Analysis of the application of First Amendment jurisprudence to university student fees *policies

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ANALYSIS OF THE APPLICATION OF FIRST AMENDMENT JURISPRUDENCE TO UNIVERSITY STUDENT FEES POLICIES

by

Christine Chairsell

Bachelor of Arts
University of Nevada Las Vegas
1983

Master of Arts
University of Nevada Las Vegas
1985

A dissertation in partial fulfillment of the requirements for the

Doctor of Education Degree
Department of Educational Leadership
College of Education

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ABSTRACT

Analysis of the Application of First Amendment Jurisprudence to University Student Fees Policies

by

Christine Chairsell

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The allocable student activity fee represents a fee imposed by the university administration and is paid at the time that tuition is paid. The administration or the elected student government body representatives disperse these collected fees to groups that have made application for funding and have passed the review process. Sometimes students object to their mandatory activities fees being diverted to certain groups because they are either political or advocate opinions with which the students disagree. Thus, the controversy becomes a free speech challenge.

The purpose of this study was to provide a historical case study about the legal controversies over mandatory student fees. It explores the application of First Amendment jurisprudence of student fees and assesses the impact of the U.S. Supreme Court's Regents of the Univ. of Wis. Sys. et. al. v. Southworth, et al., 120 S. Ct. 1346 (2000) on select public universities' mandatory student fees
programs in the Ninth Circuit. Guidelines are offered to administrators on how to rigorously review and modify their respective policies concerning student fee collections and disbursements in order to comply with the First Amendment rights associated with the Southworth decision.

In order to accomplish this, the following research questions are addressed by this study:

1) How did the U.S. Supreme Court resolve the conflict between the circuits regarding allocable mandatory student fee programs in Southworth?

2) What were the major arguments in the judicial process that influenced the U.S. Supreme Court's decision?

3) What areas were left in doubt?

4) Were there continuing disagreements?

5) Are there questions left unanswered?

6) What, if any, new questions or issues emerged from this decision?

7) What is the impact on mandatory student fees policies of specific, major state universities in the Ninth Circuit as a result of the Southworth decision?

8) What should administrators do to come into compliance with the Southworth decision/precedent?

Because this endeavor constitutes legal research, the writing style contained in this dissertation was a combination of APA and Harvard Blue Book.
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CHAPTER I

INTRODUCTION

Mandatory student activity fees, imposed by post secondary institutions, are a source of funding for a variety of service-related and educational functions. For instance, student fees provide funding for student health centers, science laboratory experiences, access to technology resources and technology-based educational programs. These fees are identified as non-allocable fees. They cannot be allocated to other student activities. A percentage of mandatory student fees are allocated to student government organizations, which in turn, distribute funding to registered student clubs and organizations (Schmitz, 1996). The process by which funds are distributed to student organizations is mandated by governing board policies and student government constitutions that are approved by the governing boards.

The allocable student activity fees program, which is a central issue in this study, is one that is supported by a fee imposed by the university administration that is paid with tuition. It is mandatory and is not refundable (Kramer, 1995). The administration or the elected student government body representatives disperse these collected fees to groups that have made application for funding.
and have passed the review process (Kramer, 1995). Recent studies indicate that over 90% of universities finance student activities with mandatory fees. Only 2.5% of funded student activities use an optional fee system. The rest secured funds through other sources such as a portion taken from tuition, private donations and fundraisers (Kramer, 1995).

Most university officials contend that mandatory allocable student activity fees are necessary to ensure that the educational value of the university experience extends beyond the classroom as student groups contribute to the total exchange of ideas in educational forums (Wells, 1988). It is considered paramount that universities do everything possible to ensure that students' First Amendment rights are protected. However, it is just as important that students have the opportunity to participate in a variety of public forums that student groups provide as part of the educational experience (Wells, 1988).

The mandatory student fees that fund these extra-curricular activities serve a number of purposes. They create a fund for financing channels of communication for student organizations, and they ultimately create a limited public forum. They provide stability for student organizations that rely upon the funding to maintain their core funding. They create opportunities for the members of the student government to administer the allocation of such funds that constitutes a useful and real-world experience (Brief for the States of New York, et. al., Southworth). The university may limit use of the funds to particular topics or forums congruent with its educational objectives, but it may not discriminate among speakers on the basis of their viewpoints with respect to
permitted topics (Brief for the States of New York, et. al., Southworth). The funding method also emphasizes to the student body that they are ultimately responsible for the activity through the allocation and distribution process under the direction of the student body governmental representatives (Brief for the States of New York, et. al., Southworth).

Under the legal standards that protect First Amendment rights, the mandatory student activity fees create non-spatial public forums that are much like the traditional physical public facilities, like public parks, and other physical locations that are used for public speeches.

Since the era of Vietnam protests on college campuses, there have been increased activities among students to politically organize. Public universities have operated programs which fund, through the use of mandatory student activity fees, various student and community organizations, some of which engage in political and ideological speech. These programs serve the mission of public universities by creating forums on the university campuses that ultimately encourage university students to express themselves on academic, social and political issues. They ultimately increase the opportunities for debate and open discussion by exposing students to a variety of viewpoints.

