No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

BOARD OF REGENTS OF THE UNIVERSITY
OF WISCONSIN SYSTEM, *et al.*,
Petitioners

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents

BRIEF OF AMICUS FAMILY RESEARCH INSTITUTE IN SUPPORT OF RESPONDENTS

Filed August 11, 1999

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATE STATUTES

HISTORICAL CONSTITUTIONS, CHARTERS AND DECLARATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Family Research Institute is a non-partisan, not-for-profit, pro-family, state legislative research institute. The Institute is dedicated to researching issues of interest to and which have an impact on Wisconsin families, and then disseminating that information to institutions and individuals. The Institute's goal is to strengthen and educate Wisconsin families.

The freedoms of speech, religion and the press are of inherent value to Wisconsin's families and, hence, to the Family Research Institute. Specifically, when students attending the University of Wisconsin are compelled to support speech or activity contrary to their and their families' principles, the Family Research Institute believes it necessary to respectfully offer its views regarding the legal and historical principles underlying the drafting and adoption of the First Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

There is a substantial history behind the development of freedom of opinion, both in the common law and in the charters, declarations and constitutions that preceded the ratification of the First Amendment. Proper application of that

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court. This brief was originally authored by Attorney Daniel Kelly and submitted on behalf of *amicus* in the United States Court of Appeals for the Seventh Circuit. Attorney Kelly has since been requested to participate as co-counsel on behalf of respondents. *Amicus* has requested Attorney Roy H. Nelson to act as counsel in submitting this brief on its behalf. Costs of submission of this brief in this Court have been underwritten by *amicus*.

Amendment's guarantees requires reference to the circumstances and struggles both preceding and coincident with its ratification. A brief survey of that history reveals that the Framers' overarching purpose in securing the freedom of speech, religion and of the press was to accomplish the larger goal of building a jurisdictional barrier between the government and matters of the mind.

Requiring students at the University of Wisconsin to subsidize speech, advocacy, or pursuit of ideological or partisan activities with which they may disagree impermissibly breaches that Constitutionally erected barrier. The District Court appropriately concluded that the University's system of disbursing portions of the mandatory segregated fees to private ideological and political groups was inconsistent with rights secured by the First Amendment.

This Court should affirm the decision of the District Court invalidating this financing system, thereby returning control over the content and extent of ideas in the marketplace to whom it belongs, *viz.*, the advocates of those ideas.

ARGUMENT

I. HISTORICAL ANALYSIS OF THE DEVELOPMENT OF THE FIRST AMENDMENT'S GUARANTEES

A major part of the development of Occidental civilization has been the continuing struggle to contain governmental control within a closely defined sphere of authority. One of the most important aspects of that saga has been the eradication of a pernicious influence on the domain of ideas, that is, governmental interposition. The goal of such influence over

matters of the mind has traditionally been accomplished by means of controlling the methods of dissemination, either by prohibition or compulsion. The purpose and effect have always been the same, to wit, a state-imposed orthodoxy over opinion, and sometimes even over matters of fact.

A. Hegemony Over Issues of Fact

It is broadly known that governments throughout history and around the world have long been prone to suppressing opinions deemed inappropriate by those in authority, and enforcing conformity to those they preferred. Just over a century ago, Joseph Story observed that:

> It is notorious that even to this day in some foreign countries it is a crime to speak on any subject, religious, philosophical, or political, what is contrary to the received opinions of the government or the institutions of the country, however laudable may be the design, and however virtuous may be the motive.

I JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 610 (Thomas M. Cooley, ed. 1873). But the extent of governmental intervention in the realm of ideas overflows the banks of opinion and spills into the domain of facts the farther one pushes back history's horizon. Over 200 years ago Thomas Jefferson remarked on the banal tendency of some states to enforce their own views of reality:

> Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now. Thus in France the emetic was once forbidden as a medicine

> and the potatoe [sic] as an article of food. Government is just as infallible too when it fixes systems in physics. Galileo was sent to the inquisition for affirming that the earth was a sphere: the government had declared it to be as flat as a trencher, and Galileo was obliged to abjure his error. This error however at length prevailed, the earth became a globe, and Descartes declared it wise whirled round its axis by a vortex. The government in which he lived was wise enough to see that his was no question of civil jurisdiction, or we should all have been involved by authorities in vortices. In fact, the vortices have been exploded, and the Newtonian principle of gravitation is now more firmly established, on the basis of reason, than it would be were the government to step in, and to make it an article of necessary faith.

