech clause values.[58] Because of the free speech clause value inherent in the government purpose of creating a forum,[59] limiting the permissible speech funding would both significantly undermine the

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expressed.").

54. *But see* Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 6-7 (1983) (arguing "*Abood* and cases akin to it are essentially askew. . . . The constitutional issues genuinely at stake do not preclude the collection of service fees from ideologically offended payors.").

55. *See Rounds*, 166 F.3d at 1039 (by funding a "broad range of extracurricular activities that are related to the educational purpose of the University," the University has "created a limited public forum . . . that encourages 'a diversity of views from private speakers'" (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 824, 830, 834 (1995))); *Kania*, 702 F.2d at 477 (the student newspaper funded by student activity fees serves "the state's legitimate interest in creating the richest possible educational environment at the University and, in its role as a forum for the expression of differing viewpoints, is a vital instrument of the University's 'marketplace of ideas.'").

56. This Article deals with instances where creating and public speech forum is at least one of the university's purposes. Where this is not one of the purposes, as where a university funds the organization to provide educational benefits to its students, this analysis may not apply. *See, e.g.*, Galda v. Rutgers, 772 F.2d 1060 (1985).

57. *See Rosenberger*, 515 U.S. at 830-31 (when the government creates a limited public forum, it may engage in content discrimination to the extent necessary to preserve the purposes of the forum, but it may not engage in viewpoint discrimination).

58. *See, e.g., Kania*, 702 F.2d at 480 (the student newspaper "increases the overall exchange of information, ideas, and opinions on the campus").

59. *See* Carroll v. Blinken, 957 F.2d 991, 1001 (2d Cir. 1992) ("A university's interest in maintaining a thriving campus forum . . . is itself a concern of constitutional dimensions, since the central purpose of the First Amendment is to guarantee the free interchange of views and energetic debate.").

government purpose[60] and disserve free speech clause values.[61] Additionally, unlike previous cases, the effect of the compulsory funding is not to skew the marketplace of ideas toward a majority-chosen point of view.[62] All of these reasons explain the Court's decision to distinguish an individual student's constitutional claim to opt out of financially supporting certain expressive activities within the forum from the claims of public employees or state attorneys that political speech and lobbying by their respective organizations violate the free speech guarantee.

But these are not the only differences between the previous compelled funding cases and the recent challenges to the use of student activity fees. Another crucial difference not noted by the Court in its recent decision complicates the constitutional analysis. In particular, characterizing the university funding schemes as "neutral,"[63] while true in the sense that funding does not depend upon the viewpoint of the organizations' intended expression,[64] hides a crucial aspect of both the purpose and effect of creating the fee forum. Universities claim the right of a collective majority to choose as a common purpose promoting, through the expenditure of collective resources, diverse, including nonmajority, expression.[65] To fulfill this purpose the universities collect resources from students with majority points of view and redirect them to students with minority viewpoints. So, while the government action does not privilege a majority-favored viewpoint, it nevertheless has a speech market impact.[66] Specifically, by taking majority resources to fund minority speech the

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60. *See, e.g.*, Cusac, *supra* note 1, at 31 (without student activity fee funding "much student expression will end"); Newbart, *supra* note 24, at 17 (noting that the hardest hit student groups will be the smallest and most controversial).

61. *See, e.g.*, Rounds v. Oregon State Bd. of Educ., 166 F.3d 1032, 1039 (9th Cir. 1999) (noting that the university's goals and "underlying policies of the First Amendment" are "inextricably connected"); Southworth v. Grebe, 151 F.3d 1124, 1129 (7th Cir. 1998)(Wood, J., dissenting from denial of rehearing en banc) ("[G]rafting dissenters' rights onto a neutral forum for the expression of a full panoply of viewpoints will most likely eliminate the forum altogether, which is a perverse way indeed to safeguard the kind of free and open political and intellectual debate that lies at the heart of the First Amendment."), *rev'd,* No. 98-1189, 2000 U.S. LEXIS 2196 (Mar. 22, 2000)

62. *See Kania*, 702 F.2d at 480. While "[t]he mandatory fees in *Abood* . . . enhanced the power of one, and only one, ideological group to further its political goals[, the student newspaper] increases the overall exchange of information, ideas, and opinions on the campus." *Id.*

63. Rosenberger v. Rector & Regents of the Univ. of Va., 515 U.S. 819, 835 (1995) (University may "ration or allocate [the] scarce resources on some acceptable neutral principle").

64. *See id.* at 834 ("University may not discriminate based on the viewpoint of private persons whose speech it facilitates.").

65. *See id.* at 834 (University's purpose is to "expend[] funds to encourage a diversity of views from private speakers").

66. *See Southworth*, 151 F.3d at 729 ("[T]he Regents attempt to justify forcing the objecting students to fund these organizations because without funding less speech will result, and less controversial speech.").

government purposefully adjusts the mix of voices in the marketplace of ideas, augmenting the volume of minority speakers to enhance the diversity available for public consumption.

This explicit government purpose to manipulate the marketplace of ideas means that the student activity fees cases posed a fundamentally different constitutional question than the earlier compelled payment cases involving union or bar dues.[67] In the case of activity fees, dissenting students claimed a constitutional right to thwart a common purpose that the majority government claims serves free speech clause values.[68] Most basically, their claim was that the free speech clause forbids the government to reallocate speech resources among private parties.[69] Consequently, at issue in the student activity fees controversy was a collective majority's power to compel its members to support the common purpose of adjusting the relative weights of the voices in the marketplace of ideas to promote more full dialogue and debate.[70]

B. Campaign Finance Regulations

Campaign finance regulations are efforts by government to control the influence of money on politics. While there is no doubt that contributions and expenditures by persons and entities to and on behalf of candidates for office is an important and valuable part of the political process,[71] campaign finance regulations represent governmental determinations that large monetary transfers of either type undermine the integrity of the political process.[72] The current

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67. *See* Leslie Gielow Jacobs, *Pledges, Parades, and Mandatory Payments: Creating Coherency in Compelled Expression*, 52 RUTGERS L. REV. 123 (1999) (arguing that the Supreme Court's compelled expression cases are best explained as applying strict judicial scrutiny where the government's purpose is to manipulate the marketplace of ideas).

68. *Southworth*, 151 F.3d at 730 ("[The Regents] point to the educational benefits flowing from the very speech to which the plaintiffs so strenuously object.").

69. *See id.* at 731 (holding that these students cannot be required to "fund what they don't believe").

70. *See id.* at 729 n.10 ("The Regents . . . argue that . . . all students benefit from 'robust debate'") (citation omitted).

71. *See* Buckley v. Valeo, 424 U.S. 1 (1976). "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* at 14. "[C]ontribution and expenditure limitations impose direct quantity restrictions on political communication and association." *Id.* at 18.

72. *See* Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 280 (1991) (noting that Congress has historically passed campaign finance reforms in response to scandals, including the Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b (1988)), passed to prevent large corporate contributions like those to presidential candidates William McKinley and Theodore Roosevelt; the Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (codified in scattered sections of 2 and 18 U.S.C.), passed in response to the Teapot Dome Scandal; and the 1974 Amendments to the Federal Election Campaign Act (FECA), Pub. L. No. 93-443, 88 Stat. 1272

constitutional controversy centers around the scope of the government's authority to regulate campaign financing according to its determination of the public interest.[73]

The blueprint for the scope of the government's authority to regulate campaign financing comes from the Court's review of Congress's effort to regulate federal campaigns after the Watergate scandals.[74] The Federal Election Campaign Act ("FECA"),[75] as amended, limited individual contributions to candidates,[76] limited expenditures both by candidates[77] and by individuals that related to a particular candidate,[78] and imposed reporting requirements.[79] In *Buckley v. Valeo*,[80] the Court generally upheld the contribution limits[81] and reporting[82] requirements but invalidated the expenditure limits as in conflict with the free speech and association guarantees.[83] The Court found that contribution limits impose "only a marginal restriction upon the contributor's ability to engage in free communication"[84] and that FECA's primary purpose—"to limit the actuality and appearance of corruption resulting from large individual financial

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(codified as amended at 2 U.S.C. § 431-455 (1988)) adopted after the abuses of the 1972 presidential election). Congressional efforts to respond to scandals continue. *See* Jeremy Paul, *Campaign Reform for the 21st Century: Putting Mouth Where the Money Is*, 30 CONN. L. REV. 779, 780 n.2 (1998) (surveying congressional reform proposals in light of alleged 1996 campaign finance abuses).

73. *See infra* notes 80-90 and accompanying text.

74. *See* ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 47-49 (1988) (describing that public demands for campaign finance reform compelled legislators to act).

75. Congress first passed the FECA in 1971. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1971). The amendments were the subject of Supreme Court review. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431-455 (1998)).

76. *See* 18 U.S.C. §§ 608(b)(1), (3) (1994) (individuals may not contribute more than $25,000 in a single year or more than $1000 to any single candidate for an election campaign).

