

No. 98-1189

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

SCOTT HAROLD SOUTHWORTH, *et al.*,
Respondents

BRIEF OF AMICUS
FIRST FREEDOMS FOUNDATION
IN SUPPORT OF RESPONDENTS

Filed August 13, 1999

This is a replacement cover page for the above referenced brief filed at the
U.S. Supreme Court. Original cover could not be legibly photocopied

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INTEREST OF AMICUS CURIAE¹

The First Freedoms Foundation is a non-partisan, not-for-profit, public interest organization founded to promote and defend individual civil liberties. The Foundation engages in research, public education, and public interest litigation.

Among its founding principles, the Foundation is concerned that expanding government progressively displaces private, voluntary systems of economic and social interaction. This displacement erodes and distorts the free market of ideas by forcibly directing private resources away from ideas which citizens themselves would otherwise choose to support. Instead, government uses those resources to support its own institutions and *fora* which tend inherently to discourage or prohibit advocacy of certain types of viewpoints -- for example, principles of limited government and theistic points of view.

The Foundation believes that the University of Wisconsin's coercion of students to support ideas they find abhorrent is particularly dangerous to First Amendment values and free society. The Foundation therefore respectfully offers its views that (1) historically, freedom of thought in higher education has been preserved by individuals pursuing truth for its own sake, not by government or ecclesiastical institutions controlling inquiry based on the perceived needs of those institutions or of society and (2) the University's forced

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 authored by counsel for *amicus curiae* and was not authored or contributed to by counsel for a party or by any other person or entity, either in whole or in part. Costs of submission of this brief in this Court have been underwritten by *amicus curiae*.

redistribution of students' resources disrupts and distorts individual participation in the free market of ideas.

INTRODUCTION

For millennia, learned men and women have struggled to pursue Truth wherever it leads. For even longer, prince and pope have struggled to restrain and subvert that pursuit for their own ends. The history of speech in the university is a history of that contest -- the struggle of scholars to pursue truth without restraint or subversion.

Throughout history, whether in the university or outside it, the single, indispensable constant in the marketplace of ideas has been that insistence and persistence of individual minds to pursue truth -- for no other reason than truth for its own sake and for their own integrity.

That principle is the essence of the First Amendment's protections and is the principle upon which this case should be decided. The University claims that compelled support for abhorrent ideas is necessary to change the content of the marketplace of ideas for the "greater good." But the pursuit of truth must never be sacrificed to official orthodoxy, whether religious or (as at present) social and political. The individual mind and conscience must always remain holy and inviolable. The University's forced subsidy of abhorrent ideas ought not stand.

I. IN THE HISTORY OF THE UNIVERSITY, THE SEARCH FOR TRUTH HAS DEPENDED ON THE CONSCIENCE OF THE INDIVIDUAL SCHOLAR

Assessment of mandatory student fees by government

universities to support student speech has emerged only recently as a widespread practice. *See, e.g.,* 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, 2011 (1994) (student fees at U.C. Berkeley appeared only about forty years ago).

This Court has indicated that it will consider the constitutionality of that practice under the rubric of cases dealing with fees compelled by labor unions and professional associations. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 840 (1995) (citing *Keller v. State Bar of California*, 496 U.S. 1, 15 - 16 (1990) and *Abood v. Detroit Board of Ed.*, 431 U.S. 209, 235 - 236 (1977)).

However, even though *Abood* and *Keller* may ultimately provide the First Amendment's controlling principles, a university campus is a very different place with very different functions than labor unions or professional associations. Rather than duplicate the parties' discussion of *Abood* and *Keller*, *amicus* suggests that those cases should be applied within the historical context of the institution under scrutiny. (Establishment clause issues have been similarly considered in an historical context. *Everson v. Board of Education*, 330 U.S. 1, 33 (1947) (J. Rutlege, dissenting)).

A. The Archetypes.

Socrates and Plato's Academy are the archetypes of those seeking truth for its own sake. This tradition has never concerned itself with the "social utility" of the search for truth, much less has it tolerated the state dictating the manner in which those who seek it must spend their time and resources.

