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Student Publications, the First Amendment, and State Speech

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STUDENT PUBLICATIONS, THE FIRST AMENDMENT, AND STATE SPEECH

T. D. BUCKLEY, JR.*

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I. INTRODUCTION

The lower federal courts and state courts have been applying the first amendment in student press cases arising at public colleges and high schools since 1967. But ordinary first amendment analysis is inadequate in most student press disputes. As a result the courts in some cases have been unable to articulate satisfactorily the bases for good decisions. And in other cases the real issues generated in student press litigations have been ignored. The reason for the conceptual difficulties is that the student press is a form of expression that is paid for by the state, while the first amendment's role historically has been to protect the citizen against the state; the courts have tried to decide the student press cases without taking the fact of state subsidization into full account.

This Article evaluates the cases so far decided, and proposes a new approach to student press disputes which would rationalize what the courts have intuitively done correctly in the past, and which also, if

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4 This Article is not about the underground student press nor the cases that have arisen from attempts to censor such independent student newspapers. See, e.g., Eisner v. Stanford Bd. of Educ., 440 F.2d 803 (2nd Cir. 1971). Underground press cases present relatively straightforward first amendment issues: independent (albeit young) private publishers are pitted against government regulators.
adopted, would provide a better framework for decision in the kind of cases in which present methods produce questionable results. Under the analysis proposed, the student press would be recognized as a form of "state speech" which enjoys constitutional protection, but which as a form of state action is also subject to special constitutionally mandated constraints.

The reported cases fall into four categories. The categories, and the summarized results in each category, are as follows:

1) The "sanction-censorship" cases: Administrators tried to punish student editors and writers after publication had occurred or tried to control content, before publication, and the editors resisted. Courts have ordered editors reinstated as students after dismissal by school authorities,5 and restored students, with back pay, to their jobs on the editorial staff of student papers after school officials had removed them.6 There is no case upholding administrative sanctions of student editors and writers for what the students had published in a school periodical. And, there is no case support for administrative sanctions directed at the periodicals themselves: a total cut-off of newspaper funds and a change from a "mandatory student fee" support system to an optional support system were both held impermissible.7 Indeed, outside of the Second Circuit, every administrative attempt to control editorial content in a student publication has been held unconstitutional.8

A Second Circuit case and a federal district court case within the Second Circuit both held that there are circumstances in which high school authorities can block distribution of a high school periodical.9 These cases also held that material in the school paper could be prohibited if, in the judgment of educators, it would be harmful to teenagers. The Second Circuit rule is inconsistent with the results in

7 Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983).
cases including both high school and college level publications everywhere else. 10

2) The “access” cases: Students (and others) who were not editors tried to force publications to print what the outsiders submitted. It has been held that an individual has no right to have an article published in a state university’s law review, 11 nor to have either a news item or an advertising notice concerning a meeting of gay students published in a state university’s newspaper. 12 On the other hand, cases have held there is a right to place editorial advertising about the Viet Nam War and other political issues in both high school and college papers. 13

3) The “mandatory fee” cases: Students (and others) who were not editors objected to what the publication was printing with their money. Three federal courts 14 and two state courts 15 have held that the exaction of mandatory student fees which subsidize the student newspaper does not infringe the constitutional rights of students who disagree with the paper’s editorial policies. And, a New York court 16 has held that fee-paying students and taxpayers have no first amendment right to require university officials to make and enforce rules keeping blasphemy and anti-religious diatribes out of the student press. In the sanction-censorship case that held administrators could not influence editorial content by eliminating mandatory fees, the Eighth Circuit said a different constitutional question would be presented if imposition of the fees were challenged by the students who pay them. 17

(4) The defamation cases. A New York case 18 and a Louisiana case 19 hold that persons libeled in a state subsidized student newspaper have no

10 There is dictum in another case approving the Second Circuit rule for censorship under limited circumstances at the high school level. Reineke v. Cobb County School Dist., 484 F. Supp. 1252, 1259 (N.D. Ga. 1980).


15 Larson v. Bd. of Regents of the Univ. of Nebraska, 189 Neb. 688, 204 N.W.2d 588 (1973); Good v. Associated Students of the Univ. of Washington, 86 Wash. 2d 94, 542 P.2d 762 (1975).


17 Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983).


cause of action for defamation against the state (in New York) nor against the university (in Louisiana).

The decisions in each category are evaluated in the four sections that follow. The case for the “state speech” analysis is first developed and then applied in the “sanction-censorship” section and then applied also to the cases in the succeeding parts of the Article.

II. THE SANCTION-CENSORSHIP CASES

The sanction and censorship cases hold that in the context of student publications, student editors have first amendment rights and school authorities do not have first amendment rights; the authorities’ attempt to control content is therefore state censorship and forbidden by the first amendment.

That student editors using state facilities have first amendment rights enforceable against school administrators is the most accepted and least examined idea in all the student press litigation. The student speech that the courts protected from censorship would clearly have been “protected speech” if it were issued by a private publisher: e.g., criticism of government officials; tasteless, crude articles; illiterate vilification; racist propaganda. The school officials in most cases asserted an institutional interest in preventing such material from being published in the school paper. The courts often were sympathetic to the administrators’ evaluation of the likely impact of what the students were doing, but they held that the students had the right to do it anyway. The courts rejected without discussion the analytic framework for the relationship between editors and school authorities that was urged in the first reported case and which is echoed in later cases as well: that the university is a hierarchal community in which student editors have a place in the chain of command below the school president and below the publication’s faculty advisor. Instead, the courts treated the student

22 Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975).
25 E.g., Schiff v. Williams, 519 F.2d 257, 261 (5th Cir. 1975).
26 Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613, 617 (M.D. Ala. 1967)("in-subordination" was "the sole basis" for sanctioning the student editor), vacated as moot,
editors essentially as if they were private publishers, even though the students used state revenues to issue their publications.

If student editors are private publishers, the cases do not present significant censorship or sanction issues: for private publishers, freedom from censorship and sanction is normal and inevitable under the first amendment. What makes the cases remarkable, if the student editors are private publishers, is their unexamined premise that public funds must support private publications.

Instead of confronting the public subsidy issue, some courts ignored or sidestepped it by making narrow holdings which purported to leave room for the fact of public subsidy to have operative effect in the future. In other cases, public funding was an operative fact, but the rationales built around it to account for the student editors’ freedom of expression are not persuasive.

The cases begin with Dickey v. Alabama State Board of Education.27 Lynn Dickey was a student editor at Troy State College in Alabama. He drafted an editorial that supported, on academic freedom grounds, a position taken by the president of the University of Alabama in a dispute between the university president and the Alabama governor and legislature. The faculty advisor to the college paper at Troy State ordered the academic freedom editorial killed and an article entitled “Raising Dogs in North Carolina” printed instead. Dickey had the paper published with a white space labeled “censored” where the editorial (or dog article) would have been. He was dismissed from Troy State for “insubordination” and for violating a rule against printing anything in the school paper that was critical of the governor or the legislators. The theory behind the rule, according to the Troy State administrators, was that the governor and legislators were acting for the “owner” of the state supported school paper and a newspaper could not criticize its owner.28

Dickey sued and the federal district court ordered him reinstated as a student. The court said it was “basic in our law”29 that the “privilege to communicate concerning a matter of public interest [was] embraced in the [f]irst [a]mendment”30 and that the first amendment rights of students were protected against unreasonable rules and regulations promulgated by school administrators. The no-criticism-of-the-owners rule was found unreasonable because it was not related to maintaining

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28 Dickey, 273 F. Supp. at 616.
29 Id. at 617.
30 Id.
order and discipline on campus. Moreover, the court said the rule could not be invoked against Dickey because using it against him as the basis for the insubordination charge was "cloaking" what was really going on: the punishment of the student "for exercising his constitutionally guaranteed right of academic and/or political expression." The state could not "force this student to abandon his constitutionally protected right of freedom of expression as a condition to his attending a state supported institution."32

Thus, under the court's rationale, Dickey's right to freedom of expression in the columns of the college paper was not an issue in the case; it was a premise. The court cited the "flag salute" case33 as if there were no difference between the right to exercise editorial control over the college paper and the first amendment right to decline to participate in saluting the flag. In effect, the opinion in Dickey says that the right to communicate is equivalent to the right to do the communicating in the pages of the college paper.

Once that right was posited, it followed that it could only be curtailed by "reasonable" rules. Therefore, the unreasonable no-criticism-of-the-owners rule could not be enforced. That rule was crudely articulated, but its promulgation was essentially an assertion by the administrators of their power to control state facilities at their college. Holding the rule to a reasonableness test necessarily allocated part of that power away from the administrators and toward the student editor. The district court, however, dealt with the power issue only indirectly and in doing so drew back from the full implications of its decision. The administrators had argued that a decision in Dickey's favor was tantamount to a student take-over of the college press. The court's response was that "there was no legal obligation on the school authorities to permit Dickey to continue as one of its editors."34 So the holding in Dickey was narrow. Punishment after the fact of publication was forbidden. But the issue of actual day-to-day pre-publication control over the student press was avoided. Under Dickey, the student editor's first amendment rights would only last as long as the school administrators allowed the editor to remain in office.

However, in the next sanction-censorship case, editorial control at the pre-publication stage was at issue. And this time the administrators lost that issue as well. Antonelli v. Hammond35 holds that administrators cannot use the threat of a cut-off in funds to force a system of prior review on the editorial staff of a college paper. The court directly addressed the public funding issue, asking whether the fact that "the expenses of

31 Id. at 618.
32 Id. See infra text accompanying notes 35-43.
34 Dickey, 273 F. Supp. at 618.
publishing . . . are payable by the college . . . significantly alter[s] either
the rights of the students or the powers of the college president over the
college press?"36 The answer was "No." The reason was that "[i]n cases
concerning school-supported publications or the use of school facilities,
the courts have refused to recognize as permissible any regulations
infring[ing] free speech when not shown to be necessarily related to the
maintenance of order and discipline within the educational process."37
The authorities cited were (1) *Dickey*,38 (2) cases holding that school
administrators could not keep unpopular speakers39 (and an artist)40 out
of speakers programs (and campus art gallery), and (3) a case holding
that students could place anti-Viet Nam War ads in the campus paper
over the objections of school officials.41 From the cases cited, it is clear
that the *Antonelli* court thought a case involving campus editors' rights
was essentially the same as a "public forum" case concerning the rights
of students to have access to state college facilities. The court's own
articulation of the reason why the students prevailed was that "[b]ecause
of the potentially great social value of a free student voice in an age of
student awareness and unrest, it would be inconsistent with basic
assumptions of [f]irst [a]mendment freedoms to permit a campus newspa-
ter to be simply a vehicle for ideas the state or the college deem
appropriate."42 As the *Antonelli* court itself put it, "assumptions" about
first amendment freedoms played a role in the outcome. Thus, while
*Antonelli* went beyond *Dickey* in holding that prior review was unconsti-
tutional, it, too, stopped short of giving student editors complete control
over the student press. In dictum, the court said that the administrators
could impose a rule that only articles written by the students themselves,
not reprints from other publications, would be printed in the school
paper.43

However, in the cases decided since *Dickey* and *Antonelli*, except for
high school disputes in the Second Circuit,44 there has been no holding
and only the weakest suggestion45 that administrators share in editorial

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36 Id. at 1336.
37 Id. at 1337.
39 Id. at 1337 (citing Snyder v. Bd. of Trustees, 286 F. Supp. 927 (N.D. Ill. 1968); Brooks
v. Auburn Univ., 296 F. Supp. 188 (M.D. Ala.), aff'd mem., 412 F.2d 1171 (5th Cir. 1969);
Smith v. Univ. of Tennessee, 300 F. Supp. 777 (E.D. Tenn. 1969)).
1969)).
42 *Antonelli*, 308 F. Supp. at 1337.
43 Id.
44 Trachtman v. Anker, 563 F.2d 512 (2nd Cir. 1977), cert. denied, 431 U.S. 925 (1978);
statute was unconstitutional as applied by school administrators. Therefore it could not be
control to any extent whatsoever. Even in the Second Circuit cases that upheld the administrators' control, the parties agreed and the courts recognized that the student press was protected by the first amendment. The controls that the administrators imposed were upheld because the censorship rules at the high school level had only to meet a "rational basis" test which the courts thought the administrators had met.46

Indeed, after Antonelli most courts treated the question of first amendment protection for the subsidized students' press as settled.47 Most

the basis for censoring a student publication. The court declared generally that the university officials could not use the flag desecration statute in the future to censor materials "of the type" they had tried to censor in the case. (It was irrelevant that the administrators had relied on an opinion of the Maryland attorney general that the student publication violated the statute.) However, the opinion does not explicitly exclude the possibility of future administrative censorship, were the administrators to apply the statute constitutionally. See also Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971), in which the district court reinstated a student editor dismissed by school officials. On the facts, the court found it unnecessary to decide whether a college might establish a non-free student press under the control of the college journalism department. Id. at 1270. See also Gambino v. Fairfax County School Bd., 429 F. Supp. 731 (E.D. Vir. 1977): "While the state may have a particular proprietary interest in a publication that legitimately precludes it from being a vehicle for [first amendment expression, it may not foreclose constitutional scrutiny by mere labeling." Id. at 734 (dictum). In the Fifth Circuit, "special circumstances" theoretically may justify censorship. Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973); Schiff v. Williams, 519 F.2d 257 (5th Cir. 1975). But no case of special circumstances has arisen. "Special circumstances" in those cases means that a publication would "lead to significant disruption on the university campus or within its education processes." Id. at 261. 46 On appeal both parties agree that the defendant's restraint of the students' effort to collect and disseminate information and ideas involves rights protected by the [first amendment." Trachtman v. Anker, 563 F.2d 512, 516 (2nd Cir. 1977).