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 232-33 (2nd Amer. ed. 1794). Fortunately, the error of erecting the edifice of science on the unsure foundation of government-dictated reality became patent and the flawed structure buckled under its own weight. The importance of that failed experiment to the issue at hand is that Thomas Jefferson employed the structural defects made apparent in the realm of governmental meddling in matters of fact to justify liberty in the realm of non-scientific matters, that is, opinions or conscience. However, the error has proven disturbingly resilient in the face of repeated attempts to permanently expunge it. To this day, as this case illustrates, there are still a few pockets of resistance that have yet to yield to history's tide toward greater liberty.

B. Hegemony Over Issues of Opinion.

Liberalization in matters of opinion, denominated as speech, religion and the press in our Constitution's First Amendment,[2] is not something that has progressed in this country on the basis of utility or generosity on the part of those in authority, but through an increasing awareness that the state lacks the jurisdiction to regulate the sphere in which those specific rights reside. The most illustrative example of the evolution of this understanding is the state's forced retreat from the provinces of religion, chief among the rights of conscience.

1. Matters of Religion as Chief Example.

In an abortive attempt to liberalize the Crown's interaction with matters ecclesiastical, King Charles II declared in 1660:

> And because the passion and uncharitableness of the time have produced several opinions in religion, by which men are engaged in parties and animosities against each other (which, when they shall hereafter unite in freedom of conversation, will be composed or better understood), we do declare a liberty to tender consciences, and that no man shall be disquieted or called in question for differences of opinion in matter of religion, which do not disturb the peace of the kingdom; and that we shall be ready to consent to such an Act of

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[2] The First Amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ."

> Parliament, as, upon mature deliberation, shall be offered to us, for the full granting of that indulgence.

DECLARATION OF BREDA (April 4, 1660) (reprinted in SOURCES OF OUR LIBERTIES 162 (Richard Perry, ed., rev. ed. 1991) (quoting THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION, 1625-1660 466 (Samuel R. Gardiner, ed. Oxford 1906))). Three years later, he granted the Charter of Rhode Island and Providence Plantations, in which he provided:

> That our royall will and pleasure is, that noe person within the sayd colonye, at any tyme hereafter, shall bee any wise molested, punished, disquieted, or called in question, for any differences in opinione in matters of religion, and doe not actually disturb the civill peace of our sayd colony; but that all and everye person and persons may, from tyme to tyme, and at all tymes hereafter, freelye and fullye hav and enjoye his and theire owne judgments and consciences, in matters of religious concernments, throughout the tract of lande hereafter mentioned; they behaving themselves peaceablie and quietlie, and not useing this libertie to lycentiousnesse and profanenesse, nor to the civill injurye or outward disturbance of others. . . .

CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1633) (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 170). Significantly, the basis for allowing this freedom was, in the case of the Declaration of Breda, an "indulgence" and in the Charter an outgrowth of the king's "royall will and pleasure."

As such, the English subjects would have had, if the Declaration had found expression in an Act of Parliament, and the colonists in fact did hold, nothing more than a privilege, which could have been revoked upon a change in the King's favor.

When the colonists began creating their own governing structures, there was frequently introduced a profoundly different rationale upon which to base the freedom of the mind. Pursuant to the Quintipartite Deed of 1676, in which the Quakers, under the influence of William Penn, assumed ownership of West New Jersey, the proprietors and freeholders there of instituted the Concessions and agreements of west New Jersey as the foundation of their government in 1677. SOURCES OF OUR LIBERTIES, *supra* at 181. They agreed amongst themselves

> THAT no men, nor number of men upon earth, hath power or authority to rule over men's consciences in religious matter, therefore it is consented, agreed and ordained, that no person or persons whatsoever within the said Province, at any time or times hereafter, shall be any ways upon any pretence whatsoever, called in question, or in the least punished or hurt, either in person, estate, or privilege, for the sake of his opinion, judgment, faith or worship towards God in matters of religion. But that all and every such person, and persons, may from time to time, and at all times, freely and fully have, and enjoy his and their judgements, and the exercises of their consciences in matters of religious worship throughout all the said Province.

CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY, chap. XVI (March 13, 1677) (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 185)

These proprietors and freeholders recognized that one person, or a combination of them, lacks the authority to require another to conform to some religious orthodoxy. Thus, instead of purporting to grant a mere boon, they recognized a jurisdictional barrier between individuals' opinions and government's legitimate sphere of control. The Bill of Rights contained in the 1776 Constitution of Virginia expressed the same idea thusly:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . .

VIR. CONST. of 1776, sec. 16 (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 312). The Delaware Declaration of Rights also mandated that "no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner control the right of conscience in the free exercise of religious worship." DELAWARE DECLARATION OF RIGHTS, sec 2 (September 11, 1776) (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 338).

Mr. Story, in surveying the import of the First Amendment, had recourse to John Locke, who affirmed that "'[n]o man or society of man . . . have any authority to impose

their opinions or interpretations on any other, the meanest Christian; since, in matters of religion, every man must know, and believe, and give an account for himself.'" I STORY, *supra* at 606 (citation omitted). This principle, that government acts outside its jurisdictional limits when it impacts matters of faith, applies much more broadly than with respect to religion only. In fact, Thomas Jefferson based his argument for the freedom of religion on the general proposition that the state lacks authority to compel a particular belief in any subject.

2. Application of Religion's Example to All Matters of Opinion.

Mr. Jefferson, drawing upon his historical understanding of the futility of governmental attempts to control the realm of facts by edict, "swor[e] upon the altar of God eternal hostility to every form of tyranny over the mind of man." II HENRY SCHOFIELD, ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 363-65 (Faculty of Law, Northwestern University, ed. 1921). His down payment on that oath, the Virginia Act for Religious Liberty, begins:

> Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishment, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness . . . ; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others . . . ; that

> to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . . ; that our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy . . . ; and finally, that truth is great and will prevail, if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them . . .

VA Code Ann. sec. 57-1 (1950) (originally enacted January 16, 1786). Upon the Act's passage, James Madison, its chief proponent, wrote Jefferson he was certain the Act's provisions "have in this country extinguished forever the ambitious hope of making laws for the human mind." IRVING BRANT, JAMES MADISON: THE NATIONALIST 354 (1948). The goal was still a work in progress by 1794 when Jefferson opined:

> The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. But our rules can have no authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are

> answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others.

JEFFERSON, *supra* at 231. In these statements both Madison and Jefferson elucidated the overarching principle: that government shall have no interference with matters of the mind.

Alexis de Tocqueville, in most points a very perceptive commentator on American law and society in the 19th century, correctly identified a crucial principle regarding freedom of the mind:

> It is in the examination of the exercise of thought in the United States that we clearly perceive how far the power of the majority surpasses all the powers with which we are acquainted in Europe. Thought is an invisible and subtle power that mocks all the efforts of tyranny. At the present time the most absolute monarchs in Europe cannot prevent certain opinions hostile to their authority from circulating in secret through their dominions and even in their courts. It is not so in America; as long as the majority is still undecided, discussion is carried on; but as soon as its decision is irrevocably pronounced, everyone is silent . . . . The reason for this is perfectly clear: no monarch is so absolute as to combine all the powers of society in his own hands and to conquer all opposition, as a majority is able to do, which has the right both of making and of executing the laws.

> The authority of a king is physical and controls the actions of men without subduing their will. But the majority possesses a power that is physical and moral at the same time, which acts upon the will as much as upon the actions and represses not only all contest, but all controversy.

I ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 263 (Phillips Bradley, ed. 1991). M. de Tocqueville correctly identifies the awesome power the majority holds and its capacity to eviscerate all competing opinions when combined with the power of government. Indeed, as Mr. Carroll remarked in discussion of the Bill of Rights in the House of Representatives, "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand...." II BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1088 (1971) (quoting debates of the House of Representatives on August 14, 1789). While thought may mock all attempts at tyranny, the government has at its disposal means by which it may deliver more than a gentle touch to the liberties of conscience. However, when decrying the purported unlimited power of the majority in his conclusion that "I know of no country in which there is so little independence of mind and real freedom of discussion as in America," DE TOQUEVILLE, *supra* at 263, what M. de Toqueville failed to account for was the distinctively anti-majoritarian provisions developed as an antidote to the potentially smothering effect created by majority control of the organs of government.