In the *Apologia*, Socrates states, "Men of Athens, I honor and love you, but I shall obey God rather than you, and while I have life and strength I shall never cease from the practice and teaching of philosophy . . . [A]re you not ashamed of heaping up the greatest amount of money and honour and reputation, and caring so little about wisdom and truth and the greatest improvement of the soul" APOLOGIA, reprinted in TEN GREAT WORKS OF PHILOSOPHY 24 (Robert Wolff, ed., 1969).

Plato's Academy maintained the same, dire independence from political fashion. It "did not exist in any immediate way for the benefit of the community; indeed, Plato and his pupils commonly were at odds with their community, in a political sense. The allegiance of the Academy was to something grander even than Athens: to Truth." RUSSELL KIRK, ACADEMIC FREEDOM 12 (1955). In fact, the "community" put "the first of its great thinker to death, forced the second to flee to Magara and Syracuse, and compelled the third, on occasion, to take refuge in Asia." *Id.*, at 11.

Thus, freedom of thought was historically grounded on the individual's pursuit of truth for its own sake and that of the seeker -- often in direct antagonism to the community and its institutions. The University's current efforts to subordinate individual judgment to the "greater needs" of the community is therefore a subversion of the very truth it purports to seek.

B. The Medieval University.

Medieval universities were "centers of power and prestige, protected and courted, even deferred to, by emperors and popes." RICHARD HOFSTADTER AND WALTER METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES

5 (1955)². They were "autonomous corporations, conceived in the spirit of the guilds" which maintained independence by existing in the "interstices of medieval society," playing pope and king against each. *Id.* at 6, 7. Further, the masters' poverty made valid the threat to cease lectures and migrate, costing those who offended them prestige, power, and valuable trade brought by students. *Id.* at 6.

Yet the very autonomy of the university allowed the guild structures to exercise restraint against their own members. *Id.* at 12. Individual scholars also intimidated each other with personal attacks and accusations of heresy. *Id.* at 28. And in the fields of theology and philosophy, scholars searched for truth within narrowly fixed limits created by fundamental, unquestionable religious doctrines. *Id.*

Still, harmonizing Greek and Christian thought left fertile ground for creative thinking and forceful dispute. *Id.* at 14. To avoid suppression, scholars developed the "disputation," a device to acceptably propose unorthodox propositions in hypothetical form. *Id.* 14, 20. Scholars also read Aristotle in secret, flaunted bans, fled to jurisdictions of sympathetic sovereigns, and published speculative writings under assumed names. *Id.* at 21, 24, 28. Abelard justified interrogations which caused doubt on the grounds that they led to inquiry which led to truth. *Id.* at 29.

In contrast to Aquinas who escaped censure by harmonizing Christianity and Aristotle, Averroes (and later, Siger de Brabant) escaped it by assigning the natural order to philosophy and reason and the supernatural order to theology

² Hofstadter and Metzger's work is the acknowledged authoritative source on the history of academic freedom and is cited extensively.

and faith. *Id.* at 33. This duality was perhaps the earliest form of free thought, allowing speculation based upon natural reason outside the confines of theological dogma. *Id.* 33 - 37.

Despite these difficulties and ruses, the scholars' autonomy and achievement ultimately arose from their service to truth, not to the community.

[I]n the Middle Ages, as in classical times, the academy possessed freedom unknown to other bodies and persons because the philosopher, the scholar, and the student were looked upon as men consecrated to the service of Truth The community did not create the privileges of the Academy any more than the community created wisdom; rather, the community simply recognized the justice of the Academy's claim to privilege. The community did not expect to be served, except in the sense that it might be so fortunate as to gather some crumbs that feel from the academic table. Like Socrates and like Aquinas, the learned man, the teacher, was a servant of God wholly, and of God only. His freedom was sanctioned by an authority more than human.

ACADEMIC FREEDOM, *supra* at 17 - 18.

C. Renaissance and Reformation.

As the Reformation dawned, papal power declined as Reformers and Counter-Reformers appealed to civil authority for protection. But as sovereigns became champions and protectors, the balance of power which had previously allowed autonomy from both pope and prince was lost. *Cujus regio* placed conscience and intellect at the service of the state.