Beginning in the 1970s, Ralph Nader encouraged formation of Public Interest Research Groups (PIRGs) for the purposes of training students to become political organizers and advocates. They operated both on and off campuses. Over the years, they have become not only accepted but also, in some cases, supported by the colleges and universities through student activity
fees (Schmidt, 1999). With such funding, PIRGs and other similar issue-organizations have enhanced the university setting as a marketplace of ideas where conflicting viewpoints can be expressed. Beyond enriching the marketplace, these organizations have also provided "out-of-class" educational services that allow interested students to gain experience in organizing around public policy issues, sometimes for extra class credit. However, allocation of student fees for this type of political research or activism was repugnant to some students and they have questioned whether their First Amendment rights to free speech were violated through their compelled funding of such organizations. Universities argued that as long as access to the student activity fees, like a public park, was available to all speakers on a viewpoint neutral basis, no First Amendment burden was imposed by the university's use of a mandatory student activity fee to create a forum for diverse speech (Brief for the States of New York, et. al., Southworth).

Throughout the decade of the 1970's, there was a dramatic increase in student fee-related litigation. For all students, the mandatory student fees program became an increasingly important issue. For some, the student activity fees represented forced contributions to disagreeable groups. For others who supported the groups, the student activity fee represented student democracy in action and thus an extension of the educational experience (Rouse & Howard, 1998).
Relevant Precedent for Determining Constitutionality
of Allocable Student Fees

In earlier years, the courts acknowledged that the primary function of student activity fees was to create and maintain a forum, or marketplace, of ideas where diverse viewpoints could be expressed and tested and, thus, have educational value.

Beginning in the late 1970's courts addressed cases that involved mandatory, public sector, union dues that were expended for political purposes. Some bargaining unit members argued that diversion of dues to political causes was beyond the unions' primary purpose of collective bargaining thereby violating their First Amendment right to Free Speech. Some courts facing student complaints regarding diversion of student fees used the union dues cases to analyze the dispute. Other courts disregarded the union cases. Instead they have focused on the idea that it is the unique mission and role of the university to create a limited public forum as an extension of the educational experience and used this notion as the foundation for deciding the constitutionality of allocable student fees cases. In order to fully appreciate the challenges and controversies associated with the judicial inquiry into student activity fees, a short history of how the jurisprudence developed is presented here to introduce the research problem. The cases are presented in chronological order. A more detailed analysis will be presented in Chapter II.
Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969), established the view that courts must consider the unique characteristics of educational institutions in deciding the nature and extent of student First Amendment rights. The Court held that only when student expression materially and substantially interfered with the operation of schools could the student expression be prohibited. In Tinker, the Court held that school officials violated students' First Amendment rights when they disciplined students for wearing black armbands in protest of the Vietnam War. While Tinker ruled that public high school students have First Amendment protection, courts have extended such protection to university students (Steele, 1987).

Healy v. James, 408 U.S. 169 (1972), represents the first attempt by the U.S. Supreme Court to balance student rights with the rights of school officials to produce a successful educational environment. Justice Powell, who wrote the majority opinion, acknowledged that the operation of colleges and universities is a delicate process that should not be interfered with by the courts unless school officials become inequitable and arbitrary in their implementation of the educational environment. Central Connecticut State College denied official recognition to a local chapter of Students for a Democratic Society (SDS). Without official recognition, this group was locked out of the college’s facilities and the campus newspaper. The U.S. Supreme Court acknowledged that school officials know more about establishing and maintaining an academic community and that courts should not interfere; however, in order to protect student rights,
the Court placed a heavy burden on colleges and universities to prove the appropriateness of their actions to prevent disruptions (Gibbs & Crisp, 1979). Ultimately, the Court could not find a valid reason to uphold the actions of the college and ordered that the SDS chapter be recognized as a student group.

The Eighth Circuit Court, in Veed v. Schwartzkopf, 353 F.Supp. 149 (D. Neb. 1973), aff’d mem. 478 F.2d 1407 (8TH Cir. 1975), cert. denied, 414 U.S. 1135 (1974), directly involved a dispute over mandatory student fees. In Veed, the court ruled that the university’s educational program extended beyond the formal classroom by providing students with a broad range of ideas within a variety of student activities that were supported by student fees. In upholding the university fee assessment, the court conferred upon the Board of Regents the right to determine what qualifies as educational; and concluded that while the views of some funded student groups might be repugnant to a student, he was not forced to attend the activities (Gibbs & Crisp, 1979).

In Larson v. Board of Regents of University of Neb., 204 NW2d. 568 (1973), the court held mandatory fees to fund a student newspaper, student government and speaker’s program to be constitutional because they are part of the educational process so long as many viewpoints are expressed.

In Good v. Associated Student of the University of Washington, 86 Wash. 2d 94, 542 P.2d 762 (1975), the Supreme Court of the State of Washington attempted to balance academic purpose with the students’ First Amendment rights. In doing so, the court decided that the university’s interest in providing a
public forum that promotes competing ideas was compelling and upheld the right of the university to impose the student fees.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the U.S. Supreme Court ruled that all members of a public sector bargaining unit could be required to finance union activity. However, the Court also determined that public sector unions could not fund political speech with mandatory union dues. Mandatory union dues could only be dedicated to activities associated with the mission of unions – collective bargaining, contract administration and grievance adjustment. Thus, the Court held unconstitutional the requirement that individuals contribute to political or ideological causes that they are opposed to as a condition of their employment.

In *Galda v. Blowstein*, 686 F.2d 159 (3d Cir. 1982), also known as *Galda I*, students argued that Rutgers Camden College’s use of mandatory student fees to fund the Public Interest Research Group (PIRG), an independent organization, violated their right of freedom of association. The Third Circuit Court reaffirmed *Veed* by recognizing that the college’s potential to demonstrate a compelling state interest was sufficient enough to outweigh students’ First Amendment rights (Steele, 1987). The court ruled that the students had not successfully rebutted the college’s presumptive valid judgment that the PIRG had substantial educational value and held in favor of the college.