C. Freedom of the Press and Speech as Derivative Liberties.

1. Regarding the Press.

It is not sufficient that a person be free to believe as he should choose in private only – the ability to communicate those ideas unimpeded by fear of civil incapacitations must be preserved inviolate if there is to be any chance of achieving

> the advancement of truth, science, morality, and arts in general, and in the diffusion of liberal sentiments on the administration of government, the ready communication of thought between subjects and the consequential promotion of union among them whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.

Address of First Continental Congress to the Inhabitants of Quebec (October 26, 1775) (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 285). Such were the First Continental Congress' concerns when it proclaimed that the press should be free. This can fairly be characterized as a backlash to the Crown's specific compassing of the destruction of that freedom. England long recognized the truth Mr. Story would later enunciate, that the press "works with a silence, a cheapness, a suddenness, and a force, which may break up in an instant all the foundations of society, and move public opinion, like a mountain torrent, to a general desolation of every thing within its reach." I STORY, *supra* at 618. Historically, out of fear of that kind of unregulated power, in many countries "the press has been shackled, and compelled to speak only in the

timid language which the cringing courtier or the capricious inquisitor, should license for publication." I STORY, *supra* at 610-11.

The guarantee of the freedom of the press ensconced in the First Amendment was not secured for its own sake, but out of a recognition that

> [t]o subject the press to the restrictive power of a licenser, as was formerly done before and since the revolution (of 1688), is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.

I STORY, *supra* at 612. This freedom is derivative of the over-arching freedom of opinion, and finds significance in its pursuance. Because freedom of opinion in England has traditionally been classified as a privilege, rather than a right, the freedom of the press is there much less secure. Although regulation there has, for all intents and purposes, lapsed,[3] it is because of the expiration of licensing statutes, and not because of a recognition that regulation would impermissibly intrude on ground over which the government may hold no sway.

In the United States, however, the liberty of the press was conceived as a necessary derivative of the freedom of opinion and conscience it was meant to serve and protect. In Blackstone's words, "[t]he liberty of the press is indeed essential to the nature of a free state . . . . [for] [e]very freeman has an undoubted right to lay what sentiments he pleases before

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[3] *See* STORY *supra* at 611.

the public: to forbid this is to destroy the freedom of the press . . . ." IV WILLIAM BLACKSTONE, COMMENTARIES *151-52. Years before ratification of the First Amendment, most of the new states guaranteed this freedom in their constitutions. Virginia, for example, declared "[t]hat the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments." VIR. CONST. OF 1776, sec. 12. The First Amendment's provision regarding the press simply reflected what was already an extant fact in the state constitutions, and guaranteed the federal government would respect the jurisdictional boundary therein established.

2. Regarding Speech.

So too is the freedom of speech a means of implementing and preserving the freedom of opinion. This specific guarantee grew out of the crucible of political disputes that formed the heritage of the colonists and Framers of the Constitution. Although freedom of debate within Parliament was established as long ago as 1512 in Strode's Act, which "condemned all forms of punishment imposed upon members of Parliament for debating bills or other matters in Parliament," see SOURCES OF OUR LIBERTIES, *supra* at 234, the right was not secure. A century later, in an address to King James I, Parliament reiterated that "'[w]e hold it an ancient, general, and undoubted right of parliament to debate freely all matters which do properly concern the subject and his right or state; which freedom of debate being once foreclosed, the essence of the liberty of parliament is withal dissolved,'" *Id.* The King responded that Parliament enjoyed the liberty of speech as a "toleration" rather than an "inheritance." *Id.* Parliament protested, remonstrating

> That the liberties, privileges, and jurisdictions

> of Parliament are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the king, state, and the defense of the realm, and of the church of England, and the maintenance and making of laws, and redress of mischiefs and grievances which daily happen within this realm, are proper subjects and matter of counsel and debate in Parliament: and that in the handling and proceeding of those businesses every member of the House of Parliament hath and of right ought to have freedom of speech, the propound, treat, reason, and bring to conclusion the same: that the Commons in Parliament have like liberty and freedom to treat of these matters in such order as in their judgments shall seem fittest: and that every member of the said House hath like freedom from all impeachment, imprisonment, and molestation (other than by censure of the House itself) for or concerning any speaking, reasoning, or declaring of any matter or matters touching the Parliament or Parliament business
> . . . .