Finally, as the Church's power and universality waned, so did the ecclesiastical nature of intellectual life and its extra-nationality. Nation states emerged in the vacuum of papal power, exercising control over universities whose masters were now financially dependent upon them. THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES, *supra* at 38 - 39.

Aristotelianism itself became a new dogma, against which humanistic scholars revolted through the hypothetical statement and "probabilism," a device by which one could challenge the rationality of any orthodoxy without conclusively denying it. *Id.* 36 - 37. Duality evolved as a method to protect theology from the effects of skepticism and science (or *vice versa*, depending upon one's allegiances). *Id.* 38 - 39.

Those devices ultimately cost theology intellectual respect, and as belief in the universities' divine sanction waned, so did their power. Although the Italian universities exercised some leadership, the intellectual torch passed to new humanistic scholars outside the university and the Church who were protected and supported by patrons, sovereigns, and the papal court itself. *Id.* at 43 - 44.

In Italy, this new freedom from the Church gave rise to thinly veiled skepticism. In the north, the Christian humanists retained allegiance to the Church, but demanded broader scholarship and study of original sources which they believed would more effectively establish the faith and the original, ethical spirit of Christianity. But the humanist's insistence on examining original sources was opposed by churchmen who correctly foresaw that resort to original sources would undermine church authority. Erasmus and humanist scholars remained largely outside the universities rather than suffer restrictions of the churchmen's opposition. *Id.*, at 46 - 49.

In the early 16th century, Reuchlin, a Hebrew scholar, opposed an edict to destroy all Jewish sources, and a group of humanists circulated a scathing *ad hominem* against the edict's supporters. This effort is the first known instance of scholars rallying in general support of the scholarly enterprise. Erasmus issued a letter calling for respect of the search for truth and for other sincere scholars which, while not persuasive in its time, was the first singular statement of the spirit of freedom for *bona fide* intellectual inquiry. *Id.* at 50 - 52.

The labors and persecutions of Copernicus and Galileo are well known, but less known is that courageous defenders arose within the Church itself. Campanella's DEFENSE OF GALILEO was "the first reasoned argument to be published in support of the freedom of scientific investigation." THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES, *supra* at 57. It asserted that proper authority existed to question Ptolemaic geocentrism (long since incorporated in church dogma) and that suppression of God-given faculties of sense and reason transgressed the "natural law of God." *Id.*, at 58.

Campanella also expressed the first germ of "marketplace" theory ("If Galileo's theory be unsound it will not endure") and introduced the phrase "*libertas philosophandi*," the forerunner of "academic freedom." The Church ignored Campanella's argument, suppressed Galileo, and drove scientific inquiry outside the universities into private scientific societies where scholars pursued truth in greater freedom until well into the 18th century. *Id.* at 60 - 61.

Thus, in preserving intellectual inquiry during the Renaissance and Reformation, the constant was not the institutions of church, state, or university but, as before, was individual commitment to truth.

D. The Enlightenment.

The Reformation's threat to the Church initially led to suppression of inquiry and intellectual freedom in both camps, lest questioning be taken for doubt and doubt be taken for admission of error. Academic autonomy began its slow re-emergence only after religious tolerance began to take hold -- the result of rising commerce, protests of religious minorities, pleas for tolerance and freedom from secularists and ethical Christians, and civil authorities demanding order after two centuries of havoc. *Id.* at 58 - 62.

Academic and religious freedom thus grew side by side because they had "one root in common: both are based upon the freedom of conscience, hence neither can flourish in a community that has no respect for human individuality." *Id.* at 62. The freedom that arose, however, was one of mutual accommodation among internally orthodox institutions. Scholars could choose their religion, but individual institutions generally attempted to enforce their own orthodoxy within their confines.