In *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983), University of North Carolina students argued that the university violated their First Amendment rights by using student fees to finance the student newspaper, *Daily Tar Heel*. The
court ruled in favor of the university because it found that the imposition of student fees did not promote ideological biases, but instead, promoted an educational environment. The court distinguished Abood by explaining that, on the contrary, the union used mandatory fees (dues) to promote a one-sided ideological viewpoint. It found that the university in Kania used student fees for the Daily Tar Heel to increase the exchange of ideas and opinions on campus. Thus, the fee assessment was used to promote more speech rather than the limited speech associated with unions.

Following the Third Circuit's ruling in Galda I, the students returned to court to challenge the university fee policy. In Galda v. Rutgers, 772 F.2d 1060, 1065 (3d Cir. 1985), cert. denied 106 S. Ct. 1375 (1986), also known as Galda II, the students at Rutgers Camden College appealed a U.S. District Court's ruling in favor of the college by arguing this time that the college's mandatory student fee program supporting the PIRG violated their First Amendment rights. On this matter, the Third Circuit Court held that the college had failed to establish a compelling state interest, which would justify funding the PIRG. Accordingly, the court ruled that the PIRG was a separate organization that took a single or narrow political view and conducted its speech outside the college's public forum.

In Keller v. State Bar of California, 496 U.S. 1 (1990), the U.S. Supreme Court relied upon the Abood v. Detroit Board of Education, 431 U.S. 209 (1977), holding that the California State Bar's use of mandatory dues to fund the annual conference of delegates that passed political resolutions endorsing gun control and the nuclear freeze was unconstitutional. The Court held that these
expenditures were not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services.

In Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991), the U.S. Supreme Court adopted a three-prong test to provide guidance on expenditure of union dues. The first prong required the use of mandatory dues be germane to the mission of the union. The second prong required the use of mandatory dues to be justified by the government's compelling interest in preserving peace and eliminating free rides (non-members that receive benefits of dues-paying members). The third prong required that the use of mandatory dues must not add a significant burden to the First Amendment rights of the workers. The Court concluded that the unions could require all members of the bargaining unit to pay for lobbying activities within the limited context of union contract ratification or implementation. However, the union could not force members of the bargaining unit to fund lobbying on other issues such as taxes or support of public education, even though these activities are very closely related to the union's interests.

In Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992), also known as Carroll I, the Second Circuit Court held that a PIRG did serve university-related functions sufficiently to justify the university's compelled student fees for speech on campus (Wiggins, 1994).

In Hays Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), cert. denied, 605 U.S. 1087 (1993), the Fifth Circuit found that a university's educational goals justified the subsidy of a university-sponsored newspaper.
In *Smith v. Regents of University of California*, 4 Cal. 4th 843, 844 P.2d 500, cert. denied, 510 U.S. 863 (1993), University of California Berkeley students sued the university's administration and the Associated Students of the University of California (ASUC) because the students were opposed to the collection of mandatory student fees that supported the student government. The students automatically became members of the student government when they enrolled and paid their fees. Complaining students opposed some of the ASUC's espoused political views. Of all the cases involving mandatory student fees and compelled speech, the circumstances in this case were the closest to the union dues cases *Abood*, *Keller*, and *Lehnert* (O'Neil, 1999). The California State Supreme Court ruled that, in the future, the university had to publish a list of organizations that practice political advocacy. From that list, students should be allowed to select those groups they wish not to fund with their mandatory student fees. A deduction would be taken from the base amount of the mandatory student fees for each group a student did not wish to support. The Smith court indicated that the university was free to adopt any type of mandatory student fee system so long as they avoided the constitutional defects, like not allowing students an opportunity to opt out of funding groups they found objectionable. For the first time, students were given an opportunity to opt out of funding certain groups at the time of payment of mandatory student fees.

After the decision in Carroll I, students returned to court continuing their challenge to the university fee policy. *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994) aff'd 899 F.Supp 1214, also known as *Carroll II*, the court applied the
germaneness analysis of Abood and Keller and ruled that the university could constitutionally fund the NYPIRG as long as that organization spent the equivalent of student contributions on campus and fulfilled the university's mission of providing for a market place of ideas.

In Galda I and Carroll I & II, the courts have allowed universities to charge mandatory student fees to support political speech within the campus' public forums. The program had to be a forum and the government (university) could not discriminate against speakers based upon content of their speech (Wiggins, 1994).

In Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), the U.S. Supreme Court addressed the ability of a university to decide whether or not to fund a student religious newspaper. Students who published the Christian newspaper, Wide Awake, at the University of Virginia challenged the university's denial of their request for funding from mandatory student fees. They argued that they were denied funding by the university based upon the newspaper's viewpoint. For the first time, the Court announced that student activity fees created a limited public forum with the money and that, when established, the forum (or distribution of fees) had to be conducted on a viewpoint neutral basis. The Court ruled that the university had discriminated based on the religious viewpoint of the newspaper, Wide Awake, and had violated the First Amendment rights of the students associated with the newspaper. The issue before the U.S. Supreme Court in Rosenberger was the distribution of mandatory student fees. While the Court acknowledged that
another pressing issue was the authority to collect mandatory student fees, it chose not to address that issue. Thus, in the Rosenberger decision, the Court basically invited future litigation that posed the question of the university's ability to collect mandatory student fees.

The student plaintiffs in Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998), opposed being required by the University of Wisconsin, Madison to pay fees that directly subsidized student groups that engaged in political and ideological advocacy (Rouse & Howard, 1998). In 1998, the Seventh Circuit Court upheld the U.S. District Court's decision that struck down the University of Wisconsin's mandatory student fee requirement. Relying upon Abood, Keller, and especially Lehnert, the court concluded that the Board of Regents had failed to sustain their fee program under Lehnert's three-prong test. The court concluded that the fee system was not germane to the university's mission (the first prong) and that the forced funding of objectionable student organizations significantly burdened the students' free speech rights (the third prong).