77. *See id.* § 608(a), (c) (limiting candidates' use of personal and family resources in their campaign and capping the overall amount candidates can spend campaigning for federal office).

78. *See id.* § 608(e) (individuals may not spend more than $1000 per year "relative to a clearly identified candidate").

79. *See* 2 U.S.C. § 431-456 (1994 & Supp. 1999).

80. 424 U.S. 1 (1976).

81. *See id.* at 59. "The contribution ceilings [] serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion." *Id.*

82. *See id.* at 85 ("[W]e find no constitutional infirmities in the recordkeeping, reporting and disclosure provisions of the Act.").

83. *See id.* at 59 ("[The expenditure limits] place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.").

84. *Id.* at 20.

contributions"—was sufficient to justify the Act's $1000 per person contribution limit.[85] By contrast, the Act's expenditure limits "impose direct and substantial restraints on the quantity of political speech."[86] The Court found the governmental interest in preventing corruption or its appearance inadequate to justify the expenditure limits.[87] The Court held that the governmental interests in preventing corruption and the appearance of corruption are inadequate to justify the ceiling on independent expenditures because (1) donors can easily evade the Act's limit on expenditures clearly identified with a candidate; and (2) independent advocacy does not pose the same danger of corruption as contributions.[88] However, the Court also stated that the governmental interest in preventing corruption "does not support the limitation on the candidate's expenditure of his own personal funds."[89] Additionally, the preventing corruption interest is not sufficient to justify overall campaign expenditure caps. The Court also found the alternative government interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections" by "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others" to be "wholly foreign to the First Amendment."[90]

Despite the *Buckley* Court's articulation of the constitutional values attached to campaign-related spending and giving, public perception of the damage to the democratic process caused by money in politics has grown since that decision.[91] Public pressure has resulted in governmental efforts, by Congress,[92] state legislatures,[93] and voter initiatives,[94] to craft reforms that will survive *Buckley's* guidelines. Inevitably, these reform efforts end up bogged down for years in litigation.[95]

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85. *Id.* at 26.

86. *Id.* at 39.

87. *See id.* at 45.

88. *See id.* at 54.

89. *Id.* at 56.

90. *Id.* at 46-47 (independent expenditures); *see id.* at 52, 57-58 (rejecting this interest in the contexts of candidate expenditures and overall campaign spending caps).

91. *See, e.g.*, Paul, *supra* note 72, at 779 (citing news articles and surveys reflecting public attitudes after the 1996 federal elections. "[V]irtually everyone agrees there are problems with the way American elections are conducted.").

92. *See, e.g.*, Molly Peterson, *Reexamining Compelling State Interests and Radical State Campaign Finance Reforms: So Goes the Nation?*, 25 HASTINGS CONST. L. Q. 421, 426 (1998) ("In the first session of the 105th Congress, at least one hundred pending House and Senate bills proposed changes to existing federal campaign finance laws. . . .").

93. *See, e.g.*, William J. Connolly, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. REV. 483, 497-98 (1996) (noting that "[b]y the end of 1993, all but eighteen states had imposed some form of contribution caps applicable to state election campaigns" and that "[m]ost of these limits came about through state legislation.").

94. *See id.* at 498 (listing examples of state contribution limits that were products of voter initiatives).

95. *See* Kristen Byrnes, *A Survey of Federal Cases Which Involve Campaign Financing*, 7

Because of *Buckley's* seemingly blanket condemnation of expenditure limits,[96] these reforms have primarily embodied contribution limits.[97] The focus of courts evaluating them has been *Buckley's* requirement that the government demonstrate a "sufficiently important interest" to justify the limit and that the limit be "closely drawn to avoid unnecessary abridgement of associational freedoms."[98] Evaluation of the government interest has focused on preventing corruption or its appearance,[99] which in turn requires defining corruption[100] and evaluating evidence of its existence[101] and public perceptions about it.[102] In the tailoring inquiry, courts have looked to the amount of the limit,[103] often relying on *Buckley's* other requirement that limits not be so low as to prevent candidates

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B.U. PUB. INT. L.J. 333 (1998) (noting litigation status of state campaign finance regulations).

96. *See* Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 358, 373 (1977) (noting absolute language of Buckley's expenditure limit condemnation).

97. A wide range of other types of reforms have been proposed. *See* CENTER FOR RESPONSIVE POLITICS, MONEY IN POLITICS REFORM: PRINCIPLES, PROBLEMS AND PROPOSALS 1, 11-17 (1996) (listing possibilities). Some states have experimented with "voluntary" expenditure limits coupled with increased contribution limits for those candidates who agree to the expenditure limits. *See, e.g.*, California Prolife Council Political Action Comm. v. Scully, 989 F. Supp. 1282, 1287 (E.D. Cal. 1998) (noting that California's Proposition 208 contains such a provision), *aff'd*, 164 F.3d 1189 (9th Cir. 1999).

98. Russell v. Burris, 978 F. Supp. 1211, 1218 (E.D. Ark. 1997) (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)). *See, e.g.*, Arkansas Right to Life State Political Action Comm. v. Butler, 983 F. Supp. 1209, 1220 (W.D. Ark. 1997) (noting need to determine whether the contribution limit at issue "burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest" (quoting Shrink Mo. Gov't PAC v. Maupin, 71 F.3d 1422, 1424 (8th Cir. 1995), *rev'd*, 120 S. Ct. 987 (2000))); *California Prolife*, 989 F. Supp. at 1293 (citing *Buckley*, 424 U.S. at 25).

99. *See California Prolife*, 989 F. Supp. at 1293 (finding that deterring corruption in government was a legitimate government interest, but that low contribution limits that would apply to candidates who did not accept voluntary expenditure limits were not closely drawn to serve the interest).

100. *See, e.g.*, Thomas F. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 CONST. COMM. 127 (1997) (noting difficulties in defining corruption); Ronald A. Cass, *Money, Power, and Politics: Governance Models and Campaign Finance Regulation*, 6 SUP. CT. ECON. REV. 1, 31 (1998) ("References to corruption elicit strong visceral reactions, but corruption is not so easily defined as those reactions might suggest."); Frank J. Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMM. 97, 103 (1986) (corruption's "apparent clarity is deceptive, and its origin is at best clouded").

101. *See, e.g.*, *California Prolife*, 989 F. Supp. at 1294 (noting that the government must have a substantial reason to suspect corruption to justify campaign finance regulation and that conviction of some members of California legislature for bribery supported the government's interest).

102. *See id.* at 1286-87 (noting that fact that Californians voted for Proposition 208, which was the subject of the litigation, indicated that they suspected corruption).

103. This is not, however, "a constitutional minimum below which legislatures cannot regulate." Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 909 (2000).

from mounting a successful campaign.[104]

The upshot of *Buckley* has been to severely cripple governments' efforts to remedy what they perceive to be the damaging influence of money on the political process. That governments cannot enact expenditure limits creates gaping loopholes that critically undermine the effectiveness of contribution limits and other types of campaign finance regulations.[105] Moreover, even these other types of restrictions remain vulnerable to reviewing courts' determinations, pursuant to *Buckley*, that the First Amendment protects individuals from such government regulation.[106]

The constitutional dilemma in the context of campaign financing is thus the correctness of *Buckley's* balance between the individual's free speech right and the collective majority's power to regulate the speech market according to its vision of the public good and free speech clause values.[107] The current focus of campaign finance reforms and litigation stems from the Court's early rejection of a valid government interest in equalizing the volume of the voices that participate in political campaigns.[108] Although the means of restriction did not exhibit government favoritism of particular points of view, crucial to the Court was that the government's purpose was nevertheless speech market-related.[109] Specifically, the government's purpose was to adjust the mix of voices in the speech market, restricting the volume of majority speakers to enhance the diversity of ideas available for public consumption.[110] By finding such a purpose

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104. *See id.* (rather than a specific dollar amount, the test is whether "the constitution limitation [is] so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below notice, and render contributions pointless").

105. *See* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 511 (1985) (White, J., dissenting) ("As in *Buckley*, I am convinced that it is pointless to limit the amount that can be contributed to a candidate or spent with his approval without also limiting the amounts that can be spent on his behalf.") (footnote omitted). "[Independent expenditure] controls are imperative if Congress is to enact meaningful limits on direct contributions." *Id.* at n.9 (citing S. REP. NO. 93-689, at 18-19 (1974) *reprinted in* 1974 U.S.C.C.A.N. 5604-5605)

106. *See, e.g.*, *California Prolife*, 989 F. Supp. at 1293 (invalidating contribution limits as not sufficiently related to interest in deterring corruption).

107. *See* Edward B. Foley, *Philosophy, the Constitution, and Campaign Finance*, 10 STAN. L. & POL'Y REV. 23, 23 (1998) (arguing that "the United States Constitution should be construed to permit Congress to choose [among visions of campaign finance reform].").

108. *See* Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

109. *See id.* at 18.

> Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, . . . it is beyond dispute that the interest in regulating the alleged "conduct" of giving or spending money "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."

Id. (citing United States v. O'Brien, 391 U.S. 376, 382 (1968)).

110. In the campaign finance context, the speech market adjustment purpose is closely related to a purpose to adjust "the relative ability of all voters to affect electoral outcomes." *Id.* at 17.

antithetical to the First Amendment, the Court articulated a constitutional vision in which an individual's interest in unlimited campaign spending trumps the collective majority's interest in restricting it to serve a public interest in ensuring full and robust political dialogue and debate.[111]

II. THE CONSTITUTIONAL LINK

The link between the student activity fee and campaign finance issues is that both require defining the scope of the individual free speech right against the scope of the government's discretion to create and structure a forum for expression by a broad range of speakers. Determining the meaning of the free speech clause in any particular context requires assessing the nature and weight of the individual's free speech interests, the interests served by the government action and the free speech impact of the government's means of achieving its objective.[112] All of these elements are substantially the same in the contexts of mandatory student activity fees that fund expression and campaign finance regulations.

A. The Individual Free Speech Right: Money = Speech

The crucial premise that defines the individual free speech right in both the student activity fees and campaign finance contexts is that money is speech.[113] So, compelling an individual to fund speech is the same as compelling the

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111. *See id.* at 48. "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *Id.* Additionally, the Court held that "the First Amendment simply cannot tolerate [the Act's] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.* at 54.

112. All of the various tests used to determine free speech issues require consideration of these factors. *See, e.g.*, Turner Broadcasting System, Inc. v. Federal Communications Comm., 512 U.S. 622, 662 (1994) ("The intermediate level of scrutiny [requires that a] regulation promote[] a substantial government interest that would be achieved less effectively absent the regulation." (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989))); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (under strict scrutiny, Court looks to where the government action "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end"); United States v. Albertini, 472 U.S. 675, 689 (1985); *O'Brien*, 391 U.S. at 377 (regulation of expressive conduct will be upheld if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

113. *See* Rosenberger v. Rector & Regents of the Univ. of Va., 515 U.S. 819, 830 (1995) (student activity fund is a speech forum "more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable"); *Buckley*, 424 U.S. at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

individual to speak[114] and restricting an individual's expenditures toward speech[115] is the same as restricting the individual's speech directly.[116]

Of course, money is not really speech.[117] And, compelling or restricting the payment of money that is used for speech[118] is not exactly the same as compelling or restricting speech directly.[119] Rather, the money = speech equation made by the Court in both contexts constitutes a judgment that the government actions regarding money are enough like government actions aimed at speech that they should be subject to the same constitutional scrutiny.[120]

A number of variables can make types of cases "the same" for purposes of free speech clause analysis. Language in the decisions implying that the individual autonomy impact of compelled[121] or restricted[122] expenditures makes

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114. *See* Abood v. Detrot Bd. of Educ., 431 U.S. 209, 235-36 (1977) (equating compelled funding of speech with compelled recitation of the pledge of allegiance (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943))).

115. In the context of campaign finance regulations, the Court has distinguished expenditure restrictions from contribution restrictions. The former constitute "direct restraints on speech," while the latter "[bear] more heavily on the association or right than on freedom to speak." Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 899 (2000) (citing *Buckley*, 424 U.S. at 19, 24-25).

116. *See Abood*, 431 U.S. at 234 ("[C]ontributing to an organization for the purpose of spreading a political message . . . 'implicate[s] fundamental First Amendment interests.'" (quoting *Buckley*, 424 U.S. at 23)); *Buckley*, 424 U.S. at 16 ("The expenditure of money simply cannot be equated with [] conduct.").

117. See *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985) where the Court held that "the expenditures at issue in this case produce speech at the core of the First Amendment." Additionally, as one dissenter noted, "[Expenditures] produce such speech: they are not speech itself." *Id.* at 509 (White, J., dissenting). *See also Shrink*, 120 S. Ct. at 910 (Stevens, J., concurring) ("Money is property; it is not speech.").

118. Not every dollar of every contribution or expenditure is used for speech. *See Buckley*, 424 U.S. at 263 (White, J., concurring in part and dissenting in part) ("There are [] many expensive campaign activities that are not themselves communicative or remotely related to speech.").

119. *See Federal Election Comm'n*, 470 U.S. at 508-09 (White, J., dissenting) ("The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are retained.").

120. *See Buckley*, 424 U.S. at 15-20 (rejecting treating restrictions on money like restrictions on conduct, and deciding to treat them as "restraints on First Amendment liberty that are both gross and direct"). *But see* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976) ("[N]othing in the First Amendment commits us to the dogma that money is speech.").

121. *See* Southworth v. Grebe, 151 F.3d 717, 730 (7th Cir. 1998) (compulsory student activity fees funding conflicts with students' "deeply held religious and personal beliefs" and the Constitution guarantees "that 'we the people' will not be compelled to pay for such speech: '[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" (quoting *Abood*, 431 U.S. at 234-35 n.31), *rev'd*, No. 98-1189, 2000 U.S. LEXIS 2196 (Mar. 22, 2000)).

122. *See Buckley*, 424 U.S. at 49 (independent expenditure ceiling "heavily burdens . . . the

these actions constitutionally the same as government actions compelling or restricting speech directly is misleading. The individual autonomy impact of governmental control of an individual's money as opposed to her speech is in fact quite different.

The compelled funding cases derive from cases where the government compelled speech directly.[123] Where the government compels individuals to speak or otherwise express words not of their own choosing, an autonomy violation can occur either because the forced speech indoctrinates the speaker or because it publicly associates the speaker with the unwanted message.[124] Neither of these autonomy harms occur with compelled funding.[125] United States citizens must fund speech all the time through taxes.[126] These people are not compelled to utter messages out of their own mouths, to become couriers for the government message, or otherwise to be publicly associated with the message.[127] They are simply required to participate, along with a number of other individuals, in funding speech that a reasonable observer knows does not represent the point of view of every individual who contributed to its propagation.[128] Although individual taxpayers may violently disagree with the messages of the

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First Amendment right to 'speak one's mind . . . on all public institutions'" (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964))).

123. *See Abood*, 431 U.S. at 235 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (invalidating compelled flag salute and pledge)).

124. *See* Jacobs, *supra* note 67.

125. *See id.*; Cantor, *supra* note 54.

> A first amendment violation would not seem to arise without government prescription of a message or forced identification with, or affirmation of, a message by the payor. The genre of spiritual invasion entailed in the payment of service fees for ideologically distasteful ends is quite different form the invasion condemned in *Barnette* or *Wooley*.

Id. at 19.

126. *See Southworth,* 2000 U.S. LEXIS 2196, at *21 ("The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on parties."); Keller v. State Bar of Cal., 496 U.S. 1, 12-13 (1990) ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed."); United States v. Lee, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

127. *Cf.* Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 470-71 (1997) (using these grounds to distinguish forced contributions for advertising from unconstitutional compelled expression).

128. *See* Cantor, *supra* note 54, at 25 ("[S]uch incursions upon conscience through forced 'support' of distasteful causes is an inevitable concomitant of living in an organized society."). *Cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 843-44 (1995) (government transfer of money used for religious speech does not violate Establishment Clause where method of distributing money to private groups is "religion-neutral").

government[129] or private individuals or entities that the government funds with taxes,[130] this individual impact is not enough to constitute a free speech clause violation.[131]

Similarly, restrictions on spending money to produce speech do not impact individuals' autonomy interests as severely as direct speech restrictions. A speaker who cannot spend money can still speak,[132] although his means and probably the size of his audience are limited.[133] But a speaker who cannot speak cannot do it at all. The Court in fact routinely upholds government actions that restrict the money that is available for speech activities[134] or restrict types of activities on which individuals might want to spend their money to communicate a message.[135] Taxes both compel people to fund expression with which they disagree and take away financial resources that could be used to communicate the taxpayer's chosen message.[136] Time, place and manner rules may constitutionally restrict the way that individuals can spend their money to communicate.[137] People who can employ solicitors to ring doorbells still might

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129. Tax protesters must pay taxes despite disagreement with government policies or speech. *See Southworth,* 2000 U.S. LEXIS 2196, at *21.

130. *See* National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (government funds disbursed to artists); *Rosenberger*, 515 U.S. at 834 ("When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.").

131. *See Rosenberger*, 515 U.S. at 833 ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.").

132. *See* Federal Election Comm'n v. National Conservative Political Action Comm., 470 U.S. 480, 509 (1985) (White, J., dissenting) ("The burden on actual speech imposed by limitations on the spending of money is minimal and indirect. All rights of direct political expression and advocacy are retained.").

133. *See* Buckley v. Valeo, 424 U.S. 1, 19 (1976) ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."). *But see* Wright, *supra* note 120, at 1012 ("The giving and spending restrictions may cause candidates and other individuals to rely more on less expensive means of communication. But there is no reason to believe that such a shift in means reduces the number of issues discussed in a campaign.").