As academic and religious toleration grew, several principles of modern intellectual freedom grounded in individual rights began to crystallize: (1) the ultimate appeal to individual conscience and reason, which was inevitable once open competition among sects became possible, (2) charity or "tolerance" of other opinions, urged by humanists as being more faithful to Christian ethics, (3) "fallibilism," the recognition that man is prone to error and that no one individual can presume himself an exception with the right to enforce his opinions on others, (4) the conviction that injurious actions, not wrong opinions, were the only proper subjects for prosecution or penalties and (5) secular morality, the belief that

a common morality is available to all by natural reason, and that right doctrine is not its indispensable prerequisite. *Id.*, at 64 - 67.

As in earlier epochs, freedom to pursue truth again survived because of the adamance and perseverance of individual scholars, in spite of the religious and political institutions which abused and suppressed them.

E. The American Experience.

History has emphasized religion's abuses of intellectual liberty. However, as soon as it came to power, the "republican" state proved itself no less capable of controlling scholars for its own ends. Early American universities were, without exception, denominational seminaries created primarily for training of ministers. But as republicanism swept across the Atlantic, the universities became political prizes contested by opposing political, religious and social factions.

William and Mary, for example, was an integral part of the Virginia Anglican establishment. But in 1776, Thomas Jefferson introduced a bill in the Virginia legislature to change the college's corporate charter, eliminate divinity from the curriculum, and render it a republican institution to develop political and social leaders for republican society. Jefferson was defeated by Anglican and other religious interests, but he partially implemented his plan as governor in 1779. He saw it completely realized in 1819 with the creation of the University of Virginia.

While Jefferson was devoted to intellectual freedom of the faculty, his devotion clearly did not extend to those faculty who thought that the study of divinity was important. GEORGE M.

MARSDEN, *THE SOUL OF THE AMERICAN UNIVERSITY* 54 (1994); Mark D. McGarvie, *CREATING ROLES FOR RELIGION AND PHILANTHROPY IN A SECULAR NATION: THE DARTMOUTH COLLEGE CASE AND THE DESIGN OF CIVIL SOCIETY IN THE EARLY REPUBLIC*, Vol. 25, No. 3, J.C. & U.L. 527, 537 - 38 (1998).

The late 18th and early 19th centuries saw the same struggles repeated throughout the states. In Massachusetts, after a long battle for state control, the legislature finally granted Harvard its independence. It ceased supporting Harvard and, instead, provided funding for "republican" Williams and Bowdoin colleges. (This measure did not satisfy Boston's republican editors who continued demanding that the state take control of Harvard.) McGarvie, *supra* at 541.

In 1819, *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819) became a watershed in the struggle for control of the universities. Corporations had long been created solely for public purposes and only by direct legislative action. However, Chief Justice Marshall established that corporations could be a private, voluntary associations outside state control, even if they were created for public or charitable purposes. McGarvie, *supra* at 555.

Thereafter, legislatures aggressively pursued direct legal control of colleges and their faculties. At Maine's 1819 constitutional convention, one delegate proposed that no school should receive support unless "the Governor and Council shall have the power of revising and negating the doings of the trustees and Government of such Institution . . ." *Id.* at 563 (quoting JEREMIAH PERLEY, *THE DEBATES, RESOLUTIONS, AND OTHER PROCEEDINGS OF THE CONVENTION OF THE DELEGATES ASSEMBLED AT PORTLAND ON THE 11TH AND CONTINUED UNTIL*

THE 29TH DAY OF OCTOBER, 1819, FOR THE PURPOSE OF FORMING CONSTITUTION FOR THE STATE OF MAINE 281 (Charles E. Nash, ed., 1920) (1894).

But another delegate expressed the historic abhorrence against external control of the pursuit of truth. He was "mortified," and accused the state of "imposing shackles" on the college. "Are we too ignorant even to be made sensible of the importance of knowledge? And does Massachusetts therefore undertake to prescribe for us?" MCGARVIE, *supra* at 564 (quoting PERLEY, *supra* at 290).

Thus, as the secular state supplanted organized religion as the primary social power, it was just as eager as the Church to take control of the university. As before, it was neither church nor state which protected the pursuit of truth, but individuals dedicated to its pursuit for its own value.

F. Modern Zealotry.

Modern academe claims great progress in protecting intellectual freedom. But the integrity of intellectual inquiry is under no less threat today than before. NEIL HAMILTON, ZEALOTRY AND ACADEMIC FREEDOM 55 (1995).