The Seventh Circuit Court did not order the university to completely abandon its fee system and it did not rule that such fees might not be used to support political or ideological organizations. Ultimately, the court left it up to the university to create its own solution, but it was expected that part of the solution would have to include an opt out opportunity in advance for students who find funding of certain groups objectionable (O'Neil, 1998).

As with most circuit court appeals, the Southworth case was heard before a panel of three judges. The Board of Regents of the University of Wisconsin
System petitioned for a rehearing *en banc*. Such a petition represents a request for rehearing by the full Seventh Circuit Court. This request was denied. However, four judges from the Seventh Circuit dissented from the denial to the *en banc* review. Judge Rovner wrote one dissenting opinion and was joined by judges Wood, Evans, and Cummings. Judge Wood wrote the second dissenting opinion and was joined by judges Rovner and Evans. The two dissenting opinions explaining why, in their view, the *Southworth* case should have been considered by the full court.

The dissenters' argument included a number of components. First, the fact that the circuit courts were in conflict demanded a rehearing by the full Seventh Circuit Court. Second, the dissenting judges distinguished *Southworth* from the three precedent cases, *Abood*, *Keller*, and *Lehnert*, particularly within the context of viewpoint neutrality. The precedent union cases were single organizations with single political agendas. Thus, these cases should not apply to *Southworth* where the university setting demands an educational experience of robust debate on a variety of issues and viewpoints. The dissenting judges argued that the court should have acknowledged the broad, unique role or mission of universities to create an educational experience beyond the traditional classroom. The dissenting judges acknowledged that the student fees in *Southworth* created the same limited public forum as in *Rosenberger*. The forum analysis asserts that the forum welcomes a variety of diverse ideas and debates. Thus, the only remedy under the forum analysis should have been allowing more speech to take place in the forum rather than evaluating the
activity and group and whether each were germane to the university's educational mission as required by Abood, Keller, and Lehnert.

Finally, the dissenting judges feared that the opt out remedy would result in hit lists of organizations to which some students objected. Additionally, the judges worried that the great administrative and financial burdens of operating such a program could ultimately eliminate the forums all together.

Following denial of the request for rehearing en banc, the Board of Regents filed a petition for a writ of certiorari to the U.S. Supreme Court. While the Court was considering the petition of the Wisconsin Regents, another case was decided concerning mandatory student fees in the Ninth Circuit. In Rounds v. Oregon State Board of Higher Education, 166 F.3d 1032 (1999), students sought relief under the First and Fourteenth Amendments to the U.S. Constitution. They argued that mandatory student fees allocated to the OSPIRG compelled speech and violated their First Amendment rights. The Ninth Circuit Court held that the activities of the OSPIRG were germane to the university’s mission (according to Abood) and justified the mandatory collection of fees from students. In its concluding remarks, the Ninth Circuit Court stated, “To the extent that (the Seventh Circuit Court in) Southworth holds that a public university may not constitutionally establish a limited public forum for the expression of diverse viewpoints, we respectfully disagree” (Rounds, at 1470).
Research Problem

The U.S. Supreme Court granted *certiorari* to the *Southworth* case. The Court would resolve the conflict within the circuit courts. Some lower courts were relying on the narrow focus of union cases and focusing upon the activities of each challenged group to determine if such activities were germane to the university missions. Lower courts were not in agreement over exactly what represented the mission of the university. As a result, university fees programs and the matriculated students were treated very differently from one jurisdiction to another. The intent of this study was to analyze how the U.S. Supreme Court resolved the conflict between the circuits and assess the impact of the decision on university operations. Further, a thorough analysis of this decision was necessary to formulate and provide guidance to administrators for establishing or implementing allocable mandatory student fees programs.

Research Questions

- How did the U.S. Supreme Court resolve the conflict between the circuits regarding allocable mandatory student fee programs in *Southworth*?
- What were the major arguments in the judicial process that influenced the U.S. Supreme Court's decision?
- What areas were left in doubt?
- Are there continuing disagreements?
- Are there questions left unanswered?
- What, if any, new questions or issues emerged from this decision?
• What is the impact on mandatory student fees policies of specific, major, state universities in the Ninth Circuit Court as a result of the Southworth decision?
• What should administrators do to come into compliance with the Southworth decision/precedent?

Significance of the Study

"The purpose of researching the law is to ascertain the legal consequences of a specific set of actual or potential facts" (Wren & Wren, 1986, p. 24). The purpose of this dissertation was to provide a historical case study about the legal controversies over mandatory student fees. In doing so, I explored the application of First Amendment jurisprudence to mandatory student fees programs. I assessed the impact of the U.S. Supreme Court's Southworth decision on university student fees policies. It was anticipated that questions would be left unanswered and new questions would arise as a result of the decision. But, the Court has provided guidelines for student fee policies. These guidelines are offered to administrators on how to rigorously review and modify their respective programs in accordance with the Southworth decision.

Definition of Terms

For the purpose of this study, the following definitions of terms are provided:

Advocacy: In practice, the active espousal of a legal cause. The art of persuasion (Gifis, 1997).
Allocable Fees: That portion of student fees that is disbursed through a variety of processes (soliciting applications from student organizations, holding hearings, conducting referenda) by student governments or universities/colleges (Rouse & Howard, 1998, p.3).