In determining the constitutionality of restrictions on student expression such as are involved here, it is not the function of the courts to reevaluate the wisdom of the actions of state officials charged with protecting the health and welfare of public school students. The inquiry of the district court should have been limited to determining whether defendants have demonstrated a substantial basis for their conclusion that distribution of the questionnaire would result in significant harm to some . . . students.

... A federal court ought not impose its own views in such matters where there is a rational basis for the decisions and actions of the school authorities. Id. at 519. Strictly speaking, Trachtman is not a "school newspaper" case. The issue was whether the editors of the high school paper could distribute a "sex questionnaire" to the students. The answers to the questions would then have been the basis for an article by the editors in the school paper. Trachtman, however, was followed in Frasca v. Andrews, 463 F. Supp. 1043 (E.D.N.Y. 1979), which is a genuine school paper case. In Frasca, too, "the parties agreed that a high school newspaper is generally protected by the [first amendment." Id. at 1048. The parties disagreed about how much constitutional protection should be afforded a paper that leveled false charges at a member of student government, and was distributed on the last day of school when no response was possible, and which, in the school officials' opinion, would have been otherwise disruptive as well. The district court purported to follow Tinker v. Des Moines Indep. School Dist., 393 U.S. 503 (1969), and apply Trachtman in deferring to the authorities' judgment that the paper would have led to a break down in order and discipline at the high school. Frasca, 463 F. Supp. at 1048-52. 47 The courts ignored the suggestion in Development in the Law—Academic Freedom, 81
administrative attempts at sanction and censorship were struck down with little or no discussion on the basis of the already decided subsidized press precedents.\textsuperscript{48} Other courts reached the same conclusion but treated official subsidized school papers essentially as if they were private publications, citing cases dealing with the rights of students who issued underground papers.\textsuperscript{49} A few cases followed \textit{Antonelli} in suggesting, 

\textit{Harv. L. Rev.} 1045 (1968), that a special and lesser freedom of the press prevail on the campus. 

[The student press should [not necessarily] enjoy the same privilege of nonmalicious reporting afforded to critics of public figures under the \textit{New York Times} decision and its progeny. A university might reasonably conclude that in view of the damage that can be done by false reporting, as well as the inexperience or possible irresponsibility of student editors, a rule banning criticism not based on demonstrable fact is justifiable in order to encourage responsible editorial comment.]

\textit{Id.} at 1130.

\textsuperscript{48} \textit{Korn v. Elkins}, 317 F. Supp. 138 (D. Md. 1970), disposed of the administrators' claim to editorial control because of public funding with quotes from \textit{Dickey} and \textit{Antonelli}. 317 F. Supp. at 143. \textit{Trujillo v. Love}, 322 F. Supp. 1266, 1270 (D. Colo. 1971), also cited \textit{Dickey} and \textit{Antonelli} as dispositive. "Well charted waters" was how the Fourth Circuit in \textit{Joyner v. Whiting}, 477 F.2d 456, 460 (4th Cir. 1973), characterized the case law applicable to the denial of financial support by college authorities to a college paper because the authorities disagreed with its editorial policy. The decision in \textit{Joyner} required the college to resume funding a racist college paper. In \textit{Bazaar v. Fortune}, 476 F.2d 570 (5th Cir. 1973), \textit{aff'd as modified}, 489 F.2d 225 (1973), \textit{cert. denied}, 419 U.S. 995 (1974), the court noted that the university had "apparently conceded" that the public forum rule of \textit{Antonelli} was applicable to disputes between student editors and school officials. \textit{Id.} at 575. \textit{Bazaar} was then cited as the "dispositive case" within the Fifth Circuit in \textit{Schiff v. Williams}, 519 F.2d 257, 260 (5th Cir. 1975), which held that administrators could not prevent publication of a student magazine that was embarrassing to them because of its "poor grammar, spelling and language expression." \textit{Id.} at 261. In \textit{Gambino v. Fairfax County School Bd.}, 429 F. Supp. 731 (E.D. Vir. 1977), the court upheld the first amendment rights of high school editors, and held that state funding did not preclude application of the first amendment. \textit{Id.} at 734 (quoting \textit{Antonelli}).

\textsuperscript{49} In \textit{Koppell v. Levine}, 347 F. Supp. 456 (E.D.N.Y. 1972), the court transformed a subsidized school publication case into a private funding case because the public funds had already been expended by the time the case came to trial. "The name of the school did not appear on the publication, and expenditures involved in its duplication had already occurred. For the purposes of this litigation this literary magazine had the character of private creation by the student editors." \textit{Id.} at 460. Therefore the court treated the question whether the school principal had discretion to control a publically funded magazine as not presented. \textit{Id.} \textit{Thonen v. Jenkins}, 491 F.2d 723 (4th Cir. 1973), and \textit{Bayer v. Kinzler}, 383 F. Supp. 1164 (E.D.N.Y. 1974), involved, respectively, "a college newspaper" and an extracurricular high school "student newspaper" for which no academic credit was given. \textit{Thonen}, 491 F.2d at 723; \textit{Bayer}, 383 F. Supp. at 1165-66. Inferentially, neither was an underground paper and public funds were involved. Nevertheless, \textit{Thonen} relied principally on \textit{Papish} v. Bd. of Curators, 410 U.S. 667 (1973), and \textit{Bayer} relied principally on \textit{Tinker} v. Des Moines School Dist., 393 U.S. 503 (1969); both \textit{Papish} and \textit{Tinker} involved privately funded expression by students, not subsidized school newspapers. See \textit{infra} text accompanying notes 52-57. \textit{Reineke v. Cobb County School Dist.}, 484 F. Supp. 1252 (N.D. Ga. 1980), contains no reference to the possible significance of public funding on the power of school administrators to censor a high school publication. It cites both public funding and private
without elaboration, that disputes between student editors and school administrators should be analyzed under the "public forum" theory. One case repeated an idea that had appeared in Dickey: sanction or censorship could not be imposed on student editors because school administrators could not attach "unconstitutional conditions" to the right to attend a public college.

No case reached the United States Supreme Court. But, the Court's handling of other student cases probably contributed to the developing body of lower court law applying the first amendment to protect student editors from attempts by school administrators to exercise editorial control. In Tinker v. Des Moines Board of Education, the Court held that high school students could not be disciplined by school authorities for expressing opposition to the Viet Nam War by wearing black armbands to school. In Papish v. Board of Curators, the Court held that an

funding cases in support of the student editors' freedom of expression. Indiscriminate citation of the underground press cases is common in opinions that do recognize that public funding might be a differentiating factor. See, e.g., Joyner v. Whiting, 477 F.2d 287 (5th Cir. 1975); Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973); Gambino v. Fairfax County School Bd., 429 F. Supp. 731 (E.D. Va. 1977), aff'd 564 F.2d 157 (4th Cir. 1977).

"The cases involving student publications are quite similar to, and own much of their rationale to, those cases which have been characterized as 'open forum' cases." Bazaar v. Fortune, 476 F.2d 570, 575 (5th Cir. 1973). "Once a [student] publication is determined to be in substance a free speech forum, constitutional protections attach and the state may restrict the contents of that instrument only in accordance with [f]irst [a]mendment dictates." Gambino v. Fairfax, 429 F. Supp. 731, 734 (E.D. Va. 1977). "The state is not necessarily the unfettered master of all it creates. Having established a particular forum for expression, officials may not then place limitations upon the use of that forum which interferes with protected speech and are not justified (sic) by an overriding state interest." Trujillo v. Love, 322 F. Supp. 1266, 1270 (D. Colo. 1971). See also Korn v. Elkins, 317 F. Supp. 138, 143 (D. Md. 1970).

"[I]f a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment. ... This rule is but a simple extension of the precept that freedom of expression may not be infringed by denying a privilege. Sherbert v. Verner, 374 U.S. 398 (1963)." Joyner v. Whiting, 477 F.2d 456, 460 (4th Cir. 1973)(citations omitted). See also Korn v. Elkins, 317 F. Supp. 138, 143 (D. Md. 1970), where the court quotes Development in the Law—Academic Freedom, 81 HARV. L. REV. 1045 (1968):

The notion that the state can condition the grant of a privilege on the surrender of a constitutional right ... has been discredited by the Supreme Court. ... With the removal of this obstacle to judicial relief, school regulations restricting student extracurricular speech ... will be subjected to the requirements of the first amendment.

Id. at 1129. Tinker cites Dickey in connection with unconstitutional conditions. Tinker, 393 U.S. at 506.

Under the first amendment, rules limiting expressive student conduct could only be enforced if the rules were reasonably related to maintaining order and discipline on campus. The holding in Tinker limiting school regulation of student speech to what was required for maintenance of "order and discipline" had been anticipated by the federal district court in Dickey. Dickey, 273 F. Supp. at 617-18. In Dickey, of course, the speech was taking place in the subsidized student press, while in Tinker the students provided their own armbands.
underground student newspaper issued at a state university was entitled to first amendment protection. And, in *Healy v. James*, the Court held that a student organization's official recognition by the college could not be conditioned on the abandonment of otherwise protected associational rights.

*Tinker, Papish, and Healy* clearly establish that students have first amendment rights. But, they do not compel a reading of the first amendment that would force the states or schools to pay for the expression that students engage in when at school. And, the theories that the lower courts and commentators have said were supportive of the student editors' first amendment rights are also not helpful in explaining the sanction-censorship cases.

The first step in the student press as "public forum" rationale is recognition that a person does not forfeit first amendment rights on becoming a student. This is the same premise that underlies the students' right to publish private, underground student papers. The leap from recognition of the right to exercise freedom of expression in general, to the right of freedom of expression in the particular context of the subsidized school paper, is accomplished, in the courts' opinions, by viewing the student editors' opportunity to use the subsidized press as a given which requires no further consideration.

Tinker's facts therefore presented a not atypical first amendment dispute: privately supported expression versus official sanctions. However, the Supreme Court in *Tinker* cited the district court decision in *Dickey* with approval (*Tinker*, 393 U.S. at 506, 514) as if the application of the "maintenance of order and discipline" rule were the same in both cases. *Id.* at 509.

As this Article goes to press, there has been another Supreme Court case decided involving the first amendment rights of students; *Bethel School Dist. v. Fraser*, cert. granted, 106 S.Ct 56 (1985). The case was decided on July 7, 1986. 106 S.Ct 3159 (1986). (The Court held that the school district acted entirely within its permissible authority in imposing sanctions upon student in response to his offensively lewd and indecent speech used in nominating a candidate at a student assembly where student was given adequate warning of the consequences of such behavior).