134. *See Buckley*, 424 U.S. at 263-64 (White, J., dissenting) (listing numerous ways the government takes money from media or makes their operations more expensive, thus reducing the money available for speech).

135. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding loudspeaker ban); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (upholding requirement that groups use city-provided sound systems and technicians for concerts in the Bandshell in Central Park).

136. *See* Cantor, *supra* note 54, at 28 ("[Under this] rationale, a first amendment attack on diminution of expressive capacity could be applicable to every government fiscal extraction—i.e., tax, fee, toll, or rent.").

137. *See Ward*, 491 U.S. at 791 ("Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech.").

not be allowed to do so.[138] Having the money to construct huge neon signboards for a yard display does not mean that it is permitted,[139] and volume controls limit those with the resources to amplify their messages.[140]

All of the above examples confirm that when the Court equates money with speech something other than the impact of the government action on the complaining individual's ability to speak freely is its reason. While speech is always speech, whether money is speech for First Amendment purposes depends upon the context. What is significant about the context is not the degree of impingement on the individual's personal liberty. Rather, what explains the money as speech correlation in both the student fee and campaign finance contexts is the speech market effect of the government action. Specifically, in both instances the government's regulation of money "skews"[141] the mix of nongovernment voices in the marketplace of ideas.[142] That the speech market alteration effect is what brings the First Amendment into play is a crucial link between the cases because it signals that the constitutional analysis must focus on the nature of and justification for the marketplace of ideas effect rather than on an abstract assessment of the degree of individual autonomy impingement that occurs when the government regulates money.

B. Government Purpose: To Create and Structure a Speech Forum

The government actions of compelling the payment of student activity fees and restricting campaign-related contributions and expenditures have an effect on the speech market, but, in both contexts, this impact is purposeful rather than incidental.[143] This government purpose is another crucial link between the cases. Stated most broadly, the government's purpose in both types of cases is to create

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138. *See* Martin v. City of Struthers, 319 U.S. 141, 147 (1943) (invalidating blanket no soliciting rule but stating that a rule that enforced a homeowner's decision not to receive solicitors would be valid).

139. *See* City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) (invalidating city's blanket ban on residential signs but stating that "more temperate measures" could comply with the Constitution).

140. *See Kovacs*, 336 U.S. at 77.

141. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 895 (1995) (Souter, J., dissenting) (there should be no constitutional problem with student activity fee funding because it "do[es] not skew debate by funding one position but not its competitors"); R.A.V. v. City of St. Paul, 505 U.S. 377, 430 (1992) (finding that a regulation that evidences viewpoint discrimination "requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue").

142. *See* Buckley v. Valeo, 424 U.S. 1, 49-50 (1976) (condemning government effort to equalize relative abilities of individuals and groups to participate in political debate).

143. *See Rosenberger*, 515 U.S. at 841 ("The object of the [student activity fund] is to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life."); *Buckley*, 424 U.S. at 49 (one "government interest" is to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections").

a speech forum that has a different composition of voices than would exist in the private speech market without government intervention.[144]

Purposeful government action that affects the private speech market is highly suspect.[145] Nevertheless, sometimes even purposefully speech-conscious government action can comport with the free speech guarantee. Specifically, where the government creates and structures a public forum, its speech-conscious action may serve rather than thwart free speech clause values.[146] Where creating a public forum is the government purpose, the inquiry in any particular case must be the strength of the government's interest in creating the forum and the safeguards available to prevent the ostensibly speech-enhancing government action from having speech-restrictive results.

As in other instances where the government's purpose is to create and structure a public forum, in both the student fee and campaign finance contexts inherent in the government's purpose is the goal of promoting free speech clause values.[147] While pursuing this purpose involves controversial theoretical[148] and factual[149] determinations, this goal of affirmatively serving constitutional values distinguishes these contexts from instances where the government pursues speech-conscious action for purposes inimical to free speech clause values.

C. The Means: Compelled vs. Restricted Spending

One difference between student fee funding mechanisms and campaign

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144. *See Buckley*, 424 U.S. at 49 (purpose is to "equalize" expression as compared to private distribution); Southworth v. Grebe, No. 98-1189, 2000 U.S. LEXIS 2196, at *26 (Mar. 22, 2000) (university's purpose is "to facilitate a wide range of speech"), *rev'g* 151 F.3d 717 (7th Cir. 1998).

145. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989) ("The government's purpose is the controlling consideration [in determining whether a regulation is content neutral].").

146. *See Rosenberger*, 515 U.S. at 829-30 (assuming that in many instances the government may decide to create a limited public forum and discussing the rules that apply); Baker, *supra* note 3, at 16-24 (1998) (discussing numerous instances of "institutionally bound" speech, such as within government decision making bodies).

147. *See, e.g.*, Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032, 1039 (9th Cir. 1999) (university's goals are "inextricably connected with the underlying policies of the First Amendment"); Burt Neuborne, Buckley*'s Analytical Flaws*, J.L. & POL'Y 111, 121 (1997) (goal of campaign financing regulation is "to search for a system of structural rules that will enable a more reasoned, a more open, and a more equal discussion leading up to the crucial vote").

148. *See* Foley, *supra* note 107, at 23 (noting that "[t]wo starkly different visions dominate contemporary debates about campaign finance reform" and that "[the] stark difference between the egalitarian and libertarian position on campaign finance derives from a deep-rooted philosophical disagreement about economic justice."). *Compare Southworth*, 151 F.3d at 730 ("educational benefits" of fee forum do not justify compelling students to fund "speech to which [they] strenuously object"), *with Rounds*, 166 F.3d at 1040 n.5 ("To the extent that *Southworth* holds that a public university may not constitutionally establish and fund a limited public forum for the expression of diverse viewpoints, we respectfully disagree.").

149. *See* Cass, *supra* note 100, at 1 (questioning premises of campaign finance reform).

finance regulations is the means used by the government to achieve its objectives. With respect to activity fees, students object to being forced to pay for speech, whereas with respect to campaign finance regulations, candidates and their supporters object to not being allowed to do so. In these cases, however, the difference in means does not affect the central constitutional issue.

As noted above,[150] the central constitutional issue is whether the government may create a public forum for the purpose of diversifying the voices that would be available absent government intervention. This involves assessing the constitutional interests on either side of the controversies. One of these is the individual's interest in speaking without government regulation.[151] Where the government acts toward speech directly, free speech doctrine generally does not distinguish between the means of compulsion and restriction.[152] Where the government acts toward an individual's money, there is even less reason to do so. Whether the government compels spending toward speech activities or restricts them, the individual can still speak freely.

Despite this fundamental similarity, when money is equated with speech, the government means of compelling as opposed to restricting spending for speech produce somewhat different individual and speech market effects. These effects, however, are balanced so that neither the means of compelling or restricting contributions for speech is clearly the better way to preserve free speech clause values.

On first consideration, the individual impact of compelling fees to fund a public forum may appear less severe than restricting speech expenditures. Although fee compulsions indirectly restrict individual spending on speech by reducing the overall amount of money that the individual has to engage in speech activities, after making the required contributions, individuals remain free to spend any amount of their remaining funds on expression. By contrast, restricting individual spending for speech limits the individual's speech spending for the designated type of speech absolutely.

Another perspective, however, highlights the individual impact of contribution compulsions. Where individuals pay a fee to support a public

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150. *See supra* Part III.B.

151. *See supra* Part III.A. (discussing individual autonomy interest and the money/speech correlation).

152. *See, e.g.*, Riley v. National Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796-97 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."). *But see* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) ("[I]n virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.'" (quoting *In re* R.M.J., 455 U.S. 191, 201 (1982))).

forum, they create speech that would not otherwise have existed.[153] The contributors thereby indirectly bring into being speech with which they may strongly disagree. Where the government restricts expenditures for speech, no one pays to bring potentially offensive speech into being. Opposing viewpoints can speak only according to the weight of the resources that they can garner in the private speech market.[154] In this way, expenditure restrictions might appear to be less intrusive on individual speech interests.

Similarly, the speech market effects of contribution compulsions, as opposed to expenditure restrictions, are mixed so that there is no means to create a speech forum that is always constitutionally preferable. Although fee compulsions do not directly restrict contributions for speech, they indirectly do so by reducing contributors' total resources.[155] So, while fees create speech they may also reduce it.[156] And, while expenditure restrictions undoubtedly reduce the quantity of speech by those subject to the restrictions, they may, in fact, increase speech by others who perceived expression in an unregulated market to be pointless. Moreover, the effect of the government's chosen means on the absolute volume of speech in the marketplace is not the only way to determine whether the government action serves free speech clause values. If the government can show a legitimate interest in regulating the relative weight of voices to promote diversity or fair deliberation, then the crucial inquiry moves from the absolute volume of speech preserved by the means of compulsion as opposed to restriction to their comparative merits in achieving one of these alternate objectives.