Id. Parliament's effort, correct in its philosophical basis, was doomed from the start, for the freedom of opinion yet was understood to be a privilege in England, not a jurisdictional barrier to governmental interference. Thus, the freedom of speech, valuable because of its derivation from the right to be free in one's opinions, was held in little esteem when believed to be in service of a privilege only. King James summarily

dissolved the Parliament. Re-establishment of this ancient prerogative did not find its way back into the organic laws of England until the Bill of Rights of 1689, which the Ministers asserted "[t]hat the freedom of speech, and debates or proceedings in parliament, ought not be impeached or questioned in any court or place out of parliament." BILL OF RIGHTS OF 1689, sec. 9 (December 16, 1689) (Eng.).

This guarantee may be found in early state constitutions, such as that of Massachusetts, which provides that "[t]he freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever." MASS. CONST. OF 1780, art. XXI (reprinted in SOURCES OF OUR LIBERTIES, *supra* at 377). This provision is reflected in the Federal Constitution at Article I, section 6: "for any speech or debate in either House, they [Senators and Representatives] shall not be questioned in any other place." These guarantees did not, in and of themselves, reach the citizens of the United States.

In England the Crown or, depending on the stage of development of the constitutional monarchy, Parliament, constituted the sovereign temporal authority; rights, therefore, were established by carving from the government's sphere of power niches of liberty. However, in the United States the Framers comprehended the Federal Constitution as a grant of limited authority from the true found of sovereignty, *viz.*, the people. Thus, the government would have no authority but that granted by those who were to be governed. Against this, it was thought, no specific enumeration of rights was necessary. This

tightly circumscribed realm of authority would, of itself, leave the people free from oppression based on advocacy of their opinions. However, to alleviate the concerns of the Anti-Federalists and secure ratification of the proposed constitution, it was agreed that a Bill of Rights would be proposed. James Madison, the First Amendment's author, understood the result of his handiwork to embody the principle that "the people have a right to express and communicate their sentiments and wishes," II SCHWARTZ, *supra* at 1096, and further that its effect had been that:

> [t]he right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiment by petition to the whole body; in all these ways they may express their will.

Id. The First Amendment assured that the people would enjoy the same type of right as members of the legislature, notwithstanding the fact that it took several years for that liberty to be fully enjoyed. Mr. Story summed up the purpose of the First Amendment thusly: "[i]t is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint . . . ." I STORY, *supra* at 610.

D. Application of the Historical Principles to the Instant Case.

"In disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasoning must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind." THE FEDERALIST NO. 31, at 193 (Easton Press 1979). The brief rehearsal of the historical basis of the freedom of opinion illustrates that this principle is a truth so primary that it can bear little questioning. So too are the related truths that freedom of speech and the press must be maintained inviolable in service of the freedom of the mind. From this, then, must be determined the appropriateness of diverting portions of the segregated funds to certain student groups or activities.

The University of Wisconsin's financing scheme transfers one person's property to another for the purpose of advancing the latter's opinions, ideas or message.[4] It may be safely presumed that the justification for resisting a change in this policy is that the recipients of this largesse would not receive an equal amount from some other source if the scheme was abandoned. Thus, inasmuch as financial resources are essential to the promotion of one's cause, the University has placed its thumb on the balance of ideas extant in the marketplace of ideas. Absent the compelled contribution, that

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[4] It is irrelevant that the funds go first through the intermediary of a student governmental body. The instant question is not how the funds are divided, but whether compelled contributions to a fund that inevitably supports ideas antithetical to the contributor offend the First Amendment.

marketplace would have a different mix of advocates, and the vigor with which those advocates would be able to promote their ideas would change depending on the funds available to them. This is not to be deplored, but celebrated as the natural consequence of a properly functioning free society. Not all ideas have equal merit, and some will wither for their inability to gain adherents or underwriters, but this in no way recommends that in such instances the state should step in to subsidize the faltering opinion. Such a course would be as mistaken as if the government had decided to resist the ascendency of Einsteinian physics over Newtonian. As Jefferson cogently observed, "[i]t is error alone which needs the support of government. Truth can stand by itself." JEFFERSON, *supra* at *129. He then observed that

> there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights[;] the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most excessive sense.