In *Healy*, however, the Court did note that at the defendant college one of the benefits of official recognition was that a "recognized" student organization would be given some access to the pages of the school newspaper for its organizational announcements. 408 U.S. at 176. See infra text accompanying notes 58-65.

In cases where administrators tried to impose sanctions after the fact of publication, this view is consistent with what had really happened: being in the position of editor, a student was able to control what did appear in print. But when administrators tried to censor before publication, and the student's opportunity to control publication was not an actual concrete reality, the courts have said that the students nevertheless have control because in the past the administrators had given them the opportunity for free speech, and once given, it became protected by the first amendment and could not be taken back.
taken back” idea is then characterized by the courts as a manifestation in the school paper context of the operation of the “open forum” or “public forum” theory.\(^{60}\)

The difficulty with this approach is that disputes between student editors and school authorities are disputes about the power to exercise affirmative control over the school paper. But a public forum, such as a bulletin board, is a common carrier whose overall substantive content is not subject to anyone’s control.\(^{61}\) The logic of the public forum theory would make the editors no different from all other students. Yet, there is no intimation in the public forum cases protecting editors from administrative censorship that the courts intended, or foresaw, the elimination of the student editors’ editorial prerogatives as the logical consequence of their analysis. While it might make some sense to compare a student newspaper to a public forum when outsiders seek access to its columns,\(^{62}\) the analogy is extremely weak and adds nothing to the rationality of the decisions that protect student editors from interference by school administrators. Reliance on the public forum idea to protect the editors’ editorial judgments against the administrators only confused the sanction-censorship opinions.\(^{63}\)

The “unconstitutional conditions explanation” is also inadequate. It purports to explain the student editors’ right to be free from administrative censorship as a natural consequence of judicial repudiation of the old rights-privileges dichotomy.\(^{64}\) Thus, according to the modern view which repudiates the distinction, the benefit of being a student editor or of having access to the pages of a student newspaper, while perhaps only “privileges” in some sense, nevertheless cannot be taken away from a student because the student exercises a first amendment freedom. The reason this principle is inapplicable in the student press cases can be illustrated by contrasting those cases with a situation in which the “unconstitutional conditions” rule would apply. Suppose that a student editor were removed from his position by school administrators (thus effectively censoring his input into the student paper) because the editor made a speech on a local television station. A classic example of “unconstitutional conditions” would be presented, and the student would

\(^{60}\) Trujillo, 322 F. Supp. at 1270; Bazaar, 476 F.2d at 575; Gambino v. Fairfax, 429 F. Supp. 731, 735 (E.D. Va. 1977); Antonelli, 308 F. Supp. at 1336.


\(^{62}\) See infra text accompanying note 102-23.


be entitled to reinstatement. The television speech, on the student's own
time and in his individual capacity, would clearly be entitled to first
amendment protection. Therefore the school administrators could not
make it a "condition" of being an editor that the student forego making
television speeches that he would otherwise have a right to make under
the first amendment. But the very issue in the censorship-sanction cases
is whether or not the student editors do have any first amendment
protection in the subsidized press. It therefore begs that question to try to
answer it in terms of unconstitutional conditions, and the rejection of the
rights-privileges distinction.

Thus, the legitimacy of turning over public funds to private publishers
who enjoy first amendment protection is never articulated nor even
squarely addressed in the sanction-censorship cases. While commentators
tend to agree that the cases were correctly decided, the lack of analytic
rationale for the decisions has not gone unnoticed. In reaction, one
author suggests that disputes between student editors and school admin-
istrators do not raise constitutional issues but are a matter of contract
law and should be left to state courts applying state law. Others have
proposed that the censorship disputes be analyzed as if a student
newspaper were a broadcast licensee, or the sort of private enterprise
with public overtones, such as a parking garage, that the Supreme
Court held to constitutional standards in Burton v. Wilmington Parking
Authority. In Professor Yudof's view, the theoretical explanation for the
results in the cases is that the holdings serve the first amendment
interest of limiting the power of government (in the form of school
administrators) to achieve a communications monopoly with respect to a
captive audience (the student body).

The trouble with the contract law analysis is that what characterizes
the student press cases is fundamental misunderstanding as to their
rightful prerogatives on both sides of the disputes. What is missing is a
meeting of the minds. In the long run, the contract theory, for which there

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65 See Yudof, When Governments Speak: Toward a Theory of Government Expression
66 Cass, supra note 61, at 1350-51.
67 Canby, The First Amendment and the State as Editor: Implications for Public
Broadcasting, 52 Tex. L. Rev. 1123 (1974). Public broadcasting itself would seem a more apt
analogy. The public broadcasting system is paid for with public monies. Some lower court
cases in that area allude to the school newspaper litigation, while not presenting the issues
found in the sanctioned censorship school disputes: public broadcasting had censored itself
but had not been censored by its funding sources. See Muir v. Alabama Educ. Tel. Comm.,
656 F.2d 1012 (5th Cir. 1981), on rehearing, 688 F.2d 1033 (5th Cir. 1982), cert. denied,
68 Newall, A Right of Access to Student Newspapers at Public Universities, 4 J. Col. &
is no case authority, is troublesome for those who favor freedom of expression in the student press because what students can be said to have gained by bargaining, future courts would hold they have given back in later bargaining. The broadcast licensee and parking garage analogies are interesting but ignore the most salient difference between student press cases and other first amendment disputes: the absence in the student cases of any identifiable private economic enterprise whatsoever.

While Professor Yudof is certainly correct in observing that cases protecting student editors from administrative censorship do have some tendency to prevent the government from drowning out dissident voices, and that such a result is consistent with the spirit if not the letter of the first amendment, the Yudof formulation, like the other rationales, does not account for the major analytic anomaly in the sanction-censorship cases: the fact that publications paid for with public funds are given first amendment protection.

All of these considerations suggest that there may be another way of looking at the entire problem. Instead of focusing on the student editors' personal individual rights, which (because the students are publicly subsidized) are demonstrably hard to justify in a traditional first amendment framework, the clash between student editors and school administrators could be seen as an intra-governmental freedom of expression dispute in which one branch, the student publication, is in conflict with another branch, the school administration. If the premise is adopted that one component of government can have first amendment rights enforceable against another component, the apparently futile attempt to articulate the individual rights of student editors is made irrelevant and unnecessary. At the same time, the focus that this approach puts on a particular government component, instead of on an individual's rights, to see whether the component ought to have constitutional protection, forces consideration of the real reasons why protection should be granted or denied. While the parties to the cases have been student editors, the editors as citizens, students, and individuals had no special right to the use of government funds for their expression. The editor's case, and therefore their claim to first amendment protection, derived entirely from the government subsidized institution for which they worked. The state speech approach thus makes the nature of the state enterprise claiming first amendment protection an important issue, and asks what kind of government component should get first amendment protection. In doing so, the analysis required under the state speech theory would bring to the surface and take into formal account what the courts are doing anyway.

71 There is also one case holding that a faculty adviser to a college paper has standing to raise a first amendment challenge to a cut-off of funds for the paper. Student editors were also plaintiffs. State Bd. for Community Colleges & Occupational Educ. v. Olson, 687 P.2d 429 (Colo. 1984).
Thus, the opinions in some of the decided cases recite that the student editors were popularly elected, without explicitly articulating why the vindication of their rights was more legitimate on that account. A commentator has critically pointed out that a premise for the cases is that there exists in nature a species known as the "student newspaper," which courts first identify before vesting its editors with constitutional rights. The government speech theory makes that identification part of the rationale for decision.

Moreover, protection of student editors from administrative censorship is more compatible with the overall purposes and values of free expression under a "protected government speech" analysis than it is under an individual speech theory. For example, Professor Emerson has identified four bases for freedom of expression: 1) it is a means for achieving individual self-fulfillment; 2) it is a means to the truth; 3) it is a method to achieve participation by citizens in social and political decisionmaking; and 4) it is needed to maintain balance between stability and change in society. Emerson's theory was developed for application to the typical free speech conflict in which the state opposes the individual. But, his theory needs a curious adaptation when brought to bear on the typical school administrator versus student editor case. The "individual fulfillment" goal has to be eliminated in that context because there is no reason why an individual editor's "fulfillment" should be preferred, in the sense of having a constitutional right to be subsidized, over all the other members of the school and taxpaying community. Thus, the easiest school paper case to decide on its facts, one that holds a college president cannot prevent the student paper from depicting him as a cartoon character, cannot be explained in terms of "individual fulfillment": there is no reason why the editor's and cartoonist's fulfillment in publicly laughing at the president should be preferred to the president's "fulfillment" in censoring the cartoon.

The fact that no "individual fulfillment" interests can legitimately be served in the student press censorship cases makes such cases different from typical first amendment disputes. And it is exactly that difference that has elsewhere been recognized as the main difference between government speech and individual speech. "Government speech", so long as it is not the only kind of speech, does serve the other three interests which make freedom of expression worthwhile.


73 Canby, supra note 67, at 1142-43.


76 M. Yudof, supra note 70, at 43; see also Yudof, supra note 65, at 865-66.
These same values (excluding individual self-fulfillment) would also be served if the "government speech" analysis were applied to various other forms of speech that may well deserve protection. For example, it would seem to be a good idea to uphold the right of a dissenting judge to have his dissenting opinion printed in his court's official reports, even if the majority, or the chief judge, or whoever else might be in charge wanted to suppress the opinion.\footnote{See Musmanno v. Eldredge, 382 Pa. 167, 114 A.2d 511 (1955); but see United States v. Kilpatrick, No. 83-1363 (10th Cir. Jan. 3, 1984)(ex parte emergency order barring West Publishing Co. from printing in the bound volumes of the Federal Supplement the opinion of a federal district judge), reported in the Nat'l L.J., Jan. 30, 1984, at 3, 36; the restraining order was lifted by the Tenth Circuit on January 24, 1984. N.Y. Times, Jan. 25, 1984, at 1, col. 2. The former judge whose opinion the Justice Department succeeded in temporarily suppressing had little to say: "Does a judge have First Amendment rights? I don't know. I'm not going to file any lawsuit." Nat'l L.J., January 30, 1984, at 36. The white space where the censored opinion would have been published appears on a page marked 505-21 in volume 570 of the Federal Supplement. West apparently has not published the opinion despite the lifting of the censorship order. See also Grodin, The Depublication Practice of the California Supreme Court, 72 CALIF. L. REV. 514 (1984); Richmond Newspapers v. Virginia, 448 U.S. 555 (1980). A federal district court judge's remarks were ordered suppressed in Gardner v. A.H. Robbins Co., 747 F.2d 1180, 1194 (8th Cir. 1984). See Gross, Judicial Speech: Discipline and the First Amendment, 36 SYRACUSE L. REV. 1181 (1986).}

Similarly, if an ombudsman (in either a government or university context) prepared a report that the authorities wanted suppressed, the report's publication might nevertheless be desirable and it might be entitled to constitutional protection. The dissenting judge and the ombudsman, as individuals, would have no more right than any other citizen to subsidized publication of their opinions. But first amendment protection of their (governmental) speech at government expense might be warranted by their institutional positions. Some other kinds of official or quasi-official subsidized expression might also at least be candidates for protection under the protected government speech theory.\footnote{The Supreme Court in Snepp v. United States, 444 U.S. 507 (1980), held that the Central Intelligence Agency was entitled to the earnings from a book by a former agent written without agency clearance. The \cite{Snepp} decision and imposition of lifetime censorship over the writings of not only former CIA agents but all government agency officers, blurs the distinction between private and public speech. See, e.g., Internal Security Order, Department of Justice, 2620.8 implementing National Security Decision Directive—84 "Safeguarding National Security Information" issued by President Reagan, March 11, 1983, 48 Fed. Reg. 39,313 (1983). The internal security order requires Justice Department employees and contractors to sign pre-publication clearance agreements subjecting their writings to prior restraint for life. Penalties for failure to submit to pre-publication review could be imposed even if what were ultimately published contained nothing "classified." The Administration in March 1984 informally agreed not to enforce this policy until further notice to Congress. See also, Note, Freedom of Speech, National Security, and Democracy: The Constitutionality of National Security Decision Directive 84, 12 W. ST. L. REV. 173 (1984); Office of Management and Budget Circular A-122 "Cost Principles for Non-Profit Organizations," 45 Fed. Reg. 46022 (1980). Revisions proposed in 1983 would have stripped federal funds from any organization engaged in "advocacy." Advocacy would have included presenting expert testimony requested by Congress or a state legislature, and submission of \cite{amicus} briefs to the courts. Notice, 48 Fed. Reg. 3348 (1983). Later proposed revisions}
As it is, cases that have already arisen in at least one other area demonstrate the utility of the protected government speech analysis, compared to the individual rights model. Thus, the theory is useful in dealing with peculiar situations such as cases in which prison newspaper editors have sought first amendment relief from censorship by the wardens. A federal district court in Vermont and the Supreme Court of California have held that once a state prison newspaper is established, the prisoners are in charge of content unless the wardens can persuade the court that security, order, or prisoner rehabilitation justify censorship. On the other hand, the Fourth Circuit left the wardens in effective control, holding that the prison authorities’ judgment about the adverse impact of particular newspaper articles on institutional interests would be deferred to, even though all the federal judges who heard the case thought the articles were harmless.