For all of these reasons, the means of fee compulsion as opposed to expenditure restriction do not crucially distinguish the student activity fee and campaign finance issues. The central question in both involves the government's discretion to choose to create and structure a public forum. Its means, of course, will be relevant, but must be assessed in light of the other factors in the constitutional analysis, specifically the strength of the government purpose and the effects of the government action in the particular context.

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153. *See* Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2096 (1991) (subsidies "have a productive value: they bring into existence [expression] that would not have existed but for the subsidies.").

154. *See* Cusac, *supra* note 1, at 30 (quoting Alliance Defense Fund's president as proposing that, instead of distributing student fees to less popular student groups, "the university could teach student groups how to market themselves.").

155. *See* Cantor, *supra* note 54, at 27 (noting that "a connection between dollars collected from an individual and expressive activity . . . raises the claim that compelled financial extractions deplete the economic resources of the payor and thereby diminish his expressive capacity.").

156. *See id.* at 28 (noting that while the claim of diminished capacity to speak because of fee exactions may be true absolutely, as a constitutional claim it "extend[s] too far" because "a first amendment attack on diminution of expressive capacity could be applicable to every government fiscal extraction—i.e., tax, fee, toll, or rent.").

III. DETERMINING THE CONSTITUTIONALLY PERMISSIBLE SCOPE OF GOVERNMENT ACTION

Determining the constitutionally permissible scope of government action in both the student activity fees and campaign finance cases requires determining the government interests that can justify purposeful speech market adjustment, as well as effects that can defeat the constitutionality of the action.

A. Interests That Can Justify Speech Market Adjustment

1. Encouraging Diverse Speech.—In numerous contexts, the government may choose to encourage diverse expression, even though this purpose necessarily changes the mix of voices in the private speech market from what it would have been absent government intervention. One of these contexts is where the government allocates a scarce resource. The government can allocate radio waves[157] and regulate cable television[158] to serve the public interest in receiving a broad range of types of expression. Pursuing this interest, of course, results in a different mix of radio and television speakers than would allocation to the highest bidders.

Another way that the government can encourage diverse expression is by creating and maintaining public forums.[159] The constitutional doctrine that defines public forums emphasizes that the government must act "neutrally" when it structures the conversation within these arenas,[160] perhaps lending the impression that the speech that occurs in public forums merely amplifies the speech that occurs in the private marketplace of ideas. This emphasis on neutrality, however, obscures the speech adjustment inherent in creating or maintaining the forum in the first instance. The existence of public forums generally augments the speech power of minority as opposed to majority voices, and of poor as opposed to wealthy speakers.[161] Public forums actually represent

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157. *See* Red Lion Broad. Co. v. Federal Communications Comm'n, 395 U.S. 367, 369 (1969) (discussing the Federal Communications Commission's "fairness doctrine" which requires that "discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage.").

158. *See* Turner Broad. Sys., Inc. v. Federal Communications Comm'n, 520 U.S. 180, 189 (1997) (holding that must-carry regulation imposed on cable operators serves "three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming").

159. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37, 45 (1983) (describing three different types of public forum: traditional, limited public, and nonpublic).

160. *See id.* (regulations must be content neutral in a traditional public forum); *Rosenberger*, 515U.S. at 830-31 (in a limited public forum, regulations must be viewpoint neutral, and must be content neutral except to the extent necessary to maintain the purposes of the forum); *Perry Educ. Ass'n*, 460 U.S. at 45 (regulations in a nonpublic forum must be viewpoint neutral).

161. Neutral rules for allocating the forums will usually diminish private power differences. For example, a rule that allows each student group to meet in a university classroom once a month

a redistribution of resources from majority to minority speakers as government funds pay to create and maintain the arenas.[162]

Creating and maintaining public forums represents one form of government subsidy of speech. The government may also make more direct money payments to encourage diverse private speech. Arts funding by the government brings art into being that would not otherwise exist, thus purposefully and necessarily affecting the content of the marketplace of ideas.[163] Funding of public television similarly creates private speech and affects the private speech market. And, when universities sponsor speakers series, they act with the purpose of exposing their students to ideas not sufficiently available or prominent in the private market.[164] In all of these instances, the public purpose of creating diversity in the marketplace of ideas justifies using public resources to pursue it.

The government may also sometimes act through the means of restricting speech to achieve its goal of promoting diverse expression. Structuring and maintaining even the most open public forums involves restricting the speech of some private individuals to preserve the forum for a broad range of participants. Parade permits[165] time limits or allocations[166] and volume controls[167] limit the quantity of speech that any individual can deliver, but are also consistent with encouraging wide open discussion and debate. Moreover, if subsidies are viewed as productive, giving funding to one speaker necessarily silences another who wanted to receive the scarce funding.[168]

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would give the five-person group the same access as the fifty-person group. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting facilities must be open to all student groups). If forced to pay for the facilities, the groups would likely not have equal access. In some instances, however, "neutral" rules can reinforce or exacerbate existing power differences. A university rule providing classroom access only to groups with membership of fifty or more would have this effect by granting a subsidy only to groups with broad support.

162. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 843-44 (1995) ("The government usually acts by spending money. Even the provision of a meeting room [which constitutes a public forum] involve[s] governmental expenditure, if only in the form of electricity and heating or cooling costs.").

163. *See* National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (National Endowment for the Arts uses federal funds to "help create and sustain" art (citing 20 U.S.C. § 951(7)); Fiss, *supra* note 153, at 2096 ("[Subsidies] have a productive value: they bring into existence art, performances, or exhibitions that would not have existed but for the subsidies.").

164. *See* Southworth v. Grebe, 151 F.3d 717, 721 (7th Cir. 1998) (students do not challenge use of the student activity fees to fund the Distinguished Lecture Series), *rev'd*, No. 98-1189, 2000 U.S. LEXIS 2196 (Mar. 22, 2000).

165. *See* Cox v. New Hampshire, 312 U.S. 569 (1941).

166. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (private groups can erect unattended displays for a certain number of weeks).

167. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989) (performers required to use city sound equipment in Central Park Bandshell).

168. *See* Fiss, *supra* note 153, at 2097 ("[S]ilencing is a necessary concomitant of every allocative decision").

In all of these ways, the government can act to diversify the expression available for public consumption even though inherent in the act of diversification is adjustment of the mix of voices in the marketplace of ideas.

2. Promoting Fair Deliberation and Decisionmaking.—Another interest that can justify purposefully speech-conscious government action is to promote fair deliberation and decision making. Judicial proceedings, legislative sessions,[169] and administrative hearings operate according to rules that purposefully adjust what would be the private speaking power of the participants.[170] Strict rules define the quantity of speech that any individual speaker can deliver[171] and public monies fund the forums, thereby effectively transferring speech resources by government fiat.

Like the speech adjustment to pursue the purpose of diversity, this speech adjustment also has the effect of privileging some speakers over others, particularly those without private power over those who possess it. Moreover, sometimes the government purpose to restrict the speech of more powerful speakers to prevent one message from drowning out all others can be more blatant when the need is more compelling. One circumstance is union elections, where rules limit the employer's voice to ensure that employees can receive and digest alternate messages.[172]

These instances demonstrate that some public interests in full or fair debate can justify purposeful government adjustment of voices in the marketplace of ideas, as well as the use of public resources to do so. They also represent broad acceptance of the government's discretion to choose equalizing the powers of various speakers as the means to ensure fairness in debate, deliberation and decision making.

3. Protecting Disfavored Speakers.—The Constitution not only allows the government to act in ways that adjust the relative weights of private voices in the marketplace of ideas, sometimes it requires the government to do so. One such instance is when unpopular speakers create a hostile audience reaction.[173] Absent

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169. *See* Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 912 (2000) (Breyer, J., concurring) ("[I]n Congress . . . constitutionally protected debate[] is limited to provide every member an equal opportunity to express his or her views.").

170. *See* Baker, *supra* note 3, at 21-24 ("Within institutions of democratic governance, acceptable regulation of speech, including content regulation, is ubiquitous.").

171. *See, e.g.*, Edward B. Foley, *Public Debate and Campaign Finance*, 30 CONN. L. REV. 817, 819 (1998) ("[T]he Chief Justice does not violate the Constitution when he tells advocates that their time is up during oral argument in the Supreme Court.").

172. *See* Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 791, 805 (1998) (listing limitations on employer speech and proposing additional ones).