Id. Alexander Hamilton, in writing an installment of the Federalist Papers, was surely cognizant of this fact when he noted that "[i]n the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" THE FEDERALIST NO. 79, at 528 (emphasis in original). Turning back to Blackstone, one discovers that "every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny." I BLACKSTONE, *supra* at *126. By

directing students' funds to support the advocacy of ideas they would rather not promote, the University has usurped their will in this arena. The only cause the University has offered as justification for this action is the support of groups and ideas that would otherwise founder for lack of funds. But as already demonstrated, this rationale is foreign to United States jurisprudence and our common law heritage. In the Blackstone/Hamilton formulation, then, the University's policy constitutes a "degree of tyranny."

Thomas Jefferson once said that "it does me no injury for my neighbor to say there are twenty gods, or no god[:] It neither picks my pocket nor breaks my leg." JEFFERSON, *supra* at 231. The students of the University of Wisconsin are having their pockets picked through the forced advocacy of ideas with which they disagree by means of compelled contribution to the segregated fund.

II. HARMONY BETWEEN HISTORICAL PRINCIPLES AN CONTEMPORARY DECISIONS.

A. Distinction Between Money Contributed to Fund and Withdrawn Therefrom.

Petitioners appear to argue that the District Court's opinion is somehow inconsistent with the results obtained in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). To the contrary, the Court's decision fits perfectly within the Supreme Court's constellation of cases involving access to university-collected funds and use of university properties, and constitutes a worthy addition to the firmament. In any such situation, there are two distinct but related

concerns. The first addresses who may receive funds made available through state action. The second concerns who is required to contribute to that fund. Part of Petitioner's disagreement with the decision below perhaps stems from the difficulty of grafting an analysis meant for the first question onto the second.

As Petitioners recognized, the Supreme Court in *Rosenberger* reached its decision on who may have access to a pool of funds created through state action by analogizing that pool to a forum, albeit one "more in a metaphysical than a spatial or geographic sense." 115 S.Ct. at 2517. That analysis, though apparently stretched to its limits, still functioned sufficiently well for the Court to conclude that distribution of funds must be accomplished in a content-neutral fashion. The analogy, however, does not travel well to the instant situation in which this Court must determine whether one can be required to contribute to a fund that will inevitably be used for the direct advancement of ideas with which one disagrees.

A better analogy may be that of money laundering. When one wishes use of improperly obtained funds, one often places it with an institution holding legitimately obtained funds, e.g., a bank. The fungibility of money thus makes it difficult to trace the tainted funds once they are withdrawn to be put to lawful ends. There can be no doubt, though, that the legitimate activity would not be possible but for the initial introduction of the tainted money. The fact that the withdrawal was lawful and the ends to which the money will be applied are legitimate does nothing to remove the fact that the money still bears its initial stain.

The student groups at the University of Wisconsin are participating in legitimate and, in many cases, laudable activity. The Associated Students of Madison is performing a valuable service in ensuring that worthwhile student organizations receive funding for their functions. How they distribute those funds, and the identity of the groups receiving the money, however, will not legitimize the money if it was obtained unconstitutionally. Because "forum" analysis is keyed to the distribution and receipt of funds whose legitimacy is unquestioned, it can do nothing in resolving the question of whether the contributions to the fund were obtained in a Constitutionally permissible manner.

Petitioner's argument breaks down at this point, for it assumes that laundering the money through a content-neutral distribution process to legitimate student groups removes any stigma that may have attached to the money before that process began. Just as the question of who may receive funds from a pool of money is different from who must contribute, so are the analyses different.

B. Parity in Protection Against Censorship and Compulsion.

Contrary to Petitioner's suggestion, involuntary participation in the promulgation of an idea with which one disagrees is protected against with at least the same level of solicitousness as prohibiting governmental action restricting free speech:

> It is a commonplace that censorship or suppression of expression of opinion is

> tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. *It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence* . . . . To sustain the compulsory flag salute we are required to say 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.