The Vermont federal court found the college newspaper cases directly on point. Any rationale that cannot distinguish a college newspaper from a penitentiary newspaper would seem to have a blind spot. Yet on the level of purely individual rights, the general rule for students, that they do not forfeit constitutional protection on the campus, is similar to the general rule for inmates, that they retain all constitutional protections not incompatible with the fact of incarceration.


To the extent that the government asserts a proprietary interest in the speech of people in private life, making their speech the government’s own for purposes of profits, then there will be a need for the development of constitutional protection for this new form of “government speech.” The political climate for such development is not promising. But the school paper cases provide a theoretical underpinning for it none the less.


82 Pittman v. Hutto, 594 F.2d 407 (4th Cir. 1979). In California the courts acknowledge a “judicial obligation of deference to the professional expertise of corrections officials . . . [but do not] uphold administrative decision which are neither even-handed in application nor consonant with fundamental constitutional principles.” Huston v. Pulley, 196 Cal. Rptr. 155, 160 (Cal. Ct. App. 1983)(mandating publication in the prison paper of a cartoon of people engaged in sex on a guillotine, and of a photo of a nude woman). Huston also relied on a California statute protecting prisoners, CAL. PENAL CODE §2600 (West 1984). The Fourth Circuit decision in Pittman was also premised on the existence of the prisoner’s individual right to publish a prison newspaper. That right however was rendered largely ephemeral because of the extremely light burden of proof that the court said wardens had to sustain in order to justify censorship.

83 See Luparre, 382 F. Supp. at 501. See also, Bailey, 32 Cal.3d at 919 n.7, 187 Cal. Rptr. at 583 n.7, 654 P.2d at 766 n.7; Huston, 196 Cal. Rptr. at 157 n.5.

Perhaps prison newspapers should be given genuine first amendment protection. But the real issues involved in deciding that question on its merits will remain buried as long as courts fail to explain both the reason for nearly unlimited deference to a state censor's judgment (as in the Fourth Circuit case), or, (as in California and Vermont) why the Constitution requires that state taxpayers must not only tolerate, but also pay for state prisoners' literary compositions.\textsuperscript{85}

Consideration of the student editor censorship cases in connection with other forms of potentially protected government speech not only highlights the exclusively public interests served by government freedom of expression, but also helps begin the process of identifying the other kinds of government expression that might qualify for first amendment protection. The government voices that so far have been protected (the student editors) and those that might be, (e.g., dissenting judges) are legitimate representatives of a significant public point of view, or public group, that was not represented democratically by the higher government authorities which wanted to suppress the speech. Students do not elect state college officials. Judges may be elected, but their majority and minority positions in particular cases are part of the democratic, representative process only in a very attenuated sense. Ombudsmen typically police within bureaucratic, civil service type organizations which persist while elected officials come and go. Particular cases could develop the boundaries of the protection.

The student press sanction-censorship cases in themselves, however, can be seen as establishing, in one area, constitutional protection for state speech when the protected state speech is threatened by others within the government, who would be censors. On a broader constitutional level however, the idea of intra-governmental freedom of expression is already clearly established historically. As Professor Tussman\textsuperscript{86}

\textsuperscript{85} In California, the taxpayers arguably do not support the prison newspapers. Financing is from an inmate welfare fund, which derives its revenues from sales at the prison canteen, and the sale of inmates' handicrafts and art work. \textit{Bailey}, 32 Cal.3d at 911, 187 Cal. Rptr. at 577, 654 P.2d at 760. But it seems clear from the \textit{Bailey} and \textit{Huston} opinions that prison facilities are used. Overhead expenses are necessarily borne by the state. The state is clearly the publisher. See \textit{id.} at 1, 187 Cal. Rptr. at 583, 654 P.2d at 766; \textit{Huston}, 196 Cal. Rptr. at 157.

\textsuperscript{86} J. \textsc{Tussman}, \textsc{Government and the Mind} 93-94 (1977):

Freedom of speech lies at the end of a long social road, not in the state of nature at the beginning... It might begin with the emergence in the dim past—already an established institution in Homer and so familiar as not even to be explained—of the herald, the divinely protected messenger moving between armies with the ritual of parley, so that minds may meet and transform the clash of arms into truce, into dialogue, even into agreement... The more conventional history comes to focus in seventeenth-century England with the struggle of Parliament for the power to discuss and advise as it sees fit, with immunity against being a called on royal carpets, against having “to answer in another place” for what is
teaches us, the Speech or Debate Clause[^87] is a reminder in our federal constitution that freedom of political expression began not as a generally, popularly enjoyed liberty, but as a special immunity for the component of British government sitting in Parliament in the seventeenth century, as against the censorial impulses of the component of the British government then sitting on the throne. In that sense then, there is really nothing new in recognizing that the law of the land protects some government speech from the same government's sanctions.

Treating the sanction-censorship cases as state speech cases is doctrinally sound.[^88] It also makes sense to treat a student publication as a form said in the House. . . . Thus, freedom of political discussion can be seen as the extension of parliamentary privilege to the electoral branch of government. _Id._ See also Reinstein & Silverglate, _Legislative Privilege and the Separation of Powers_, 86 HARV. L. REV. 1113 (1973).

[^87]: "[F]or any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place." U.S. CONST. art. I, § 6.

[^88]: City of Boston v. Anderson, 439 U.S. 1060 (1979), is sometimes referred to as standing for the Supreme Court's rejection of the idea that the first amendment protects government speech. See Zeigler, _Government Speech and the Constitution: The Limits of Official Partisanship_, 21 B.C.L. REV. 578, 602-04 (1980); see also M. YUDOF, _supra_ note 70, at 42-48 n.22, 49 (1983). In _Anderson_ the Court dismissed for want of a substantial federal question the City of Boston's appeal from a decision of the Supreme Judicial Court of Massachusetts. Boston's appeal was based on the first amendment and freedom of expression. The Massachusetts' courts had enjoined the city from spending public money to influence the outcome of the vote on a pending state referendum issue. (Earlier, the Supreme Court had stayed the decision of the Massachusetts court (Anderson, 439 U.S. 1389 (1978))(Brennan, J.), and so Boston in fact was able to wage its electoral campaign). The effect of the Supreme Court's eventual dismissal of the appeal was to leave standing the state court's decision, 376 Mass. 178, 380 N.E.2d 628 (1978), that the city, despite its first amendment claim, could not legally engage in electoral campaign speech.

The _Anderson_ case does not foreclose a state speech analysis of the school paper cases. The denial of a municipality's claimed first amendment right to engage in election campaign speech has no direct or necessary bearing on any other form of government speech. Moreover, the Supreme Judicial Court of Massachusetts in reaching the decision that the United States Supreme Court left standing did not rule out the possibility of some first amendment protection for municipal speech—the Massachusetts court found that even if the first amendment applied, the taxpayers who challenged the expenditure of city money had established an interest sufficiently compelling to overcome the first amendment's protection for the city's speech. 376 Mass. at 196-97, 380 N.E.2d at 637. Therefore the court held that suppression of the city's speech was warranted. In any event, _Anderson_ is a case in which a claim to first amendment protection for government speech lost to censors who were plaintiffs in a taxpayer's suit, while the school newspaper sanction-censorship cases uphold the first amendment claim to protection for government speech against censors within the government itself. _Anderson_ is thus distinguishable from the school paper cases.

More recently the Supreme Court in _Fed. Communications Comm'n v. League of Women Voters_, 104 S. Ct. 3106 (1984), held unconstitutional the section of the Public Broadcasting Act forbidding "editorializing" by public stations receiving federal subsidy. Two thirds of these stations are operated and supported also by state and local governments. _Id._ at 3125 n.22. Neither the majority nor the four dissenting Justices paused at the invocation of the first amendment to protect this form of "government" speech.

Other expressions of hostility to the idea of first amendment protection for government speech...
of protected government speech because that viewpoint is useful in analyzing all the other issues that student publications generate. The application of the state speech analysis is continued with respect to the other kinds of student press disputes in the sections that follow.

III. OUTSIDER ACCESS TO STUDENT PUBLICATIONS

An important advantage of treating a student publication as a form of protected government speech is that the viewpoint is useful in analyzing all the other issues that student publications generate. Indeed, some of the cases dealing with access to school papers already treat the student press as government speech. While consistency in analysis is not necessarily imperative, it would seem better than an approach to problems that requires picking among first premises according to the particular issue at hand.

There are four access cases, in two of which courts granted non-editors access to the columns of a student publication, and in two of which outsider access was denied. The cases that granted access, for paid political ads, did so on the theory that operation of the school paper was state action and that each paper had been established as a first amendment "open forum." A dissent in one case that denied access

speech are also not persuasive when applied to the school newspaper cases. The thrust of Professor Yudof's objection, on principle, to constitutional protection for state speech is that the true freedom of expression ideals that the first amendment embodies call for some controls on government speech, lest the combination of big government and powerful communications technology enables the government voice to drown out all other forms of expression and kill diversity. See M. YUDOF, supra note 70, at 42-50, 301-06. Thus even on Professor Yudof's own terms, recognition of constitutional protection for state speech in the school newspaper cases should not be objectionable: the cases lead to more diversity not less. Indeed, Professor Yudof thinks that the cases themselves are correctly decided for just that reason; however he does not classify them as state speech cases. Id. at 218-20.

Whitton and Larson's oft quoted dictum that "the problem of freedom of speech in the constitutional sense simply does not arise when the government itself is doing the speaking" was also pronounced without reference to the school newspaper sanction-censorship cases and it is of course at odds with what the courts have actually done in those cases (if not with what they have said). J. WHITTON & A. LARSON, PROPAGANDA: TOWARDS DISARMAMENT IN THE WAR OF WORDS 242 (1964)(quoted in Van Alstyne, The First Amendment and the Suppression of Warmongering Propaganda in the United States: Comments and Footnotes, 31 LAW AND CONTEMP. PROBS. 530, 531 (1966); requoted in M. YUDOF, supra note 70, at 44, n.27).


"As a campus newspaper, the Royal Purple constitutes an important forum for the dissemination of news and expression of opinion. As such a forum, it should be open to anyone who is willing to pay to have his views published therein—not just to commercial advertisers." Lee, 306 F. Supp. at 1100-01; see also, Lee, 441 F.2d at 1259. "We have found,
(for gay rights ads and announcements) also invoked "open forum" theory.92 The majority in Mississippi Gay Alliance v. Goudelock,93 the gay rights ad case, denied access because the court found that a paper run by students was not a form of state action.94 The other case denying access held that there was no constitutional right to have an article published in a state university law review because the plaintiff-author had not established any right to use the law review as a medium of expression.95 It seemed to go without saying that state support for the law review, which the court acknowledged, added nothing to the case for publication. Open forum theory was not mentioned.