173. *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111 (1969) (demonstrators arrested because their speech incited onlookers to violence); Cox v. Louisiana, 379 U.S. 536 (1965) (speaker arrested because his speech was "inflammatory"); Edwards v. South Carolina, 372 U.S. 229, 237 (1963) (speakers arrested because their speech was "sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection"); Feiner v. New

government intervention, the hostile audience would likely silence the speaker.[174] Where public disorder is imminent, arresting the speaker to prevent the violence would mirror the result of the private marketplace of ideas. The Constitution, however, forbids this.[175] To fulfill its responsibility of preserving public order, the government must use the threat of force to protect the unpopular speaker.[176]

Not only does protecting a speaker from a hostile audience change the mix of voices that would otherwise exist in the marketplace of ideas, it also both redirects resources from majority to minority speakers and restricts the speech of majority speakers to ensure that the minority speech can be heard. When unpopular speech provokes an audience to violence, the least costly option is to arrest the speaker. By foreclosing this option, the Constitution effectively mandates that the government expend majority resources to protect the minority speaker, even though the public resources expended to do so far exceed the speaker's "share" of the speech market.[177] This use of public resources subsidizes minority speech with majority dollars.[178]

Police protection of unpopular speakers can also take the form of restricting majority speech that threatens to drown out the minority message.[179] So, police may eject hecklers from speech halls or quiet a crowd that makes it impossible

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York, 340 U.S. 315, 317 (1951) ("[Police] stepped in to prevent [speech] from resulting in a fight."); Terminiello v. Chicago, 337 U.S. 1, 3 (1949) (speaker arrested and charged with using speech that "stir[red] the public to anger, invit[ed] dispute, [brought] about a condition of unrest, or creat[ed] a disturbance").

174. *See, e.g.*, *Gregory*, 394 U.S. at 111 (noting the ratio between demonstrator and onlooker was 85:1000).

175. *See* Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."). This rule evolved over time. *Compare Feiner*, 340 U.S. at 320 (speaker can be arrested for "the reaction [his speech] actually engendered"), *with Gregory*, 394 U.S. at 111 (speaker cannot be arrested for disorderly conduct because of listeners' reaction).

176. *See Edwards*, 372 U.S. at 237 ("The Fourteenth Amendment [of the Constitution] does not permit a State to make criminal the peaceful expression of unpopular views.").

177. *See Gregory*, 394 U.S. at 111 (one hundred police officers protect 85 protesters); Forsyth County v. Nationalist Movement, 505 U.S. 123, 136 (1992) (holding that a county cannot charge a higher demonstration fee to cover the cost of police protection "in the case of a controversial political message delivered before a hostile audience").

178. *See* Francis X. Clines, *Neo-Nazis Cancel D.C. March After Only 4 Show Up*, SACRAMENTO BEE, Aug. 8, 1999, at A6 (a force of 1,426 police officers provided a security cordon for a neo-Nazi hate march that did not occur; police chief laments that "the city had just spent close to $1 million protecting the civil rights of a no-show troublemaker.").

179. *See Gregory*, 394 U.S. at 111 (Constitution does not permit police to arrest about 85 protesters because of hostile reaction of over 1000 onlookers); *see also In re* Kay, 1 Cal. 3d 930, 941 (1970) (en banc) ("[T]he state retains a legitimate concern in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' rights of free association and discussion.").

for the speaker to be heard. The silenced speakers may speak at another time, in another place or in another manner. Nevertheless, the government action of restricting what would be their private power to dominate and drown out less powerful speakers alters and equalizes the balance of voices in the marketplace of ideas.

Numerous free speech clause values underpin this requirement that the government act affirmatively to protect unpopular speakers.[180] In any event, its gist refutes a vision of the First Amendment that enshrines private ordering as the speech market distribution that best serves the public value of robust discussion and debate. Embedded in free speech clause doctrine is the different vision of the minority speaker or "lonely pamphleteer"[181] as entitled to government protection beyond that which he would be able to acquire either through votes in the democratic process or dollars in the private market. That this vision compels the redistribution of resources and sometimes the suppression of majority speech to protect, and thereby encourage, minority speech suggests that it also leaves room for government discretion to decide to do these things for this purpose.

B. Constitutional Concerns That Can Invalidate Speech-Conscious Government Action

1. The Danger of Government Favoritism.—The primary danger against which the free speech clause protects is governmental favoritism of certain viewpoints in the marketplace of ideas.[182] Whether the favoritism takes the form

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180. *See* Edward L. Rubin, *Review Essay: Nazis, Skokie, and the First Amendment as Virtue*, 74 CAL. L. REV. 233 (1986) (discussing free speech clause values that might protect Nazi speech); Lee Bollinger, *The Skokie Legacy: Reflections on an "Easy Case" and Free Speech Theory*, 80 MICH. L. REV. 617 (1982).

> One can understand . . . [the] choice to protect the free speech activities of Nazis, but not because people would value their message in the slightest or believe it should be seriously entertained, not because a commitment to self-government or rationality logically demands that such ideas be presented for consideration, . . . not because a line could not be drawn that would exclude this ideology without inevitably encroaching on ideas that one likes—not for any of these reasons nor others related to them that are a part of the traditional baggage of the free speech argumentation; but rather because the danger of intolerance towards ideas is so pervasive an issue in our social lives, the process of mastering a capacity for tolerance so difficult, that it makes sense somewhere in the system to attempt to confront that problem and exercise more self-restraint than may be otherwise required.

Id. at 629-31.

181. *See* Branzburg v. Hayes, 408 U.S. 665, 704 (1972) ("Traditional doctrine [is] that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.").

182. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").

of a resource transfer[183] or a speech restriction,[184] the Court looks at it with great suspicion. This suspicion stems from the fact that government censorship threatens all of the values that underlie the free speech guarantee.[185] Fundamental to these values is ensuring that there exists a wide open and robust marketplace of ideas so that individuals can seek to discover individual truths[186] as well as engage in the reflective self-government on which democracy depends.[187]

This fear of government favoritism in the speech market leads to the fundamental analytical division in free speech clause doctrine between content-based and content neutral government actions.[188] The former are subject to strict scrutiny,[189] while the latter are subject to a balancing that weighs the government interest against the burden on free speech interests.[190] Although viewpoint discrimination is the most egregious form of government favoritism,[191] subject

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183. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (holding that a school district cannot provide meeting-room access to speak about family issues but deny it to those who speak from a religious perspective).

184. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (city cannot criminalize only subset of fighting words that express particular types of animus).

185. *See, e.g.*, Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989) (listing and discussing values that underpin the free speech guarantee).

186. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (noting a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); Whitney v. California, 274 U.S. 357, 375 (1927) ("Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . ."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."); JOHN STUART MILL, ON LIBERTY (1959) (articulating the "search for truth" rationale for prohibiting government suppression of speech).

187. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) ("When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger: [Just] so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion [which] is relevant to that issue, just so far the result may be ill-considered. [It] is that mutilation of the thinking process of the community against which the First Amendment [is] directed."); *see also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523 ("[F]ree speech [can serve the value of] checking abuse of power by public officials.").

188. *See, e.g.*, *R.A.V.*, 505 U.S. at 382 ("The First Amendment generally prevents government from proscribing speech [because of] disapproval of the ideas expressed. Content-based regulations are presumptively invalid.").

189. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983).

190. *See* United States v. Grace, 461 U.S. 171, 177 (1983).

191. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

matter discrimination is generally also subject to rigorous review[192] because the government purpose is to skew the marketplace of ideas.[193]

From these concerns stems *Buckley's* rule that, regardless of viewpoint or content sensitivity, government actions are highly suspect when they "involve 'suppressing communication'" to achieve an "equalizing" effect,[194] implying that this purpose, too, creates the danger of government favoritism that is inimical to free speech clause ideals.[195] Along with the great danger of government favoritism, however, is the fundamental purpose of the free speech clause to preserve a diverse marketplace of ideas.[196] Despite the great danger of any government manipulation of the speech market, this fundamental purpose means that the free speech clause leaves room for, and in some instances, mandates, speech-conscious government actions that are consistent with it. The great difficulty is determining where a particular government action falls on the spectrum between dangerous favoritism and salutary speech market enhancement.

In particular, the *Buckley* rule against government equalizing coexists with the assumption that government-created forums and direct monetary subsidies of private speech are consistent with, and in fact promote, the values that underpin the First Amendment, even though both of these actions adjust and equalize the relative weights of voices in the marketplace of ideas. Because the government's purpose is the same in both contexts, the question is whether a concern with government favoritism explains the different abilities of the government to achieve it.

Government forums and speech subsidies are presumptively consistent with free speech clause values when they do not exhibit the type of "government favoritism" inimical to free speech clause values. Access to these opportunities must be either content or viewpoint neutral, meaning that it is distributed according to principles that do not depend upon the expression's message.[197] Specifically, where the government creates a limited public forum, it can engage in content discrimination to preserve the purposes of the forum, but it cannot

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192. *See Perry Educ. Ass'n*, 460 U.S. at 46 (content discrimination is permissible in certain circumstances where the government controls the speech or forum).

193. *See* Burson v. Freeman, 504 U.S. 191, 197 (1992) ("[T]he First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.").

194. Buckley v. Valeo, 424 U.S. 1, 18 (1976).

195. *See id.* ("The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.").

196. *See id.* ("[The First Amendment] was designed to secure the widest possible dissemination of information from diverse and antagonistic sources." (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (internal quotations omitted))).

197. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983) (articulating rules of access for various types of government forms).

discriminate according to viewpoint.[198] A neutrality that looks to the viewpoint expressed is different from a neutrality that looks to private power, either by number of adherents or by financial resources. Requiring this first type of neutrality thus condones purposeful government speech market adjustment.

First Amendment doctrine embraces the equalizing tendency of content neutral access rules as preferable to the danger of "favoritism" where the government considers the expression's message in allocating speech opportunities.[199] This is true even though, because the government presumptively represents majority sentiment, viewpoint-sensitive allocations would better mirror the private speech market. Equality among viewpoints as a principle of distribution is constitutionally "fair" even though its probable effect is to redistribute private speech power. In fact, its fairness may stem from the recognition that the probable redistribution that occurs when the government creates a public forum is against the majority's interests. The free speech clause was meant to protect against the inevitable urge of the majority in charge of the government to skew the marketplace of ideas in its own favor. Granting new speech opportunities equally to all comers tends to advantage less powerful voices. This effect is the opposite of the "favoritism" that the free speech clause condemns. That the government disadvantages itself is a factor counseling in favor of the constitutionality of a speech-conscious government action.

By contrast to government promoting speaker diversity by creating a public forum, viewpoint-based actions to pursue the same diversity interest carry a greater favoritism danger. For example, the purpose of restricting hate speech or pornography is not only speech conscious but also sets out to disadvantage certain points of view.[200] Although the government's argument is that a deficiency in the private market requires government intervention and that such intervention will diversity the range of voices available,[201] these effects are debatable and come with the certain effect of the government expressly advantaging certain viewpoints.

Consequently, a crucial consideration when the government seeks to augment

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198. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995)

199. *See* Southworth v. Grebe, No. 98-1189, 2000 U.S. LEXIS 2196, at *33 (Mar. 22, 2000), *rev'g* 151 F.3d 717 (7th Cir. 1998) ("The whole theory of viewpoint neutrality is that minority views are treated with the same respect as majority views.").

200. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985) (condemning anti-pornography ordinance because "[u]nder the ordinance graphic sexually explicit speech is 'pornography' or not depending on the perspective the author adopts"), *aff'd*, 475 U.S. 1001 (1986); R.A.V. v. City of St. Paul, 505 U.S. 377, 378 (1992) (condemning hate speech ordinance because it "imposes special prohibitions on those speakers who express views on disfavored subjects").

201. *See* Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 475 (1984) (noting, with respect to pornography, "the self-expression argument is double-edged. Those who oppose pornography assert that pornography denies women *their* right to individual dignity and choice. They maintain that pornography forces the state to choose whose right to individual dignity and choice it will protect.").

speaker diversity by creating a limited public forum is whether it does so in a viewpoint neutral manner. "Favoritism," meaning viewpoint-sensitivity in the allocation of speech opportunities, will likely condemn the government action. But, the lack of favoritism when the government acts with the same diversity purpose cuts the other way. That is, public forum doctrine recognizes that free speech clause values are on the government's side when it chooses to pursue speaker diversity by regulating in a viewpoint neutral way.[202]

2. Distorting Public Perceptions.—Creating diversity means changing the balance in the marketplace of ideas. A danger of such speech-conscious government action is that it will distort public perceptions of the support that certain ideas have and thereby distort individual truth-seeking and self-government deliberations.[203]

The degree of this danger depends on several factors. The first is the degree of accurate correlation between the quantity and volume of speech in the private market and the validity of the ideas in the public's evaluation. Ability to speak often and loudly in the private market correlates to wealth and political power. Neither of these necessarily accurately reflect the weight or validity of ideas in the public mind. "Distortion" must be measured against an ideal. Private speech ordering is not necessarily it. With respect to the weight of political ideas, one speech dollar per vote might more accurately convey public sentiment.[204]

Another factor relevant to distorting public perceptions is the degree of public awareness of the government's involvement in the mix of voices. In a public forum, such as the street corner soap box, or a ritualized forum, such as a criminal trial or legislative debate, no one thinks, or at least no one should think,[205] that rules equalizing access accurately reflect the public support for the ideas expressed. To the extent that the public knows the rules of the game, it is aware that it must seek information about the public acceptance of the ideas from some source other than the forum.[206] This knowledge greatly reduces the danger

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202. *See Southworth*, 2000 U.S. LEXIS 2196, at *28 (imposing only a "requirement of viewpoint neutrality in the allocation of funding support").

203. *See* Donald L. Beschle, *Conditional Spending and the First Amendment: Maintaining the Commitment to Rational Liberal Dialogue*, 57 MO. L. REV. 1117, 1150 (1992) (noting danger of distortion of public debate when government selectively subsidizes points of view).

204. *See* Foley, *supra* note 12, at 1213 (arguing that "equal-dollars-per-voter, like one-person-one-vote, is an essential precondition of a democratic legislative process.").

205. *Cf.* Capitol Square Review Bd. v. Pinette, 515 U.S. 763, 780 (1995) (O'Connor, J., concurring) (endorsement inquiry under the establishment clause should look to the perspective of a "hypothetical observer" who "must be deemed aware of the history and context of the forum."); *see also id.* at 768 & n.3 (plurality opinion) (discussing that if government in fact operates a public forum even reasonable mistake of observer about endorsement of a religious display should not render access to the forum invalid).

206. *See* Carolyn Wiggin, *A Funny Thing Happens when You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities*, 103 YALE L.J. 2009, 2027 (1994) (arguing against selective government funding of viewpoints within a public forum, but noting that maintaining the forum does not create this problem because "the public assumes that speech or art

of distortion.

3. Suppressing the Speech of Some in the Process of Promoting the Speech of Others.—The effect of suppressing speech while ostensibly promoting it is a constitutional danger, as it can defeat the very purpose that justifies the government action. It is first important to locate where this consideration enters in the context of student fees and campaign finance. As already noted,[207] that the government regulates money as opposed to speech directly diminishes the individual autonomy impact. Moreover, where the government acts to enhance speech the First Amendment enters on both sides of the analysis, meaning that the mere fact that the government action diminishes individuals' speech opportunities indirectly is not enough to resolve the constitutional question.[208]

Once the government demonstrates a legitimate purpose for adjusting the private speech market, the concern with individual impact is appropriately addressed in the means inquiry. That the means to promote the government purpose reduces the quantity of speech in the marketplace of ideas balances against the validity of the government action. The question, then, is whether the government purpose is powerful enough to justify some speech suppression. If so, the additional question is whether any less speech suppressing means exist to achieve the government's objective.

An example is where the government compels one entity to carry the speech of another for the purpose of presenting the public with a diversity of points of view.[209] Although the purpose serves First Amendment values, a danger in this context is that the requirement will silence the forced speaker or at least alter the content of the speaker's expression.[210] The question, then, is whether there exists a less speech suppressing means to achieve the government's objective. Usually there does, because the government could create a public forum funded by all the speech beneficiaries rather than by one alternate speaker.[211]

This danger is less pronounced in the context of student activity fees and

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within a public forum is representative of views held by members of the public as opposed to officially sanctioned views.").

207. *See supra* Part II.A.

208. *See* Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 912 (2000) (Breyer, J., concurring) ("[W]here a law significantly implicates competing constitutionally protected interests in complex ways[,] the Court has . . . refrained from employing a simple test that effectively presumes nonconstitutionality.").

209. *See* Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986) (utilities commission order required PG&E to place ratepayer group's newsletter in its billing envelopes); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (statute required newspapers to print replies of candidates attacked in editorials).

210. *See Tornillo*, 418 U.S. at 257 (editors subject to right-of-reply requirement "might well conclude that the safe course is to avoid controversy"); *Pacific Gas & Elec.*, 475 U.S. at 15 (envelope inclusions requirement would have same effect).

211. *See Pacific Gas & Elec.*, 475 U.S. at 15 (contrasting "content-neutral subsidies" with envelope insertion requirement that "forces the speakers opponent—not the tax-paying public—to assist in disseminating the speaker's message").

campaign financing because the government regulates money rather than speech directly. The regulations do not do anything to the individual's ability to speak on all topics. Nevertheless, both types of regulation limit the individual's ability to spend to speak, which means they are volume limitations. Although not as worrisome as content limitations, volume limitations still pose a First Amendment danger. But, while it is very difficult for the government to justify a content limitation, content neutral volume restrictions are easier to justify. Even when the government does not have First Amendment values on its side, volume restrictions can be consistent with the free speech guarantee.[212] That the government has such values on its side should add legitimacy to the government action.