Zealotry hostile to freedom of academic thought and speech has historically originated in a variety of sources: lay boards of trustees and administrators, the lay public, government, and, in the 1960's, students. The newest threat is from the group that academic freedom was designed to protect: the professoriate itself. *Id.*

A recent symposium collected papers examining

McCarthyism, "1960's Student Activism" and "1990's Faculty Fundamentalism." Hamilton, SYMPOSIUM ON ZEALOTRY AND ACADEMIC FREEDOM 22 Wm. Mitchell L. Rev. 331 *et seq.* (1996). The rabid demand for "relevance" in the 1960's led ineluctably to political correctness in the 80's and 90's -- the ultimate "triumph" of defending scholarship based on perceived social utility rather than the absolute right and value of pursuing truth for its own sake.

G. The University of Wisconsin Experience.

The University of Wisconsin has been subject to the same pressures against individual pursuit of truth as every other institution throughout history. Although the Regents have attempted to synthesize the pursuit of truth for its own sake with its pursuit for the sake of social utility, the tension between those objectives is inevitable and problematic.

The University is a land grant university created and governed by the state through its Board of Regents, and epitomizes the view that a university should serve the needs of the state. "The Wisconsin idea" is that "the boundaries of the campus are the boundaries of the state." W. LEE HANSEN, ACADEMIC FREEDOM ON TRIAL 15 (1994).

During a 1957 ceremony rededicating a plaque in front of Bascom Hall (the University's "seat of power"), the Regents stated that they were attempting to "employ with utmost energy the power of truth and freedom for the benefit of mankind." *Id.* at 6. On the rededicated plaque are engraved the following words:

WHATEVER MAY BE THE LIMITATIONS
WHICH TRAMMEL INQUIRY ELSEWHERE, WE

BELIEVE THAT THE GREAT STATE UNIVERSITY OF WISCONSIN SHOULD EVER ENCOURAGE THAT CONTINUAL AND FEARLESS SIFTING AND WINNOWING BY WHICH ALONE THE TRUTH CAN BE FOUND." (TAKEN FROM A REPORT OF THE BOARD OF REGENTS IN 1894.) MEMORIAL, CLASS OF 1910.

Id. at 66 - 67.

Despite their uncompromising tenor, those words have an equivocal history. ACADEMIC FREEDOM ON TRIAL was published in 1994 as a centennial commemoration of the watershed investigation of Professor Richard T. Ely who was director of the University's School of Economics, Politics and History in 1894 -- the year of the Pullman strike, a national depression, and exceptional social unrest. Though he was apparently a social conservative and a devout "social gospel" Christian, Wisconsin's Superintendent of Public Instruction, Oliver Wells, publicly attacked him as being morally unfit, an anarchist, and a union sympathizer and instigator of boycotts.

After a hearing before a committee of the Board of Regents, Ely was fully exonerated. Although the incident galvanized support for Ely's right to address economic and labor issues (Frederick Jackson Turner was a faculty member under Ely's direction and an ardent defender), Ely did not defend against Wells' charges on the grounds of academic freedom. Instead, he mounted a "prudential" defense, denying the specific charges but conceding that, if the charges were true, his dismissal was warranted.

To the committee's credit, it issued a report which asserted

academic freedom. "In all lines of academic investigation, it is of the utmost importance that the investigator should be absolutely free to follow the indications of truth wherever they may lead." *Id.* at 67. The words inscribed on the Bascom Hall plaque were lifted directly from the report and, in Ely's own words, they became "a beacon of light in higher education in this country" and a "part of the Wisconsin Magna Charta." *Id.*

"Continual and fearless sifting and winnowing" have been University watchwords ever since. Nevertheless, Ely's pusillanimous defense illustrates the perennial pressures to restrain aggressive inquiry which challenges the status quo.