In treating student publications as open forums, the courts recognized that the reality of state action is not diminished because a student editor and not a school administrator is in charge of a state subsidized publication. This was tantamount, particularly where student editors were defendants,96 to considering the student paper a form of government speech. Moreover, examination of the implications of the Gay Alliance case, which mistakenly rejected the state action theory, is even more helpful in clarifying that the student publications are better seen as a form of government speech. In Gay Alliance, the rationale for the court's conclusion that the editorial decision to reject the gay rights ad was private action began with the premise that any attempted interference with that editorial decision by school administrators would have been forbidden by the first amendment;97 the hypothetical administrative

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92 Mississippi Gay Alliance, 536 F.2d at 1080-84 (Goldberg, J., dissenting).
93 536 F.2d 1073 (5th Cir. 1976).
94 The Fifth Circuit, in affirming, quoted with apparent approval the district court's opinion that "rejection of the [gay rights] advertisement 'does not constitute state action in any sense of the term.'" Id. at 1075. The Fifth Circuit also found "special reasons" for upholding a ban on gay rights ads: Mississippi's criminal statute forbidding "Unnatural Intercourse." Id. at 1075. The Gay Alliance ad offered legal aid. The circuit court said "[s]uch an offer is open to various interpretations, one of which is that criminal activity is contemplated, necessitating the aid of counsel." Id. at 1076 n.4. "The editor ... had a right to take the position that the newspaper would not be involved, even peripherally, with this off-campus homosexually related activity." Id. at 1075-76. The majority's short opinion is heavy with homophobia. See id. at 1075 (reference to an "off-campus cell of homosexuals").
96 Student members of the college's Student Publications Board were defendants in Lee v. Bd. of Regents, 306 F. Supp. 1097 (W.D. Wis. 1969), as were student members of the school paper's staff. The student staff members and the Student Publications Board were responsible for the policy forbidding "editorial advertisements" successfully challenged by non-staff student plaintiffs. Id. at 1099. Thus the student editors were the would-be censors.
97 "As a matter of fact, in the context of the matter before us, this Court has held that the University authorities could not have ordered the newspaper not to publish the Gay
interference would clearly have constituted state action; the first amendment (typically) protects private action against the state, and so the editor's decision, which would have been protected, therefore had to be a form of private, not state action. From that logic, coupled with the Supreme Court's decision in *Miami Herald v. Tornillo*, it followed that the decision of the student editor to deny access was itself entitled to first amendment protection.

Thus, if the *Gay Alliance* case is correct in characterizing student editors as private publishers, the two cases allowing outsider access to campus papers must either be wrong, because under *Tornillo* private publishers do have constitutional protection against such outsider access, or those two cases form a special exception to the *Tornillo* rule and some "private publishers", namely student editors, do owe the public some right of access. In effect, equating the student editor of a subsidized publication with the publisher of a purely private newspaper such as the Miami Herald either oversimplifies the campus press access issue (while foreclosing consideration of the reasons students might be entitled to access to their "student" newspapers) or it overcomplicates *Tornillo* and tortures its own private publisher analysis by suggesting an exception to the ordinary "no access" rule, (the exception to be triggered by public subsidy).

The *Gay Alliance* case also exposes the strain the private speech interpretation puts on the actual facts in typical cases. The paper in *Gay Alliance* was paid for in major part from non-waivable fees charged to students; it was printed on state university facilities; and it was probably perceived by its audience as the university's "official" campus newspaper. "Private action" in that context is at best a legal fiction. And since even in the cases in which the editors' rights are upheld

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Alliance advertisement, had it chosen to do so." *Gay Alliance*, 536 F.2d at 1075 (citing Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973)).

418 U.S. 241 (1974)(cited in *Gay Alliance*, 536 F.2d at 1075). *Tornillo* held that there was no right of access to the pages of a private newspaper; a statute granting such access was itself unconstitutional because it violated the first amendment rights of the newspaper publisher.

Since there is not the slightest whisper that the University authorities had anything to do with the rejection of the material offered by this off-campus cell of homosexuals, since such officials could not lawfully have done so, and since the record really suggests nothing but discretion exercised by an editor chosen by the student body, we think the [first [a]mendment interdicts judicial interference with the editorial decision. *Gay Alliance*, 536 F.2d at 1075.

536 F.2d at 1074.

Cf. 536 F.2d at 1085 n.25: "If facts were found on remand to establish public perception of the *Reflector* as the official campus newspaper, the state action determination could be made with more confidence." (Emphasis added).
against administrative censorship, that legal fiction will not stand analysis, its imposition in the access cases is all the less desirable.

However, while the "open forum" opinions constitute authority for treating student publications as "government speech," and the access cases in general demonstrate that the government speech analysis makes sense factually, the access cases also demonstrate that the "open forum" approach provides only a very imprecise tool for determining whether and when outsiders should be granted access to the columns of student publications. The open forum theory as applied in the cases proves too much, because it would take away from a student editor any power to edit.

The cases that applied the theory analogized the school paper to a campus speaker's bureau, a school auditorium, a public park, and the advertising placard spaced in public transit cars. The logic of such opinions would turn the school newspaper into a campus bulletin board. Yet there is no intimation in the opinions that the courts that used the open forum approach intended or foresaw that the application of its logic would deny student editors the power to edit their publications. The theory's implications are simply inconsistent with student publications staffed by editors exercising editorial prerogatives. The imprecision of the open forum idea as an analytical tool is also clearly demonstrated by considering its possible application in the law review case. A law review is clearly a forum for the expression of ideas. Yet it seems inconceivable that there should be any constitutional right to have one's article published in a state university law review.

The open forum theory, as applied, and as invoked in the dissent in the Gay Alliance case, may also prove too little, because in all three cases the newspapers had already established advertising or other relatively open sections, and the issue presented was whether the plaintiffs' particular messages could be refused publication on account of their content while other advertisements and messages were printed. The cases (including

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102 See Lee v. Bd. of Regents, 441 F.2d 1257, 1259 (7th Cir. 1971) (citing Brooks v. Auburn University, 269 F. Supp. 188 (M.D. Ala. 1969) (a campus speakers bureau case)).
104 See Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073, 1082 (5th Cir. 1976) (dissenting opinion).
105 See Lee v. Bd. of Regents, 306 F. Supp. 1097, 1101 (W.D. Wis. 1969), aff'd, 441 F.2d 1257 (7th Cir. 1971), and Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969), both citing public transit cases decided before the Supreme Court held in Lehman v. Shaker Heights, 418 U.S. 298 (1974), that there was no right of access for political ads to transit placard space.
107 See Mississippi Gay Alliance, 536 F.2d at 1076 (dissenting opinion); Lee, 441 F.2d at 1259; Zucker, 299 F. Supp. at 103.
the dissent) therefore do not stand for any generalized right of access to all school papers.

The Gay Alliance dissent suggests that the proper approach is to enforce a constitutional right of access only to the part of a student newspaper which has already been set aside for paid advertising or free announcements. The part of the paper containing "editorial product" would be left under the control of the editor and not open to outsider access. The dissent recognized that deciding whether a guest column or letter to the editor belonged in one category or the other might raise problems, but left to future cases precise definition of the boundaries of the student paper's two component parts.

In effect, the Gay Alliance dissent responds to the constitutional law question: "Should there be public access to student newspapers?" by positing the existence of a bifurcated publication, one part of which would not be a public forum, and hence not open to public access, and the other part of which, labeled explicitly the "Bulletin Board" or open forum part, would be available for public use. This is an ultimately unsatisfying resolution of the issue not only because of its artificiality, but because it leaves unexplained why student editors should have the right to express their ethical values in the editorial part of the school paper and not have the right to express exactly the same values in the advertising section by, for example, refusing to run an ad for a term paper writing service. Moreover, to try to answer questions about the limits of state power, as exercised by the editor, and the rights of citizens who want to use public facilities for expression, in terms of the nature of the medium of expression, its fitness for expressive purposes, and its dedication to public use, is to head up the same analytic blind alley that plagues much "open forum" discussion: the search for descriptions and characteristics of the particular public places (such as certain kinds of columns in the newspaper) which the people have a right to use for expression. Just as it makes little sense to think about the Constitution going in and out of effect depending upon where, physically, one stands to make a speech, it does not add to our understanding of access problems to try to locate the newspaper sections where the first amendment protects the public.

Nevertheless, such a formalistic geography-bound approach to the open forum issue was apparently endorsed by the Supreme Court long after Gay Alliance in Perry Education Ass'n v. Perry Local Educator's Ass'n. The Perry rationale was later applied in Cornelius v. NAACP Legal

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108 Mississippi Gay Alliance, 536 F.2d at 1087-89.
109 Id.
110 The student editor of The South End at Wayne State University refused to run military recruiting advertising to protest U.S. military policy in Central America. Cleveland Plain Dealer, Sept. 6, 1985, at 3B, col. 1.
Defense and Educational Fund, Inc.\footnote{113} Perry dealt with a teachers' union's right of access to the school's teachers' schoolhouse mailboxes, and to the school system's internal mail delivery system. Access to the system and to the mailboxes meant rapid delivery of union messages to the teachers. The Court in Perry posited three kinds of government "forums" for expression: 1) "Quintessential" public forums such as streets and parks from which expressive activity could never be totally excluded;\footnote{114} 2) other places that the government had decided to open to the public for expressive use on a non-discriminatory basis\footnote{115} (e.g., some meeting areas within a public university);\footnote{116} and 3) "non-public forums," places that neither tradition nor government designation had opened to the entire public generally,\footnote{117} (e.g., Fort Dix, and transit car advertisement spaces).\footnote{118} The Court found the teachers' mailboxes and delivery system belonged in category three.\footnote{119}

In categories one and two, besides reasonable time, place, and manner regulations, the Court said that the only limits on speech permissible under the Constitution, were limits that were narrowly drawn and supported by a "compelling" state interest.\footnote{120} In category three, the non-public forum, however, exclusions on the basis of subject matter and the identity or status of the speaker were permissible, while, confusingly, exclusion merely because public officials opposed the speaker's point of view were not permitted. "The touchstone for evaluating these distinctions [was] whether they [were] reasonable in light of the purpose [of] the forum."\footnote{121}

In Perry, the school system had already given the Cub Scouts, the YMCA, and a rival bargaining agent teacher's union access to the teacher's mailboxes and the delivery system.\footnote{122} Yet it was allowed to exclude the plaintiff union. In Cornelius, the Court held that the Combined Federal Campaign, the federal employees charity drive, could exclude the plaintiff because of a policy barring defense funds and political advocacy groups from participating in the joint solicitation of federal workers. As formulated in Perry, and elaborated on in Cornelius, therefore, the rule for category three, "non-public forums," gives the proprietors of a government platform large discretion in choosing who can and who cannot have access. Nevertheless, Perry and Cornelius both
fobid "viewpoint" or content based exclusion, even from category three, non-public forums, except for "compelling" not merely "reasonable" justifications.

In what category is a school newspaper or other student publication? The lower courts in school paper cases have analogized the school paper to a campus speaker's bureau and to other (presumably) category two forums. Arguably the "bulletin board" part of a newspaper suggested by the Gay Alliance dissent belongs in category two. A law review presumably belongs in category three. In both cases, however, access can be denied on the basis of content only if the government can establish a "compelling interest" supporting denial.

If student editors wanted to exclude copy because of its content, the issue would be whether the government's interest in giving student editors the power to edit is "compelling" enough to let the editors "edit out" the advertisements, announcements, or other offerings of which the editors disapproved. The student editors might argue that the government had an interest in creating community (school) newspapers and other publications that duplicated as closely as possible the free market press; that editorial discretion, including the right to deny access to outsiders, was an essential characteristic of the classic American periodical; and that the government's interest in supporting that kind of real newspaper (instead of running a bulletin board that looked like a newspaper) was "compelling" enough to bar outsider access. The outsiders presumably would develop arguments about the compatibility of at least some outsider access with the government interests in vigorous, tough-minded student editorial voice.