If the government's purpose is to create a public forum to promote diverse expression or enhance fair decisionmaking, the question must be whether the purpose justifies suppressing some speech in the process. Where the government compels fees to fund a forum thereby reducing the speech resources of all contributors, the inquiry must be whether the government has a legitimate interest in promoting diverse speech for its constituency, and whether it has spread the burden across the beneficiaries thereby lessening it for all. Where the government restricts expenditures for speech, the same considerations apply. In both instances, the Constitution also requires some inquiry into the absolute amount of the burden. The money payments required or restricted should not be so great as to defeat the purpose that justifies the government action.[213] In particular, the government actions ideally should be tailored to preserve the ability of the burdened speakers to speak on all topics while limiting their ability to engage in repetition.

IV. APPLYING THE ANALYSIS TO FEES AND FINANCING

The potential constitutional harm that links the university fee and campaign financing issues is that the government regulates money for the purpose of manipulating the private speech market. Although such a purpose is always highly suspect, sometimes the government can engage in purposeful speech manipulative action. The circumstances of the particular regulation determine whether the government has a sufficient justification to engage in speech-conscious action and whether the regulation is well tailored to minimize the constitutionally dangerous effects of the government action.

A. Fees

Mechanisms for assessing and distributing student fees vary. Most important in assessing a challenge to particular distributions used for expressive activities

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212. *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989); Kovacs v. Cooper, 336 U.S. 77 (1949).

213. *See Shrink*, 120 S. Ct. at 909 (campaign finance limits should not be "so low as to impede the ability of candidates to 'amass the resources necessary for effective advocacy'" (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976))).

must be the nature of the government's justification. The crucial question must be whether the university is expending fees for the purpose of creating a speech forum.[214] This purpose distinguishes a fee case from other mandatory payments cases, where speech was incidental to a primarily nonspeech purpose.[215] Absent the diversity justification, a fees case becomes like these previous payments cases, with the university having very limited leeway to subsidize speech to achieve its nonspeech purpose.[216]

A university expending fees to create a speech forum has powerful justifications on its side. Its purpose to foster intellectual diversity is directly linked to its educational mission.[217] As such, it is at least as strong as the government's more general purpose to promote speech by subsidizing public forums.

Although fostering simple exposure to a wide range of views is a university's most compelling justification, it can also assert an interest in promoting fairness in the presentation of views to its students during a critical period of self-formation.

The mechanics of particular distribution systems will determine when a university can assert the additional purpose of protecting disfavored speakers. Unless the distribution system is keyed to locking in or augmenting the status quo, the university will be able to assert this interest. This interest, in turn, helps defeat the concern that the effect of the redistribution will be to fund university-favored points of view. Again, the system's mechanics will be important. Established criteria, decisions by a changing body of students, and a record of distributing funds to a wide range of applicants without regard to their majority status will defeat concerns of favoritism.

Most university funding schemes would seem to pose little danger of

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214. *See Southworth,* 2000 U.S. LEXIS 2196, at *33 (doubting whether the referendum process for funding student groups appropriately creates a limited public forum because it appears to "substitute[] majority determinations for viewpoint neutrality"); Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032, 1040 (9th Cir. 1999) (distinguishing funding of Public Interest Research Group as one of many groups from "a general student activities fee [that] could be perceived as creating a forum to support diverse viewpoints" from previous case in which PIRG received a mandatory fee that "was separate from the general student fee [and so] . . . created a forum that only supported [] PIRG's viewpoints." (citing Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985); Galda v. Bloustein, 686 F.2d 1059 (3d Cir. 1982))).

215. *E.g.*, Keller v. State Bar of Cal., 496 U.S. 1 (1990) (state bar dues); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (union dues).

216. *See Keller*, 496 U.S. at 13 (expenditures from mandatory payments for ideological activities must be "germane to the purpose for which the compelled association was justified").

217. *See Southworth,* 2000 U.S. LEXIS 2196, at *26 (university's purpose "to facilitate a wide range of speech" is "important and substantial"); Rosenberger v. Regents & Visitors of Univ. of Va., 515 U.S. 819, 836-37 (1995) (tracing universities' educational missions from "ancient Athens", through the time when "Europe entered into a new period of intellectual awakening" to the present day when "[t]he quality and creative power of student intellectual life . . . remains a vital measure of a school's influence and attainment.").

distortion. The student activity fees funding mechanism is public so all members of the audience presumably know of the redistribution that occurs. Concerned universities could further eliminate the danger of distortion by requiring those groups that receive student fee funding to disclose it in the course of their communications.

Finally, student activity fees funding suppresses the ability of contributors to speak only minimally. Extracting fees does not affect any student's ability to speak on any topic. While it diminishes a student's total assets available for speech, the resource diminution is usually minimal and its effect is no different than tuition, which diminishes student assets by a far greater amount.

B. Campaign Financing

Promoting both diversity and fairness can justify campaign financing regulation, although the weight of the objectives is reversed from the student fees context. Specifically, promoting fair deliberation on campaign-related issues that lead to the decisions that form our representative democracy is as compelling a purpose as promoting such deliberation once the bodies of government are constituted.[218] Regulations that tend toward equality are consistent with the rules that govern other decision making.[219] In addition, promoting diversity particularly supports campaign finance regulation because of the self-government rationale that underpins the free speech clause.[220] Regulations that tend toward equality tend to protect disfavored speakers, in the context of campaigns, meaning those critical of the existing government. Thus, all of these justifications support campaign finance regulation.

The specifics of particular regulations will determine whether potentially dangerous effects undermine these purposes. Favoritism is a potent danger. Although equalizing rules may seem to protect government outsiders, there is also the concern that incumbents can achieve name recognition and publicity of

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218. *See* Baker, *supra* note 3, at 2-3.

> [L]egislative debates, committee hearings, judicial proceedings, and agency proceedings are contexts where political speech occurs within legally structured or institutionally bound parts of government. In each of these realms, explicitly political and fully protected speech is often subject to severe limits, justified by the goal of making the particular institutional element of government better perform its democratic and governing functions. . . . [C]ampaign speech is an institutionally bound subcategory of political speech. [Campaign finance] [r]egulations are justified as long as they aim at increasing the democratic quality of the institutionalized process of choosing public official or making binding legal decisions.

Id.

219. *See* Foley, *supra* note 12, at 1213 (equality of campaign speech opportunities stems from equal weight of votes rule).

220. *See, e.g.*, Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 ("The First Amendment protects the freedom of those activities of thought and communication by which we govern.").

their points of view without the expenditures required by challengers who cannot converse with constituents at government expense.[221] Another concern is that campaign finance regulation adopted by incumbents will always embody this bias.[222] These are potent concerns and particular regulations must be reviewed with them in mind. That monied interests consistently oppose campaign finance regulations suggests however that concerns of incumbent advantage may be overstated. The crucial point is that the danger of insider advantage should be the focus of the inquiry, not free speech rights more abstractly. Regulations of money do not affect individual autonomy interests to the same extent as direct speech restrictions, and even direct speech restrictions are permissible when supported by the government purpose of promoting full and fair deliberation in a decision making forum.

That the public will be misled by the effects of campaign finance limits seems unlikely. As with fees, it is possible to advertise the specifics of the limits and their equalizing effects. Once the nature of the regime is clear, the public should be no more misled than is a jury that hears the same number of minutes of argument from both the prosecutor and the defense.

Finally, campaign finance regulations indeed carry with them the danger of suppressing speech absolutely in the pursuit of diversifying its content. Although the danger of suppressing speech by restricting what an individual can do with money is more attenuated than a direct speech restriction, it is still a real danger. Nevertheless, even direct speech restrictions comport with the Constitution when the government's interest is strong enough. The crucial question is thus the weight of the government interest as compared to the likelihood and degree of speech suppression. Certainly, the government must prove the need to limit expenditures to achieve fairness and diversity.[223] In addition, regulations that limit the ability of a speaker to repeat pose less of a constitutional danger than those that limit the ability to express ideas for the first time.

CONCLUSION

The student activity fees and campaign finance regulation challenges raise the same question: the scope of the government's discretion to redistribute money to create and structure a public forum. The government generally can create public forums so long as it does not favor or disfavor particular types of expression. Creating such forums for diverse expression serves the constitutional value of promoting deliberation that includes a wide range of points of view,

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221. *See* Foley, *supra* note 12, at 1243 (addressing concern that campaign finance limits may "act as an incumbency-protection device").

222. *See* Cass, *supra* note 100, at 57 ("[T]he risk that the law regulating campaign finance disadvantages outsiders and advantages insiders, if not irresistibly strong, is at least more palpable than the harms it is supposed to cure.").

223. *See* Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897, 900 (2000) ("The question of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

even though this government action redistributes speech resources to achieve this objective. When the government's purpose in compelling student activity fees or regulating campaign spending is similarly to promote the free speech clause value of nurturing rich and full discussion of public issues, these same public forum principles should apply. In both contexts, the government's interest in equalizing speech resources to serve the expressive and deliberative interests of its entire constituency should have weight sufficient to defeat claims by dissenters that such redistribution by the government violates their free speech rights. Whether in any particular case the government's interest in fact prevails over the interests of dissenters must depend upon how well tailored the means are to achieve the theoretically permissible objective.