In 1927, for example, the University opened its "Experimental College," a dramatic experiment in freedom of inquiry under the direction of Alexander Meiklejohn. Students lived and worked with staff in the same dormitory, had an exceptional reading program but no exams, produced their own plays and literary works, participated in the state legislative process, engaged in political demonstrations and, in general, exhibited "uninhibited zest for thought and for action" to which the regular university was not accustomed. ALEXANDER MEIKLEJOHN: TEACHER OF FREEDOM (Cynthia Stokes Brown, ed.) 22 - 23 (1981).

The Experimental College closed in 1932, not only for a lack of funding, but because of perennial problems which have always inhibited free thought. A small but vocal contingent of communist students was continually monitored in the state press. (One member arrested in a Milwaukee labor demonstration later ran for governor of Wisconsin from his residence in the Milwaukee County House of Correction.) When the University refused to permit Bertrand Russell's wife to speak on campus because she advocated premarital sex, the

College formed a Free Speech Club and arranged for her to speak in the Unitarian Church. She was the Meiklejohns' guest, as Bertrand Russell had been the previous year, and the Meiklejohns were ostracized by the Madison community.

Parents were also concerned that their sons (the College admitted only men because co-ed dormitories were impermissible) were not being properly prepared for a position in the tight Depression era labor market. Others were deterred by the high percentage of Jewish students the College attracted. There were tensions within the University itself as the College of Letters and Sciences continued to demand examinations and grades. Professional rivalries developed with faculty not involved in the College, and Meiklejohn himself was at odds with the University because of its reluctance to experiment.

Resentful faculty, students and administrators spread rumors that the College would be abandoned -- which it shortly was when its faculty refused to make program concessions requested by a committee from Letters and Science. President Glenn Frank refused to support the College because he had no support within the community. The Regents removed him five years later without due process and with no protest from faculty. *Id.* 20 - 35.

At present, the University congratulates itself that these unfortunate incidents are ancient history and that it has developed faculty rights and due process which prevents them from happening again. FREEDOM ON TRIAL, *supra* at 5 - 8 and *passim*.

Others, however, suggest that the situation may be worse than ever. The 1970 class of *alumnus* Dr. Mordecai Lee, for example, never even participated in a graduation ceremony

because student radicals were allowed to shut down the University. ACADEMIC FREEDOM ON TRIAL, *supra* at 209. University Professor E. David Cronon states that

For nearly three decades since the turbulent protests against the Vietnam War,³ it has been risky and sometimes impossible to invite to the campus speakers whose unpopular ideas are opposed by one student group or another, lest they be heckled, shouted down, or even physically threatened. The result is a self-imposed censorship and conformity that denies the campus community the opportunity to hear all points of view. It makes a shameful mockery of the sifting and winnowing ideal.

What is more disturbing is that it has been a long time -- decades, in fact -- since the faculty as a body, or a top campus administrator, or a regent has spoken out forcefully and taken a strong stand against this form of censorship by student storm troopers.

Id. at 249.

More recently, the University adopted its infamous "Hate Speech Code" in 1989 which was eventually ruled unconstitutional by District Judge Robert Warren. *Id.* at 216 - 20. Dr. Lee himself expresses the tension inherent in any university created expressly to serve the state.

The UW-Madison faculty may wish for the

³ Perhaps the most tragic event in University history was the death of a graduate student killed when student radicals bombed the University math center which they believed was conducting military research.

academic freedom of their counterparts in private institutions. But, the context of their academic freedom, as part of a state government, means that the academic freedom they get is somewhat different. The UW faculty needs to recognize this reality of being part of state government and develop a concept of academic freedom consistent with it.

Quality teaching, community service, and applied research are what the taxpayers want in return for their investment. The cry for the "relevance" that typified the student protest movement in the sixties is returning, and now it is coming from the people who hold the purse strings. *It is time to redefine what academic freedom means in a public university in the 1990's.*

Id. at 215. (Emphasis added.)

These regrettable anecdotes demonstrate once again that preservation of bold, original inquiry will never lie in a group or in an institution. Instead, it will always lie with individuals, master and scholar alike, who follow truth where it leads them and who refuse to acquiesce or conform, regardless of current fashion.