The access cases themselves provide little help in predicting how this debate over the use of government speech facilities would turn out, for the access cases do not focus on the government interests involved in supporting student publications. Cases that do address that subject are cases in which student outsiders challenged the exaction of mandatory activity fees to subsidize school papers which printed political ideas to which the outsiders objected; and it is these cases which are discussed in the next section.

It should be clear, however, that the state speech analysis of student publications, which two of the access cases take for granted as appropriate, at least opens the door to arguments in favor of outsider access, arguments which would be virtually impossible to make under the Fifth Circuit's private speech-Tornillo approach to the access issue.

IV. THE MANDATORY FEE CASES

There are six cases in this category.

Four cases hold directly that students who disagree with their college

123 See supra notes 102-05 and accompanying text.
papers' editorial policy can nevertheless be forced to support the paper through payment of mandatory activity fees.124

In another case, *Stanley v. Magrath*,125 the Eighth Circuit held that it was unconstitutional for administrators to replace a mandatory fee system with a voluntary fee system, in retaliation against the campus papers' offensive "humor" edition. The district court had upheld the administrators' decision to abolish mandatory fees. But even the district court had said in *dictum* that the Constitution did not require the switch from a mandatory to a refundable fee system.126 Thus the *Magrath* case at both the district and circuit levels strongly endorsed mandatory fees, without holding directly that they were constitutional.

In the sixth case, student plaintiffs did not dispute payment of fees but treated payment as a given; they then argued, unsuccessfully, that if school papers were supported by mandatory fees the papers therefore had to operate under rules forbidding publication of anti-religious anti-Catholic blasphemy.127

As elaborated below,128 the law on the basic mandatory fee issue involved in five of the six cases would be the same whether the school paper were considered a form of government speech or private speech. But in the blasphemy case, and in another case129 that involved a college paper with a racist editorial policy, the government speech analysis adds a dimension and creates constitutional issues that would be absent if an ordinary private publisher issued either blasphemous or racist tracts.

It is appropriate, however, to consider the coerced funding issue before reaching the blasphemy-racism questions because if mandatory fees as such are unconstitutional, it is unlikely that school papers could survive financially to print blasphemy, racism, or anything else.

Some of the courts that upheld mandatory fees invoked the open forum idea, either alone or in connection with another basis for decision.130 It should be clear, however, that the open forum idea is not helpful in framing the issues. The courts that used the idea began with the premise that a student newspaper was an open forum. They then observed that


125 719 F.2d 279 (8th Cir. 1983). This case cost the University of Minnesota $182,000 in attorney fees paid to the student editors' counsel. Nat'l L.J., Feb. 27, 1984, at 6.


127 See infra text accompanying notes 132-44.


establishment and subsidization of an open forum did not violate the first amendment. Ergo, the courts concluded, students paying mandatory fees had no basis for complaint under the first amendment.\(^{131}\)

It is evident, of course, from the existence of a body of "open forum" law, that the creation by the government of an open forum is not forbidden by the first amendment. But the open forum idea is factually unsatisfactory and therefore raises as many questions analytically in the mandatory fee context as it does in the other areas of student press disputes. For example, in *Arrington v. Taylor*,\(^{132}\) one of the cases that used the open forum idea to justify mandatory fees, the so-called "open forum" had been closed by its student editor to the publication of student opinion that opposed mandatory fee subsidies for the paper.\(^{133}\) The irony may not have been lost on the court, because the *Arrington* opinion also relied, in the alternative, on the law dealing with one's right "not to associate;" it applied that law to uphold coerced funding.\(^{134}\) In any event, however, since the "open forum" label is not descriptive of school papers whose editors edit (censor) contents, a rationale for mandatory fees that builds on the open forum analysis is intrinsically unpersuasive.

The Fourth Circuit, which had affirmed *Arrington*, later abandoned the open forum approach in *Kania v. Fordham*,\(^{135}\) a case in which the result in *Arrington* however was reconsidered and reaffirmed. Between the *Arrington* and *Kania* decisions, the United States Supreme Court had decided *Abood v. Detroit Board of Education*\(^{136}\) in which the Court held that (1) under the Constitution, public employment could not be conditioned on paying mandatory union fees that were expended on union political activity unrelated to "core" union labor relations activity, but (2) mandatory union fees were constitutional if used to support such "core" union activity as collective bargaining and grievance adjustment. *Abood*, delineating the circumstances in which government could and could not make people pay for (associate with) ideological activities they disapproved of, was clearly pertinent to the coerced funding of a student newspaper that took editorial positions of which some students disapproved. The district court in *Kania* therefore allowed new plaintiffs to relitigate the same question decided earlier in *Arrington*: whether the mandatory fee system used to support the University of North Carolina's Daily Tarheel violated the rights of students who disagreed with the Daily Tarheel's editorial policy. The Fourth Circuit then affirmed the district court's grant of summary judgment in favor of the university.

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\(^{131}\) *Arrington*, 380 F. Supp. at 1364; *Veed*, 353 F. Supp. at 153.


\(^{133}\) *Arrington*, 380 F. Supp. at 1355.

\(^{134}\) *Id.* at 1360-63.

\(^{135}\) 702 F.2d 475 (4th Cir. 1983).

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defendants, thereby upholding the university's use of the mandatory fee to support the Tarheel.\footnote{702 F.2d 475 (4th Cir. 1983).}

Abood was followed. Abood had held that coerced funding of "core" collective bargaining activities was constitutional because of the existence of a significant state interest in collective bargaining as the key to labor peace.\footnote{Abood, 431 U.S. at 224-27.} That governmental interest was sufficient to overcome the first amendment objections to forced association raised by workers ideologically opposed to collective bargaining. It followed and was also held in Abood that compelled support for the political, ideological, and social activities of the union was unconstitutional because those non-core activities were not essential to the fulfillment of the state's interest in labor peace.\footnote{Abood, 431 U.S. at 234-37.} Therefore, under Abood, workers had a limited right to exemption from mandatory union fees. Forced association, through payment of mandatory fees, to support enterprises that fulfilled a major governmental interest was constitutional. But forced association with non-essential activities was not constitutional.

In Kania, the Fourth Circuit reasoned that the state's interest in education and the Daily Tarheel's role as a "vital part of the university's educational mission" were the kinds of important governmental interests that Abood said justified imposing mandatory fees.\footnote{702 F.2d at 480.} In Kania, the student newspaper was held to bear the same relation to the state's major interest in higher education that the union's collective bargaining activities, in Abood, bore to the government's major interest in labor peace.\footnote{id.}

In Abood, of course, the result of the "state interest" analysis was that mandatory support for ideas and ideologies (as opposed to collective bargaining activities) was unconstitutional. By contrast, in Kania the Fourth Circuit's application of the Abood analysis led to the rejection of the plaintiffs' claims that they should not be forced to support a school paper whose views and ideologies the plaintiffs opposed. The Fourth Circuit attempted to minimize the apparent contradiction by maintaining, probably correctly in fact, that the Daily Tarheel increased the overall exchange of ideas and openness on campus, whereas in Abood, the

\textit{Id.}\footnote{Id.}

\footnote{Featherstone, 431 U.S. at 234-37.} \footnote{702 F.2d at 480.}
court said, the union's political activity reflected only one ideology.\textsuperscript{142} That distinction, however, was considerably undercut by the circuit court's acknowledgement that there was no way for the university to require the newspaper to give equal access to the plaintiffs' dissident views, or any viewpoints other than those of the editors.\textsuperscript{143} There is no escape from the conclusion that in Kania the Abod analysis was used to uphold precisely what Abod said must be struck down: mandatory fees to pay for viewpoints, ideologies, and political ideas that dissident plaintiffs disagreed with. The seeming paradox is best resolved by recognizing the extremely important place in society that the Kania decision accorded to the independent, student edited, state subsidized state university campus newspaper. The campus newspaper's role in higher education was sufficiently large to justify the state university rule forcing students to associate with the paper by paying for it with their mandatory fees.\textsuperscript{144}

As noted above, analysis of the school paper-mandatory fee issue in terms of Abod and the "right not to associate" does not depend on characterizing the student newspaper as a form of state speech.\textsuperscript{145} Indeed the Abod case dealt with coerced funding to support the private speech and expression of a private labor union. The opinion in Abod, however, makes it clear that the law on the right not to associate is relevant to some forms of state speech as well as to private speech. The point is significant because ordinarily there is no need to provide justification for compelled support of government speech.\textsuperscript{146} The government speaks constantly and supports its speech activities with money paid by taxpayers, some of whom disagree with what the government says. No court as yet has perceived constitutional issues in the appropriation of tax money paid by pacifists to pay for army recruiting advertisements. Thus the government speech analysis of the student press cases might seem to suggest that there really is no student press "mandatory fee" issue: student fee payers would have no more basis for objecting to what student editors said in editorials than taxpayers would have for objecting to what the President said in a Saturday afternoon talk on the radio. If this were the logical consequence of applying the state speech analysis to the student press, the Fourth Circuit in Kania would have reached the right conclusion in upholding mandatory fees but would have followed an unnecessarily complicated path to arrive at what should have be a very simple decision: students who objected to mandatory fees would have had to pay anyway—not because of the major state interest in a free, student edited, campus press, but simply because the campus press was a form of

\textsuperscript{142} Id.
\textsuperscript{143} Id. at 477 n.5.
\textsuperscript{145} See supra text accompanying notes 132-44.
\textsuperscript{146} See M. Yudof, supra note 70, 237-45.
government speech and therefore the public could not be heard to object to paying for it.

Intuitively, such an outcome is troublesome. The government speech analysis, if it led to such an outcome, would seem to oversimplify a genuine issue. While all of the courts that dealt with the question upheld mandatory fees, the results were not self-evident to the courts; nor did the student plaintiffs’ objections seem trivial. The usefulness of the state speech analysis of the student press would be questionable if it trivialized a real issue. In fact, however, as the opinion in Abood makes clear, the state speech approach has no such consequence. The government interest test used in Abood to justify (or strike down) forced financial association with speech applies not only to private labor unions’ speech, but also to some forms of government speech as well. This is evident from the Abood Court’s reference to Lathrop v. Donahue, a case in which the Supreme Court held that a state could make everyone who wanted to practice law within that state pay dues to an integrated bar association which spent some of the money on political and legislative activities. The integrated state bar associations’ resources were derived from funds extracted from lawyers practicing within the state. The lawyers paid because of a state court rule that made the payments mandatory. The reason for the state’s establishment of the integrated bar was that the bar’s activities served important state interests. When the funding system was challenged, the bar association was represented in the United States Supreme Court by the State Attorney General. The integrated bar association’s speech activities, in other words, were a form of “state speech” akin to state speech in the student press. The basic factors leading to the conclusion that student newspapers are state speech were all present: state financial support, state institutional sponsorship, and the absence of any identifiable private publisher.

The Supreme Court’s decision in Lathrop was narrow. All the Court held was that the rule that made lawyers belong to and financially support the integrated bar association was not unconstitutional on its face. According to a four Justice plurality the question whether lawyers who disagreed with the political positions taken by the integrated bar association could nevertheless be forced to pay dues was not yet ripe for decision. The lengths to which the four member plurality went in avoiding the question whether dissidents could be compelled to support the integrated bar implies that they thought it was a difficult

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148 See Lathrop, 367 U.S. at 846: “There is an allegation that the State Bar’s revenues amount to about $90,000 a year, of which $80,000 is derived from dues . . . .”
149 Id. at 822.
150 Id. at 831-43.
151 Id. at 820. Other State Attorney Generals filed briefs amici curiae, id. at 821.
152 Id. at 842-43.
153 Id. at 845-48.
constitutional issue. The majority of the Court said that the constitutional question was ripe for decision; but they disagreed among themselves about how it should be resolved. Thus at least five and probably all nine Justices in Lathrop thought that a constitutional issue would be presented if a case arose in which lawyers were forced to support an integrated bar association, and there were specific political issues on which the association spent money and on which some lawyer-plaintiffs disagreed with the political positions taken.