Amicus Curiae: Friend of the Court brief. One who gives information to the court on some matter of law, which is in doubt. The function of amicus curiae is to call the court's attention to some matter, which might otherwise escape its attention. (Gifis, 1997).

Bill of Rights: The first ten amendments of the U.S. Constitution, which articulate the fundamental rights of citizenship. They were added to the U.S. Constitution in 1791. It is a declaration of rights that are substantially immune from governmental interference, and constitutes a reservation of limited individual sovereignty. Among such rights guaranteed in the federal Constitution are the rights to speak, assemble, and practice religion free from federal government regulation, the right to be free from unreasonable searches and seizures and the right to a jury trial when tried for a criminal offense. Originally, the Bill of Rights was intended to be restrictive upon federal power; however, the various amendments have mostly been incorporated to apply to state governments through the due process clause of the Fourteenth Amendment to the U.S. Constitution. (Gifis, 1997).

Certiorari: Gaining appellate review. An order issued from a superior court to one of inferior jurisdiction, commanding the latter to certify and return to the former a record in the particular case. In the U.S. Supreme Court, the writ is
discretionary with the Court and will be issued to any court in the land to review a federal question if at least 4 of the 9 justices vote to hear the case (Gifis, 1997).

**Collective Bargaining:** In labor law, the negotiation of employment matters between employers and employees through the use of a bargaining agent designed by an uncoerced majority of the employees within the bargaining unit. (Gifis, 1997).

**Declaratory Relief:** Also known as Declaratory Judgment. A judgment of the court for the purpose of establishing the rights of the parties or expressing the opinion of the court on a question of law without ordering anything to be done. The distinctive characteristic of a declaratory judgment is that it stands by itself, and no executory process follows as a matter of course (Gifis, 1997).

**En Banc:** Many appellate courts sit in divisions of three or more judges from among a larger number on the full court. These parts will generally decide a particular case but sometimes either on the court’s motion or at the request of one of the litigants, the court will consider the matter by the full court. This is called a rehearing en banc (Gifis, 1997).

**Equal Protection of the Laws:** Constitutional guarantee embodied in the Fourteenth Amendment to the U.S. Constitution which states in relevant part that “no state shall...deny to any person within its jurisdiction the equal protection of the laws” (Gifis, 1997).

**First Amendment:** The first of the ten amendments (Bill of Rights) to the U.S. Constitution. Originally intended to restrict federal power, the various rights of political and religious freedom articulated in this amendment have been held
applicable to state governments through the due process clause of the Fourteenth Amendment to the U.S. Constitution. The First Amendment guarantees freedoms of speech, press, assembly, petition, free exercise of religion, and non-establishment of religion (Gifis, 1997).

General Student Services Fund (GSSF): A student activity fund that was administered through the Associated Students of Madison's (ASM) Finance Committee (Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998)).

Germaneness Test: Created by the U.S. Supreme Court in the Abood decision. Any expenditures for political or ideological activities must be germane (related) to the purpose for which the collection of fees or compelled association is justified. In this instance collection of fees must be germane to the university's role or mission (Abood & Keller; Frank, 2000).

Injunctive Relief: A judicial remedy awarded for the purpose of requiring a party to refrain from doing or continuing to do a particular activity. The injunction is a preventative measure which guards against future injuries rather than affording remedy for past injuries (Gifis, 1997).

In Loco Parentis: Refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties (Gifis, 1997).

Labor Union: Any association of workers whose main purpose is to bargain on behalf of workers with employers about the terms and conditions of employment,
to include, but not be limited to, grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work (Gifis, 1997).

**Petitioner:** One who presents a petition to a court to take an appeal from a judgment. The adverse party is called the respondent (Gifis, 1997).

**Primary Purpose Test:** Established in Galda I. If a group is found to be engaged primarily in political and ideological activities, then any funding by mandatory student fees should be subjected to strict scrutiny (Galda v. Blowstein, 686 F.2d 159 (3d Cir. 1982)).

**Public Forum:** There are three types of forums: the traditional public forum, limited public forum that is open by government for specific purposes, and all remaining use of public property (Greenawalt, 1996 & Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)).

**Public Interest Research Groups (PIRG):** Encouraged to form in the early 1970s by Ralph Nader for the purpose of training students to become political organizers and advocates. They have operated on and off campuses, but have become accepted and, in some cases, supported by colleges and universities through student fees (Schmidt, 1999). The University of Wisconsin at Madison's student PIRG is known as WISPIRG.

**Public Policy:** A general plan of action adopted by government to solve a social problem, counter a threat, or pursue an objective (Janda, Berry, & Goldman, 2000).

**Rational Basis Test:** A method of constitutional analysis under the equal protection clause used to determine whether a challenged law bears a
reasonable relationship to the attainment of some legitimate governmental objective. The principle that the constitutionality of a statute will be upheld, if any rational basis can be conceived to support it. If the violation of a fundamental right, such as the right to vote, right to free speech, or the creation of a suspect classification such as color, religion, national origin, or indigence, is alleged, then the law is subject to strict scrutiny and may only be upheld if the government shows a compelling interest in sustaining the statute (Gifis, 1997).

**Remand:** When a judgment is reversed, the appellate court usually remands the matter for a new trial to be carried out consistent with the principles announced in its opinion. Often, the court will simply direct that the matter be remanded to the lower court for further proceedings not inconsistent with the opinion (Gifis, 1997).

**Respondent:** Any one who answers or responds may properly be called a "respondent." The term also refers to the party against whom an appeal is brought (Gifis, 1997).

**Student Government Activity Fund (SGAF):** An activity fund administered by the Associated Students of Madison (ASM). Funds may be issued to support an RSOs operations and events, travel expenses central to the purpose of the organization (Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998).