H. Summary.

In summary, assaults on freedom of inquiry throughout history have come from all quarters -- from church, state, patron, students, fellow scholars, the university itself. The pursuit of truth has survived, not because of social, political or institutional commitment, but because individual scholars have defied fashion and authority to pursue the truth as they see it.

In this case, a few individual scholars have courageously challenged the University because it extracts from them fees to support ideas which offend their consciences. The greatest service this Court can render is to end that violation of conscience. The First Amendment does not and ought not countenance a soulless, bureaucratic program on the vacuous rationale that it is necessary to offend the conscience of one so that he will learn not to offend the conscience of another.

II. COMPELLED SUPPORT FOR ABHORRENT IDEAS DISRUPTS THE MARKETPLACE ESSENTIAL TO THE PURSUIT OF TRUTH

The University claims that coercing students to fund ideas they find abhorrent serves the greater good of expanding the "marketplace of ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). However, violating any individual's decision and conscience inevitably damages not only the violated individual, but also defeats the purposes the marketplace of ideas is intended to serve.

A. Granting Exemption from the Fee System Will Not Limit Speech at the University.

The University claims that granting exemptions to objecting students will endanger campus speech. But Respondents comprise only a handful of the University's 40,000 students. Funds lost by granting the exemptions would be infinitesimal. On the other hand, if such exemptions did spark a mass exodus by other students, such exodus would be compelling evidence of the fee program's injustice. The greater the exemption from the program, the greater the evidence that the views it subsidizes do not reflect the views of those compelled to support it.

B. The Fee System's Facial "Content Neutrality" Belies Bias Inherent in Selecting Which Groups Will Receive Funds.

Numerous scholars have noted the obvious problem that interference in the market by *any* governmental structure disturbs the free flow of ideas and has the inevitable effect of perpetuating the orthodoxies preferred by those in control of the structure. (See, e.g., Brietzke, HOW AND WHY THE MARKETPLACE OF IDEAS FAILS, 31 Val. U.L. Rev. 951 (1997); Wonnell, TRUTH AND THE MARKETPLACE OF IDEAS, 19 U.C.D. L. Rev. 669 (1986); Ingber, THE MARKETPLACE OF IDEAS: A LEGITIMIZING MYTH, 1984 Duke L.J. 1 (1984).

The University's policy does just that. Although it contains no overt criteria discriminating against applicants based upon the content of their speech, it leaves to small student committees the final decisions over which groups will or will not receive funding. The policy does not (and, as a practical matter, can not) control the biases of those students empowered to make such decisions. Funding decisions thus inevitably reflect their individual preferences and value judgments.

C. The Fee System Is Subject to Abuses Characteristic of All Subsidized Programs.

The program is also subject to all-too-familiar abuses attendant in any program of governmental subsidy. For example, it clearly encourages *bolshevik* style efforts to control the committees empowered to make grant decision. It also encourages scheming by relatively few students to form a multiplicity of small, coordinated groups, thereby garnering and controlling a greater percentage of available funds.

The subsidies also bring into existence less valuable speech because the very rationale of the subsidies is that without them, faculty and students would see fit to utilize their existing resources to support speech other than that approved by the committees. The process thus substitutes the judgment of a small number of students for the individual of all other students.

Subsidies also ultimately confer disproportionate benefits on authoritarian students who have no qualms about taking the property of others to support their own ideas. Across the political spectrum, authoritarians hold in common the belief that government compulsion is morally justifiable to modify otherwise free choices of their fellow citizens. In contrast, the beliefs and consciences of individualists (such as libertarians and proponents of limited government) prohibit them engaging in such tactics. The differing inhibitions of these groups make it inevitable that one will benefit more from subsidies or other forms of official compulsion than will the other.

The student fees program, like all forms of official compulsion, tips the scales in favor of those who employ political force rather than rational persuasion. As Justice Douglas stated, "When we force people to listen to another's ideas, we give the propagandist a powerful weapon" *Public Util. Comm'n v. Pollak*, 343 U.S. 451, 469 (1954) (Douglas, J., dissenting). How much worse then, when government forces objectors not merely to listen to abhorrent speech, but to *pay* for it.