The inference to be drawn from the Lathrop opinion therefore is that compelled support for at least some forms of state speech must meet constitutional standards. The Abood Court's reference to Lathrop indicated that it regarded the Lathrop case as not significantly different from Abood on its facts. In Abood the Court said that Lathrop would have provided guidance on the "constitutional questions here presented" if those questions had been addressed and authoritatively answered in Lathrop. Thus it is clear that in Abood the Supreme Court thought that in cases where actual dissidents were compelled to support speech, the same constitutional issue would be presented whether the speech was that of a private labor union or that speech issued by the particular sort of state agency that issued the state speech in Lathrop.

In describing the kind of state speech for which mandatory funding schemes are problematical under the Constitution, it is helpful to consider not only the facts in Lathrop, but a passage in Justice Powell's concurring opinion in Abood in which he spelled out why, ordinarily, compelled support for state speech needs no justification:

[C]ompelled support of a private association is fundamentally different from compelling support of government. Clearly, a local school board does not need to demonstrate a compelling state interest everytime it spends the taxpayer's money in ways the taxpayer finds abhorent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of the union which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

The observation that a school board can spend school taxes over the

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154 Id. at 845-46. See also id. at 848 ("I must say, with all respect, that the reasons stated in the plurality opinion for avoiding decision on this Constitutional issue can hardly be regarded as anything but trivial.") (Harlan, J., concurring).

155 Id. at 849 (Harlan, J., and Frankfurter, J., concurring); id. at 865 (Whittaker, J., concurring); id. at 866 (Black, J., dissenting); id. at 878 (Douglas, J., dissenting).

156 Abood, 431 U.S. at 233 n.29.

157 Id. at 259 n.13 (Powell, J., concurring).
protests of some of the taxpayers because the school board is a “representative” body suggests that the category of state speech for which compulsory financial support raises constitutional problems is narrow. State organs that are not representative of the whole body politic and that derive their revenues in whole or significant part from non-tax assessments of their limited constituency are uncommon. The integrated bar is one example. A student newspaper is another.

Thus *Lathrop* and *Abood* not only provide a framework for decision in which constitutional standards for student newspaper mandatory fees can be articulated, the cases also make it clear that there is a real need to articulate such standards even though the student press is a form of government speech.

V. **THE BLASPHEMY AND RACISM CASES**

In the *Kania* case, and in the other typical mandatory fee cases, the issue was whether the plaintiffs could be forced to pay for the publication of ideas with which they disagreed. The merits and the very nature of the underlying ideological conflict between the student-editors and the student-plaintiffs was irrelevant. *Kania* and the other mandatory fee cases therefore are different from the blasphemy case, *Panarella v. Birenbaum*, in which the plaintiffs’ position was not that mandatory fees were always unlawful, but that printing blasphemy with the funds collected through a mandatory fee system was unconstitutional under the establishment clause of the first amendment. Typical mandatory fee cases are also different from a censorship case, *Joyner v. Whiting*, in which college authorities cut off funds for the college paper because of the paper’s racist editorial policy. The college officials regarded the racist policy as unconstitutional under the fourteenth amendment. In these cases the substantive content of the publications, their blasphemy or racism, makes the characterization of student publication as government speech appear to be a significant factor in decision making. Private speakers who blaspheme and issue racist diatribes ought to be quintessential beneficiaries of first amendment protection. As exponents of

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159 477 F.2d 456 (4th Cir. 1973).

160 *Id.* at 458.

161 *But see* Note, Blasphemy, 70 COLUM. L. REV. 694 (1970), and *Beauharnis v. Illinois*, 343 U.S. 250 (1952). There is little constitutional law on blasphemy but there have been several successful prosecutions, in both the nineteenth and early twentieth century. Note, 70 COLUM. L. REV. at 702-10. *Beauharnis* upheld the conviction of a racist, under a group libel statute. But *Beauharnis* is probably no longer good law. The Seventh Circuit declined to follow it when the Village of Skokie sought to justify its prohibition of Nazi rallies. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, Smith v. Collin, 439 U.S. 916 (1978). Yet two Supreme Court Justices dissented from a denial of a stay of the Seventh Circuit’s
unpopular minority viewpoints they are the kind of speakers who most need a right to express themselves freely. Underground, self-supporting student newspapers that were anti-religious or racist would clearly have a right to exist and publish. If subsidized student publications are merely another form of private speech, like underground student papers, then their right to be anti-religious and racist would be assured. However, if student publications are a form of state speech, the establishment clause and fourteenth amendment issues, not found in the private speech context, would seem to be unavoidable.

In Joyner v. Whiting, however, the issues were avoided. The Fourth Circuit held that racism in the student newspaper was not state action but something different called "state advocacy" which was beyond the reach of the fourteenth amendment. The Fourth Circuit held therefore that the state subsidized racism was not only not forbidden by the fourteenth amendment, but was protected against administrative censorship by the first amendment.

By contrast, in Panarella v. Birenbaum the New York Court of Appeals dealt forthrightly with the establishment clause objection to blasphemy in the student press. The manner in which the issue was presented was unusual however. The plaintiffs were tax-paying and mandatory fee paying students who sued not the student editors or authors, but college officials. The relief sought was an order from the court forcing the college officials to impose publication guidelines forbidding the non-party student editors from publishing blasphemous articles in the future. In effect, the plaintiffs wanted the court to turn the school officials into unwilling censors. They failed. The court of appeals said that "the test is not the appearance of derogatory or critical material, but whether government, and government schools, maintain neutrality in the sense of permitting all sides of any religious controversy to be raised and never permit one side or another to be favored directly or indirectly." On a record showing only a few blasphemous articles and no systematic anti-religious editorial line, the court refused to force the defendant to issue the content-based guidelines sought by the plaintiffs. The defendant college officials' hands-off attitude, after setting up what the court called a "neutral forum," was upheld.

The rationale in Panarella is weakened by its reliance on the "neutral forum" idea. It was fortuitous that the same editors who published the blasphemous articles did not print many more of them, but instead

order in the Skokie case, remarking that Beauharnis had never been explicitly overruled.


163 Id. at 467.
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actually opened their pages to letters from readers complaining about blasphemy. The "neutral forum" that the court discovered in the facts was the result of that fortuity.

Similarly, the overall significance of Panarella is somewhat reduced because of the narrow question actually presented to the court: Are school administrators correct in letting student editors exercise their own editorial judgment in the student press? There was already so much law supporting the defendant administrators' self-proclaimed powerlessness to censor student newspapers that the plaintiffs' choice of defendants gave their case a built in weakness.

Nevertheless, Panarella is important because its premise for decision is that the establishment clause applies to the student press because the student press is a form of government speech. Panarella's resolution of the establishment clause issue in terms of open forum theory however is inadequate.

How then should a case of blasphemy or of racism in the student press be analyzed? Answers have to be tentative; however, the following observations may be helpful in approaching the issues such cases raise.

First, there is no reason to preclude the possibility that an establishment clause or fourteenth amendment violation could occur by reason of speech alone. Some forms of speech are unlawful. Obscenity, defamation, some advertising, and fighting words are actionable in and of themselves. Even when an offense is not inherently speech related, as are defamation and obscenity, speech can be the means by which an offense is committed: negligence may consist of transmitting a false...
telegraph message.\textsuperscript{172} In one of the censorship cases, the court took it for
granted that flag desecration, a form of secular blasphemy, could be
enjoined in the student press.\textsuperscript{173} Posting the Ten Commandments on a
public school classroom wall is unlawful.\textsuperscript{174} So is teaching creationism in
the public schools.\textsuperscript{175} Moreover, peculiarly governmental offenses exist.
They arise out of actions which would be innocent or at least not
actionable if performed by private individuals: self-help repossession
(which is lawful) would be a denial of due process if state action were
involved.\textsuperscript{176}

Does student editorship or authorship confer some immunity on state
speech putting it beyond the control of the establishment clause and of
the fourteenth amendment? Under our system of checks and balances in
which sovereignty is exercised by no single government entity, the
relative weakness of the student voice, compared say, to the legislature’s
voice, should not be dispositive. Restraints on government action apply to
each small fragment of the whole government system, no matter how
relatively unauthoritative or removed from central power the govern-
ment actor may be: water and sewer districts, and lame duck elected
officials all have to obey the general rules that limit government action.
The first amendment applies whether the state is acting as educator or in
some other role.\textsuperscript{177} There is no reason why students, when they wield
some state power, in print, should not abide by the same rules. Indeed,
one of the premises for subsidized student press freedom is that student
editors are responsible people, legitimately able to represent the body of
students from which they are chosen. The duty to obey constitutional
mandates that apply to all others who act with the state’s funds is
commensurate with constitutional protection for the student editor’s
right to engage in state subsidized speech. Student editors should not be
immune from constitutional constraints.\textsuperscript{178}

There is not much authority on the tests for the application of those

\textsuperscript{172} See W. P. Keeton \& W. Prosser, Prosser and Keeton on Torts 362 (5th Ed. 1984). See

\textsuperscript{173} Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970), in which the court found the Maryland
flag desecration statute unconstitutional only as applied to the particular picture students
wanted to put on the cover of a publication; apparently if the statute had been constitu-
tionally applied, it could have been the basis for censorship.


\textsuperscript{175} McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982), aff’d, 723 F.2d 45
(8th Cir. 1983).

garnishment).

\textsuperscript{177} See, e.g., Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853,

\textsuperscript{178} See Delgado, The Language of the Arms Race: Should the People Limit Government
Speech? 64 B.U.L. Rev. 961 (1984) (examining the case for limiting government speech in
a different area).
constraints. In Anderson v. Martin\textsuperscript{179} the Supreme Court held that at least one form of racist government speech violated the fourteenth amendment. A Louisiana law required that the race of every candidate for elected office be listed on the ballot alongside the candidate's name. The law violated the equal protection clause of the fourteenth amendment, the Court said, because

by placing a racial label on a candidate at the most crucial stage in the electoral process—the instant before the vote is cast—the State furnishes a vehicle by which racial prejudice may be so aroused as to operate against one group because of race and for another. This is true because by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines. . . . The vice lies not in the resulting injury but in the placing of the power of the state behind a racial classification that induces racial prejudice at the polls . . . . Race is the factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid.\textsuperscript{180}

It is an understatement to say that the striking down in Anderson of a starkly racist piece of state legislation, conceptually similar to the Nazi law making Jews identify themselves by wearing the Star of David, does not automatically compel the prohibition of either racism or anti-Catholicism in a college newspaper. The Supreme Court's reaction to the statute in Anderson stressed the likelihood of actual harm to the black plaintiffs from the interplay between the state law and racial prejudice within the state. Anderson was not a case of racial hostility in the abstract. Particularized harm to the particular plaintiffs who were candidates for elective office was foreseeable. Furthermore, a narrow reading of Anderson would help account for the scarcity of authority establishing affirmatively that racial violations can be committed through speech. Racism is a part of the fabric of American life, and anti-racist efforts have consumed an enormous amount of judicial and law enforcement energy. In that context the paucity of authority on the legality or illegality of racist speech, whether private or public, suggests that government racist speech is not a \textit{per se} constitutional violation.

The same argument, from the realities of everyday life, cannot of course, be made with respect to blasphemy. The absence of a volume of precedent on blasphemy as an establishment clause violation is perfectly understandable. Blasphemy is both rare, and when private, rarely

\textsuperscript{179} 375 U.S. 399 (1964).
\textsuperscript{180} Id. at 402-04.
objected to. Nevertheless, the Anderson case implies by analogy at least that hostility to religion emanating from a government sponsored source would only be actionable if it were addressed to a public that was already anti-religious or, in terms of the facts in Panarella, anti-Catholic.