**Strict Scrutiny Test:** A test to determine the constitutional validity of a statute that creates a classification of persons. Under this test, if a classification scheme affects fundamental rights, it requires a showing that the classification is necessary to, and the least intrusive means of, achieving the compelling state interest. The governmental body passing the legislation in question bears a
heavy burden of justification to show that the law is necessary to promote a compelling state interest and is being accomplished by the least drastic and intrusive means (Gifis, 1997).

**U.S. Federal Courts:** These courts derive their legitimacy from Article III of the U.S. Constitution. The U.S. District Courts are the general courts of original jurisdiction or the federal trial courts. The U.S. Courts of Appeal (formerly circuit courts of appeal) are the appellate review courts. The U.S. Supreme Court is the only court directly created by the U.S. Constitution, and is the court of last resort in the federal system. The U.S. Supreme Court has final appellate review of lower federal courts and of state court decisions involving questions of federal law (Gifis, 1997).

**Viewpoint Neutrality:** When opening a public forum, government may not restrict speech at that forum based upon the views of the speaker (*Lamb’s Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993)).
CHAPTER II

REVIEW OF LITERATURE

This review of literature discusses the legal issues evolving around student fees. Significant court decisions were analyzed illustrating the development of First Amendment jurisprudence applicable to mandatory student fees and compelled speech. This chapter concludes with an extensive discussion of the Southworth decisions rendered by the U.S. District Court and the Seventh Circuit Court of Appeals. The petition for a *writ of certiorari* to the U.S. Supreme Court is reviewed. In addition, the briefs of the parties, *amicus curiae* briefs, and the oral arguments before that Court are reviewed.

Historical Background of Court Cases

*Education As a Privilege*

The earliest judicial approach to students' constitutional rights can be described as the privilege approach as it applied (Steele, 1987). In *Steier v. New York State Education Commission*, 271 F.2d 13 (2nd Cir. 1959), Brooklyn College suspended one of its students because he bitterly expressed his view of college administration. The dean of the college suspended Steier and justified the
suspension by citing the rule that required students to conform to the requirements of good manners and good morals. Steier was readmitted into the college on the condition that he honor and live by the rules of the college. Steier was then expelled again when he wrote the story of his probation in the campus newspaper. Steier sued the college for violation of freedom of speech, equal protection and due process. The college argued the actions were justified because it assumed the responsibilities of parents in *loco parentis* to its students. *In loco parentis* was the parental authority institutions of higher education held over students. It justified curbing student speech and activities. The U.S. District Court sided with Brooklyn College and the Second Circuit Court affirmed that decision. The court implied that Steier could say anything he wished, but could not say it as a student at Brooklyn College. Thus, the college had not impaired Steier's right to free speech.

*In Steier,* the court refused to grant constitutional rights to students in public colleges. In an earlier U.S. Supreme Court Case, *Hamilton v. Regents,* 293 U.S. 245 (1934), the Supreme Court described attendance at state universities a privilege and not a constitutional right. Thus, courts deferred to the actions of public universities.

**Fundamental Fairness**

In 1961, the Fifth Circuit Court held that a college degree no longer represented a privilege or a luxury. Society and, more specifically, middle class
America, viewed a college education as a necessity for success in the modern world. Such changes in society resulted in the chipping away of the in loco parentis. In Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961), cert. denied, 286 U.S. 930 (1961), Alabama State College for Negroes expelled students after they had participated in a sit-in at a whites only cafeteria in the Montgomery County Courthouse. These students received no reason for their expulsion and they were not given the opportunity to have a hearing. The court sided with the students and held that when an act of government injures individuals, there must be due process of law. Dixon established the principle that students attending state institutions of higher learning had constitutional rights.

Applying First Amendment Rights to University Students

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) involved the discipline of high school students who protested the Vietnam War in violation of a school rule forbidding such protests. The Court held that students possessed limited First Amendment protection in the school setting. Specifically, the U.S. Supreme Court held that only if student expression materially and substantially interferes with the operation of schools, could the student speech be sanctioned. The Court determined that discipline by school officials violated students' First Amendment rights because students wore black armbands in protest of the Vietnam War. While Tinker applied the First Amendment to high
school students, the courts, almost immediately in *Healy v. James*, 408 U.S. 169 (1972), began to use this reasoning to extend such protection to university students (Steele, 1987).

In *Healy* the U.S. Supreme Court addressed the control/authority of universities over the use of facilities and publications partially financed by student fees. Central Connecticut State College denied official recognition to a local chapter of Students for a Democratic Society (SDS). The group could not utilize the campus newspaper or college bulletin boards to announce their meetings. They could not utilize college facilities for their meetings. The students argued that this violated their First Amendment rights to freedom of expression and association. The Court agreed. While the Court acknowledged that school officials knew more about establishing and maintaining an academic community and that courts should not interfere, the Court also placed a heavy burden on colleges and universities to prove the appropriateness of their actions to prevent disruptions (Gibbs & Crisp, 1979).

The college president's justification for denying the SDS official recognition included four points. First, the group's national reputation was unfavorable. This reason was rejected as a basis for denying recognition because the government failed to meet its burden to prove that the local chapter knowingly affiliated with an organization possessing unlawful aims and goals, with a specific intent to further those legal aims (*Healy*). Second, the philosophy of the SDS was questionable. This basis for denying recognition was also rejected by the Court. Third, the president denied recognition because he feared potential of school
disturbances. The Court cited Tinker and denied this basis for rejection by stating that potential for disturbances in the educational environment was not enough to deny official recognition. Fourth, the president believed that the SDS would be unwilling to obey the rules of the school. This final basis for denying recognition provided the only justification for the college's non-recognition of the SDS and the Court remanded the case to the district court directing that court on the grounds that there was no way to determine if the college had any valid rules to justify non-recognition. According to Healy, the SDS chapter could be recognized unless it was determined that the organization would not obey reasonable university rules. First Amendment restriction can be imposed only when speech and association activities infringe upon reasonable campus rules, interrupted classes, or substantially interfered with the opportunity of other students to obtain an education (Gibbs & Crisp, 1979).