Further, as with other entitlements, the greatest injury done by the speech subsidies is not that inflicted upon those whose property is taken to support ideas they abhor, but is rather the injury inflicted upon those who receive the support. Such

recipients of intellectual welfare come to believe that their ideas are more meritorious than the free market warrants and that they are entitled to the support of others -- if not voluntarily, then upon pain of force and forfeiture. The tragedy is that the university community at large comes to believe that compulsion and subsidized thought is *rerum naturum*, and it loses the will to oppose the "storm troopers" of which Professor Cronin complains.

Finally, the University also argues that the students come to campus knowing that the fee system is in place. But this claim also admits that the University is tampering with the market. The very existence of the fee system is, in fact, an admission by the University that it is not satisfied in some respect with the quantity, quality, or diversity of viewpoints which would arise if students were left to themselves.

Further, it is doubtful that students are even aware of the arcane system of fees and disbursements when they come to campus. But even assuming that they are, there is no way to know whether they came *because* of it or *in spite* of it. It seems far more likely that those who oppose the system on grounds of conscience may be dissuaded from attending the University at all, thus actually limiting rather than broadening the range of ideas on campus.

D. The Fee System Damages Civility and Reason.

The University's relies heavily on the program's "content neutrality." One can only hope that the University does not really mean it.

The archetype colloquium was a community of masters and scholars, respectful of truth and of each other. But a truly

"content-neutral" process destroys respect for both. If the University persists in its program, even the most unsophisticated undergraduate will, in time, come to question its sincerity and, ultimately, its rationality.

Content neutrality destroys civility in two ways. "Substantively," if the process is truly neutral, then anyone must be eligible for funding irrespective of his teachings, no matter how pernicious. Does the allocation process really not distinguish between the Student Council and the Aryan Nation? Between the NAACP and the Ku Klux Klan? How can the University expect any student to respect a "content-neutral" process which forces him to subsidize vitriolic attacks against himself and principles he holds dear?

"Procedurally," campus debate should certainly vigorous. But a free, uncompelled exchange of ideas is the greatest guard of civility and market effectiveness because it requires two *willing* participants. In a voluntary exchange of ideas, just as in a free and open economic exchange, the audience can simply refuse to listen and walk away if judge the proponent to be absurd, abusive, disrespectful, inconsequential or insincere.

Compelled support for abhorrent ideas destroys that fabric on which the market depends. One forced to support an abhorrent idea has no chance to "walk away" from its proponent, regardless of how uncivil or irrational that proponent may be. In place of voluntary respect for truth and others, forced subsidy breeds pernicious resentment.

"Content-neutral" disbursement of funds also damages rationality. If the University is taken at its word, its methodology prohibits from distinguishing not only on a political basis, but on a rational basis as well. Refined thought

is afforded no greater chance of support than thought which is patently absurd. One is confronted with the Kafkaesque picture of the University standing beside its students, scooping up chaff and detritus, and dumping it back in the basket just as fast as the students can "sift and winnow" it out.

Amicus does not ascribe such irrationality to the University or the students making the funding decisions, nor does it suppose that there are no outer limits of rationality or decency which preclude some speech from being subsidized.

Instead, *amicus* suggests that any pledge of "content-neutrality" is at best naive and at worst disingenuous. Again, such patent defects breed disrespect for the University, for civility, and, ultimately, for reason itself.

CONCLUSION

As in many First Amendment cases, the symbolic effect of this Court's decision is as important as the substantive result. Granting students an exemption from fees to support speech they find abhorrent sends a critical message: an idea should survive because it is persuasive and because its adherents are committed, not because of their wretched ability to extract subsidies from those with whom they disagree.

Instead of a system of compelled support for ideas one finds abhorrent, the University should instill in students an unassailable, "Camelot"-like vision -- that they should convince others by their enthusiasm and the force of their arguments, not by exercising the power of the state to extract support from their opponents.

Justice Douglas expressed this ideal in the context of

religious ideas. This Court should "sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

The search for truth has always depend on the dogmatic, uncompromising, insistence of the single individual to think for himself. *Amicus* urges the Court to protect the true guarantor of the search for truth, the sanctity of the individual human mind.

Respectfully submitted,

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