Thus racism and blasphemy in the student press are probably not automatically actionable; yet they are clearly not automatically immune from constitutional control either. The fact that such speech may be "advocacy" and that it originates with students should not insulate it from judicial review. The issue should be whether racist government speech in the student press actually harms anyone. One can imagine contexts in which real harm would likely occur and therefore be subject to proof, and other contexts in which the only harm done would be to the reputation of the racist or anti-religious editors themselves. The court in Joyner sensed that this was the real issue in that case: it found and noted in passing that there was "no proof that the editorial policy of the paper incited harrassment, violence or interference with white students and faculty." The court's decision upholding the student editors was probably correct not because the editors were students, but because their racist editorials were not proven to have been effective in really hurting anyone. Similarly, in Panarella, the court may have been willing to tolerate hostility to Catholicism in a government publication because of the improbability of harm to anything besides the plaintiffs' sensibilities. However, in both kinds of cases, the fact that the publications involved were government speech, paid for by the people, should lead courts to make the kinds of inquiries into actual or potential harm which are suggested by the Supreme Court's handling of the Anderson case.

VI. THE DEFAMATION CASES

There are two cases that deal explicitly with the question of public institutional liability for defamation in the student press. The New York Court of Claims in Mazart v. State of New York held that plaintiffs libeled by a state university student newspaper had no claim against the state. In Milliner v. Turner a Louisiana appellate court held that libel victims had no claim against the state university.

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181 See Note, Blasphemy, 70 Colum L. Rev. 694 (1970).
182 Joyner 477 F.2d at 461.
184 436 So.2d 1300 (La. App. 1983).
185 There are a handful of other cases in which public colleges were defendants in libel cases arising out of matters printed in student publications, and in which the courts did not reach the issue of public institutional liability as such.

In Scelfò v. Rutgers, 116 N.J. Super. 403, 282 A.2d 445 (1971), summary judgment was granted in favor of the university and other defendants because the publication was not libelous as a matter of law and not malicious under the standard in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Truth was an absolute defense in a libel action against the
In *Mazart* the court posited and rejected two theories of liability: "(1) *respondeat superior* (i.e. the University, as principal, might be liable for the torts of its agents, the student paper and editors), and (2) . . . the University, may have been negligent in failing to provide guidelines to


In *Madison v. Yunker*, 180 Mont. 54, 589 P.2d 126 (1978), the Montana Supreme Court held unconstitutional, under the Montana Constitution, a "retraction statute" which made a demand for retraction a prerequisite to the bringing of a libel case. The court reversed a judgment for all defendants based on the retraction statute and remanded the case for trial. The University of Montana was a defendant, together with the student newspaper and others. The university had raised a separate additional defense, the failure of plaintiffs to file a claim against it pursuant to a state statute dealing with tort claims against a political subdivision. The Montana Supreme Court did not discuss that defense. The university apparently raised no other special defenses and from all that appears, therefore, did not consider itself immune from liability for defamation in the student press.


In *Naylor v. Minnesota Daily*, 342 N.W.2d 632 (Minn. 1984), the Supreme Court of Minnesota held that failure to give a statutory notice was not a basis for dismissal of a case against the state, under the Minnesota Tort Claims Act. The defendants included the campus newspaper and the University of Minnesota. The defendants had moved for dismissal on a number of other grounds not specified in the supreme court's opinion; however, the state of Minnesota had itself intervened as a defendant in the case, implying that it recognized its potential liability. The case was remanded for trial.

In *Big Wheel Restaurants, Inc. v. Bronstein*, 158 Ind. App. 422, 302 N.E.2d 876 (1973), the Daily Student, the newspaper at Indiana University, was initially a defendant along with the restaurant that had placed an allegedly libelous advertisement in the paper. When the newspaper's motion to dismiss on grounds not stated in the opinion was granted, the plaintiff abandoned that aspect of its case and proceeded against the restaurant alone. Similarly, in *Klahr v. Winterble*, 4 Ariz. App. 158, 418 P.2d 404 (1966), the plaintiff apparently assumed from the outset that he had no defamation case against the University of Arizona, and so sued the student editors of the campus paper instead of the university itself.


And the University of Wisconsin Regents made a non-cash settlement of a trademark case brought against them on account of unauthorized use of the "Peanuts" character in a campus newspaper. The Regents agreed to take "responsible action" if the unlawful use occurred again. *AGB Notes*, May 1983, at 2 [AGB Notes is published by the Association of Governing Boards of Universities and Colleges].
the . . . staff regarding libel . . . and . . . the need to review and verify letters to the editor."

There was no liability on the respondeat superior theory because the university had no control over the paper and its staff and therefore, the court concluded, there was no principal-agent relationship between the state and the editors who were directly responsible for the libel. There was no control because the first amendment forbade university officials from exercising editorial control over the paper's content.

There was no negligence because the journalistic standard that the editors failed to meet was so elementary that the editors' ignorance of it was not foreseeable by school administrators; hence the state had no duty to provide the editors with guidelines.

The disposition of the Louisiana case was similar. At the trial level the university has been held liable for the student edited defamation because of a section in the Louisiana Civil Code that provided that "teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence. In the above cases, responsibility only attaches, when the . . . teachers . . . might have prevented the act which caused the damage, and had not done it;" and (2) because the university was negligent in not providing as much faculty control over the paper as its "Student Guide" purported to require. On appeal the judgment against the university was reversed; it was held that the civil code provision and, by implication, the self-imposed "guidance" responsibility, were both inconsistent with the freedom of the press enjoyed by the student newspaper under the first amendment.

The respondeat superior-"control" issue in the Mazart case in New York is best understood in terms of New York law on sovereign immunity as that law has developed and been applied to damages caused by judicial officers. The state of New York is not liable for such damages. The rationale is that judicial officers are not subject to orders or control from other people within the state government. Lack of control makes the doctrine of respondeat superior inapplicable. But the non-liability of the state, where respondeat superior is inapplicable, is attributed by the cases to the state's decision not to waive immunity where it lacks control.

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186 Mazart, 109 Misc.2d at 1098, 441 N.Y.S. 2d at 604.
187 Id. at 1099, 441 N.Y.S.2d at 604-05.
188 Id. at 1099, 441 N.Y.S.2d at 605.
189 Id. at 1103, 441 N.Y.S.2d at 607.
190 LA Civ. CODE ANN. art. 2320 (West Supp. 1986) (quoted in Milliner, 436 So.2d at 1302).
191 Milliner, 436 So.2d at 1302.
192 Id. at 1303.
over the tortfeasor. Under New York law then, lack of state liability is nevertheless consistent with state action: if a judge’s torts were not state action, there would be no need for the state to invoke sovereign immunity as a defense in the first place.

If this judicial gloss on the New York Court of Claims Act is read into the Mazart case, and student editors (who can not be controlled by school officials) are analogized to state judges, the result on the respondeat superior issue in Mazart is thus consistent with characterizing the student editors’ libel as state speech. The reason that New York was not liable was not that the defamation was not state speech, but that the state had not consented to be liable for its “speech-action” under the no-control circumstances of the case.

The reasoning in the Louisiana case is essentially the same. While waiver of sovereign immunity was not the touchstone for decision, the university’s liability under the civil code depended on the university’s capacity for control of the student paper; and under the first amendment, the university lacked control. Both the Louisiana and New York decisions are state law decisions, with the state law, however, shaped by the first amendment’s limits on the state school’s power to control the subsidized student press.

Disposition of the negligence issue in Mazart was also consistent with the state speech analysis: the New York court simply held that the school officials who had not issued guidelines pointing out obvious, common sense journalistic standards, were blameless even though a libel occurred. Since the school officials were without fault, their behavior was not a basis for state liability. This resolution of the issue implies that there might, however, be some way in which nonfeasance or misfeasance by school officials could lead to state liability for what is published in a school paper. That potential for liability should be contrasted with the state’s potential for liability with respect to private or underground student newspapers. Would state university officials be held to the exercise of any duty of care or prudence whatsoever in providing guidelines to students running their own independent publication? There are no cases, but the answer would seem to be clearly “No.” Thus the court’s handling of the negligence issue, which included examination of the reasonableness of the school officials’ conduct vis-a-vis the subsidized student paper, suggests that the court of claims viewed the subsidized paper as a form of speech significantly different from the private speech that students might engage in without state subsidy.

The Mazart decision seems clearly correct on the negligence issue. As the court pointed out, it would have been a jury question in New York

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194 In addition to finding no control by the state, the cases also hold that judges are not state officers within the meaning of the Court of Claim Act. See, Rossman v. State, 40 A.D.2d 1046, 338 N.Y.S.2d 916 (1972); Jamieson v. State, 7 A.D.2d 944, 945, 182 N.Y.S.2d 41, 42 (1959). See generally, 19A CARMODY-WAIT 2D NEW YORK PRACTICE, §§120:1-2 (1979).
whether newspaper editors must verify, before publication, who is really responsible for a letter to the editor which identified its purported authors as homosexuals. The student editors, as adult citizens, would have been eligible to sit on a New York jury faced with that question. Hence it was not negligent for school officials to omit to give guidelines to student editors on a question they and all other adults would have been presumed competent to answer as jurors.195

However, evaluation of the "respondeat superior" part of the Mazart decision requires consideration of 1) the New York rule that sovereign immunity is not waived with respect to actions taken on behalf of the state by people not under the "control" of the state; and 2) whether even that "control" rule actually applied in the student newspaper context.

The New York sovereign immunity rule raises the question why victims of harm caused by state judges, acting as state judges, and by student editors, using state facilities as editors, should not be compensated by the state. The Mazart opinion offer no explanations; it merely points out the lack of control, and draws the conclusion of no state liability as if it were self-evidently correct. Perhaps under the New York sovereign immunity law no other result was possible. But the wisdom of that immunity law seems questionable. The Mazart court recognized that the unfortunate but probably inevitable consequence of its decision was that the victims of the libel would have no effective remedy; the student editors were probably judgment proof.196 This was the result despite the fact that the state university benefited in many ways from the existence of the campus newspaper and the university's funding for the paper provided the climate in which it could flourish. It seems to be at least arguable that the state should pay for harm caused by people who are not under the control of the state but have nevertheless been put into a position by the state that makes it possible for them to cause the harm.197

Moreover, even if New York's no control—no liability rule were an appropriate limit on the state's waiver of sovereign immunity, it is further questionable whether the rule was properly applied to the facts in Mazart. The court applied the rule because the student editors were not under the control of school administrators. The court did not, however, explore the possibility that the editors were answerable to a student publication board or other student organization. Control over student editors by such a student organization is legally distinguishable from control by administrators because the legitimacy of the editors' freedom from censorship by school administrators is a function of the editors' role as spokesperson for student interests. Hence accountability to organized student interests, and subjection to "control" by such interests, is probably compatible with the Constitution. Indeed, some such accountability is

195 109 Misc. 2d 1092, 1103, 441 N.Y.S. 2d 600, 607.
196 See 109 Misc. 2d at 1102, 441 N.Y.S. 2d at 606.
197 See Note, supra note 185, at 1077-83.
arguably a prerequisite for the lawfulness of the state's action in putting its publication facilities at the disposition of student editors. Such accountability is also a desirable check on editors, similar to marketplace pressures felt by non-subsidized publications. To the extent there was such student control over the student editors at the state university where the Mazart case arose, the wisdom of the decision in Mazart is made even more questionable.

The same criticisms apply to the Milliner opinion from Louisiana. Again, the result may have been required under the civil code provision that insulated teachers (interpreted to mean the university itself in Milliner) from liability for the acts of their "scholars and apprentices" when the teachers could not prevent the scholars from causing damage. But again, the wisdom of such a result is questionable.

In any event, the Mazart and Milliner cases, as decided, are perfectly compatible with the state speech analysis of student publications. And while the courts may have felt constrained not to provide a remedy for the wrong the plaintiffs suffered due to New York's limited waiver of immunity, and Louisiana's Civil Code provision, a non-state speech analysis would require such an unfair result in all other jurisdictions. Mazart's and Milliner's unfortunate results, denying relief to people clearly injured by a state instrumentality, need not be repeated elsewhere if the state speech analysis is adopted. Only under that analysis can courts reach the merits of government financial responsibility for harm to reputation caused by the subsidized student press. It is possible that on the merits, the questionable results in Mazart and Milliner are correct, but the search for an answer is possible only if the subsidized student press is recognized as a form of government speech.