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 633-34 (1949) (emphasis added). The Supreme Court reiterated the importance with which it held the right not to be compelled to speak in *Wooley v. Maynard*, 430 U.S. 705 (1977):

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. *See Board of Education v. Barnette*, 319 U.S. 624, 633-634 (1943); *id.*, at 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. *The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." Id.*, at

> 637.

430 U.S. at 714 (emphasis added). That the State seeks to promote religious, political or ideological causes with a blind eye is wholly irrelevant.[5] The right to remain silent defies application of a standard that asks whether competing ideas are treated even-handedly.

The State must "presume that speakers, not the government, know best both what they want to say and how to say it. . . . [E]ven with the purest of motives, [the government] may not substitute its judgment as to how best to speak for that of speakers and listeners . . . ." *Riley v. Nat. Fed. of Blind*, 487 U.S. 781 (1988). Justice Stewart recognized that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977). The Supreme Court has recognized that "[m]aking a contribution . . . enables like-minded persons to pool their resources in futherance of common political goals." *Buckley v. Valeo*, 424 U.S. 1 (1976). The corollary principle is also true: If the contribution is compelled, the goals furthered are, by definition, alien to the will of the contributor.

While it is true that some legitimate governmental activities have the incidental effect of promoting an idea, or

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[5] Even the State's professed blindness to the ideologies that are promoted through use of the segregated fees is suspect. Surely the University must have peeked beneath its blindfold in determining that some groups were not receiving adequate funding, for if all were receiving adequate amounts of money there would be no need of this type of financing.

even several, to the relative detriment of others, government policy ought not be allowed to have as its motivating purpose intervention in the marketplace of ideas in such a way that it disturbs the natural balance therein. Justice Murphy's concurring opinion in *Barnette* contained the seeds of this standard:

> The right of freedom of thought . . . as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society – as in the case of compulsion to give evidence in court.

Barnette, 319 U.S. at 645 (Murphy, J. concurring). In this case, the University acknowledges that the central purpose for its financing scheme, as it relates to the student groups, is to promote debate. When the result of that avowed purpose is to skew the marketplace, the government has stepped outside its proper boundaries.[6]

The District Court decision fills the gap identified by Justice O'Connor in *Rosenberger*, when she noted "the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be

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[6] This is significantly differen6t from making a facility or park available to all who should seek its use. Such provision does nothing to alter the number of advocates in the marketplace or affect the efficacy with which they can promote their agendas.

compelled to pay for speech with which she disagrees." *Rosenberger*, 515 U.S. at 851 (O'Connor, J. concurring). Whereas cases such as *Rosenberger* adequately apply a "forum" analysis to the expense side of the ledger, the income side requires the Court to ascertain whether the purpose of the compelled contribution is Constitutionally permissible. If the purpose of the requirement is to affect the balance of the marketplace of ideas, as here contributions must be voluntary to survive scrutiny. On the other hand, if the motivating purpose of the regulation is not to promote an idea, or group of ideas, and yet has the incidental effect of doing so in pursuance of otherwise legitimate governmental function, the regulation survives review. The District Court decision ensured that the pool of funds is not contaminated by unconstitutional compulsion, and faithfully followed the history of the First Amendment and the *Abood, Maynard, Riley* and *Barnette* decisions.

III. CONCLUSION

The First Amendment's guarantees grew out of the experience of people whose governments had tried to coerce assent to ideas, and even systems of science, with which they disagreed. Their goal was to create a jurisdictional moat around matters of the mind that the government would be unable to ford. This they expressed by placing religion, speech and the press off-limits to State regulation.

This Court has the opportunity to clarify the different analyses applicable to the two sides of the ledger of a governmentally created fund. "Forum" analysis provides a workable structure only when addressing expenses paid from

the fund. Income deposited in the fund, though, must be screened for compulsion. If the purpose of the fund has only the incidental effect of promoting the expression of an idea or ideas, there is no Constitutional harm. However, if the purpose of the money, at least in part, is to promote the advocacy of ideas or opinions, the First Amendment prohibits compelled contribution. As Jefferson has said before, "to compel a man to furnish contributions of money for the propagation of the opinions which he disbelieves, is sinful and tyrannical." For these reasons, *amicus* urges this Court to affirm the District Court's decision in this case.

Respectfully submitted,

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