Constitutionality of Mandatory Student Fees

The Eighth Circuit Court, in Veed v. Schwartzkopf, 353 F.Supp. 149 (D. Neb. 1973), aff'd mem. 478 F.2d 1407 (8th Cir. 1975), cert. denied, 414 U.S. 1135 (1974), addressed the constitutionality of mandatory student fees. In Veed a student argued that because he disagreed with the philosophy of many speakers appearing on campus and the editorial policies of the student newspaper, he should not be required to pay the mandatory student fees. The mandatory student fees forced him to associate himself with philosophies he disagreed with and, thus, violated his First Amendment rights. Further, the student argued that because the activities for which fees are collected and spent

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were non-credit hours, the University of Nebraska could not justify these fees as being educationally necessary.

The court ruled that the university's educational program extended beyond the formal classroom by providing students with a broad range of ideas within a variety of student activities. The court opted not to intervene in the educational process and deferred to the Board of Regents the right to determine what qualified as educational (Gibbs & Crisp, 1979). The court concluded in Veed that, while some views may be repugnant to the student, he was not forced to attend the activities where these views were expressed. Thus, there was no violation of his First Amendment rights. The court was careful to focus upon the entire university community rather than attempting to rectify that which insults only a few. The Veed court followed the precedent set by Justice Powell in Healy and acknowledged that it was the Board of Regents' responsibility to determine, the activities which are part of the educational environment in or out of the formal classroom.

The Balance Test

The courts continued to be very careful to balance the university's right to determine what is educational with students' First Amendment rights. In Good v. Associated Students of the University of Washington, 86 Wash. 2d 94, 542 P.2d 762 (1975), the Supreme Court of Washington attempted to balance the students' First Amendment rights against the university's duty to "provide an atmosphere of learning, debate, dissent and controversy" (Good at 768). The
court noted that given the environment of challenges and spirited debate, it would hardly be fair to allow students the right to refuse to pay for those debates they disagree with as it would negate the whole educational experience (Gibbs & Crisp, 1979). Hence, in balancing academic purpose with First Amendment rights, the court decided that the university's interest in providing a public forum with competing ideas was compelling and upheld the university's right to impose fees supporting a variety of expression activities.

In Abood v. Detroit Board of Education, 431 U.S. 702 (1977), the U.S. Supreme Court examined the question of whether employees' constitutional rights were violated by a Michigan statute which allowed local governments to enter collective bargaining agreements that required all local government employees represented by a union to pay a service fee equal to union dues as a condition of employment. The Court upheld the Michigan statute with the proviso that the service charge was used to finance union expenditures for collective bargaining, contract administration, and grievance adjustment. The Court specifically addressed the use of non-union member fees for non-collective bargaining purposes. First, the Court established the right of freedom of association for the purpose of presenting ideas and beliefs to be protected by the First and Fourteenth Amendments. Second, the Court established the individual's right not to give up guaranteed First Amendment rights as a condition of public employment. The Court upheld the non-union member's argument that they have the constitutional right to prevent the unions from spending a part of their required service fees to contribute to political candidates and to express
political views unrelated to its duties as exclusive bargaining representative. Thus, the Court held unconstitutional the use of service fees for political or ideological causes that non-members opposed. The Abood case is relevant here because some courts considered mandatory union service fees jurisprudence an important component deciding mandatory student fees litigation.

In Galda v. Blowstein, 686 F.2d 159 (3d Cir. 1982), also known as Galda I, students argued that Rutgers' Camden College's use of mandatory student fees to fund the Public Interest Research Group (PIRG), an independent organization, violated their right of freedom of association. The court held that if students are to prove a violation of their First Amendment rights, they must establish that the challenged group functions essentially as a political action group with only an incidental educational component. The court further determined that even if the students were able to successfully prove fees violated their First Amendment rights, the college could still impose the fees by demonstrating a compelling state interest of the PIRG's contribution to the college's public forum. The case was remanded to the U.S. District Court for the students to build their case of violation of their First Amendment rights and for the college to prove that the PIRG was not operating as a political organization. Galda I reaffirmed Veed by assigning a burden of proof, and recognized the college's potential to demonstrate a compelling state interest sufficient to outweigh student dissenters' First Amendment rights (Steele, 1987). Galda also established the Primary Purpose Test. If a group is found to be engaged primarily in political and ideological
activities, then any funding by mandatory student fees should be subjected to strict scrutiny.

As mentioned earlier, in Abood, the U.S. Supreme Court ruled that it was unconstitutional for public sector bargaining parties to impose fees for the purpose of funding political views or ideologies unrelated to the primary mission of collective bargaining. In Galda I, students relied upon the Abood ruling to support their claim that student fees used by Rutgers to fund the PIRG violated their freedom of association. The Third Circuit Court also relied upon Abood and held that in order to justify an infringement upon the students’ right to associate, the college must show a compelling state interest. On remand, the U.S. District Court found that the students had not convinced the court that the PIRG was solely a political entity with no substantial educational value (Galda v. Blowstein, 686 F.2d 159 (3d Cir. 1982), and held in favor of the college.

In Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983) was decided by the Fourth Circuit Court. University of North Carolina students argued that the university violated their First Amendment rights by using student fees to finance the student newspaper, The Daily Tar Heel (DTH). The students relied upon Abood to support their argument. The university argued that Abood supported the use of student fees to fund the DTH because Abood upheld the union’s right to collect mandatory fees to support its collective bargaining function. The university also argued that the DTH provided an educational forum for the exchange of ideas as part of the university’s educational mission.
The court ruled in favor of the university because it found that the imposition of student activity fees to fund the DTH did not promote ideological biases, but instead promoted an educational environment. It found that the university in *Kania*, unlike the union in *Abood*, used mandatory fees for the DTH to increase the exchange of ideas and opinions on campus rather than limit expression.

In *Galda v. Rutgers*, 772 F.2d 1060, 1065 (3d Cir. 1985), *cert. denied* 106 S. Ct. 1375 (1986), also known as *Galda II*, the students at Rutgers appealed the district court's ruling. The Third Circuit Court held that the college had failed to establish a compelling state interest that would justify funding the PIRG. Further, the court held that a true distinction could be made between a PIRG and student organizations funded by mandatory student fees. The court said that mandatory student fees fund a variety of student organizations and, therefore, provided a public forum that sustained the market place. The Third Circuit Court distinguished between student organizations and the PIRG finding it was a separate organization that took a single or narrow political view and conducted its speech outside the college's public forum.

In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the Court relied upon the *Abood* reasoning and held that the California State Bar's use of mandatory dues to fund the annual conference of delegates that passed political resolutions endorsing gun control and the nuclear freeze was unconstitutional. The Court ruled that these expenditures were not necessarily or reasonably incurred for the
purpose of regulating the legal profession or improving the quality of legal services, the primary purpose of bar associations.

In *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), the U.S. Supreme Court provided a three-prong test to provide guidance for determining whether union dues were being properly used. First, the Court ruled that use of mandatory dues must be germane to collective bargaining (the Germaneness Test of *Abood*). Second, the use of mandatory dues must be justified by the government's vital interest in preserving labor peace and eliminating free rides by non-union members (the Compelling Interest Test). Free rides refer to non-union bargaining unit members who do not pay dues and, thereby, unfairly benefit from the collective bargaining efforts of union members. Third, the use of mandatory service fees must not add a significant burden to the First Amendment rights to pay the service fee.

Based upon the three-prong test above, the Court ruled in *Lehnert* that the union had only limited power to fund political activities with mandatory dues. The union members could not be forced to subsidize public relations activities because such activities were not related enough to the collective bargaining function. However, the Court concluded that fees could be expended to pay for lobbying activities within the limited context of contract ratification or implementation. It was also improper applying the three-prong test to fund lobbying on issues such as taxes and support of public education.

The Court, in *Abood*, *Lehnert* and *Keller*, established a constitutional framework for judging union and bar association expenditures of mandatory fees.
These cases became important precedents used by some lower courts, and especially in *Southworth*, in deciding mandatory student fee litigation. Other circuit courts rejected the labor union/bar association precedents creating significant conflict between the circuits called on to address student fees litigation.

In *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992), known as *Carroll I*, the Second Circuit Court held that a PIRG did serve university-related functions sufficiently to justify use of mandatory fees to fund its speech on campus (Wiggins, 1994). *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994) *aff'd* 899 F.Supp 1214 (1994), or *Carroll II*, applied the Germaneness Test of *Abood* and *Keller* and ruled that the university could constitutionally fund the NYPIRG as long as that organization spent the equivalent of student contributions on campus and fulfilled the university’s mission of providing a market place of ideas. In *Galda I* and *Carroll I & II*, courts have allowed universities to charge mandatory student fees to support political speech within the campus’ public forum. Moreover, within the government could not discriminate against speakers based upon the views expressed (Wiggins, 1994).

A New Category and Standard of First Amendment Interests

The University Setting

sued the university's administration and the Associated Students of the
University of California (ASUC) because they were opposed to the collection of
mandatory student fees and the distribution of those fees to various student
groups that promoted viewpoints with which they disagree. The Berkeley
students also opposed the ASUC’s use of mandatory student fees to fund the
student government’s own lobbying efforts. The ASUC was a statewide
organization authorized by the Board of Regents to administer student
government and extracurricular groups. Students automatically became
members of the student government when they enrolled and paid their fees. Of
all the cases involving mandatory student fees and compelled speech, the
circumstances in this case were the closest to the circumstances in Abood,
Keller, and Lehnert because student government was lobbying and espousing
political views.

The Supreme Court of California reaffirmed earlier decisions, and adopted a
Jeffersonian philosophy in its ruling, by stating that forced monetary contributions
were a form of speech and compelled speech offended the First Amendment,
just as restrictions on speech. The Smith court cited the Galda I & II decisions
referring to the Primary Purpose Test (Smith at 858). As mentioned earlier, the
Primary Purpose Test dictates that if a group is found to be engaged primarily in
political and ideological activities, then its funding (by mandatory student fees)
should and will be subjected to a strict scrutiny.

The Smith case was remanded to the lower court to test the funding of each
group as well as the lobbying activities of the ASUC. The lower court ruled that,
in the future, students should be given a list of groups not eligible for funding with mandatory student fees. Students would be allowed to select, on a group-by-group basis, those groups they chose to fund with their mandatory student fee. Deductions would be allowed from the base amount of the mandatory student fees for each group a student did not wish to support.

While it seemed that Smith broke with tradition by not fully appreciating the university's role to invite diverse speech to the public forums in the educational environment (Wiggins, 1994), it is apparent that because students automatically became members of the student government organization when they paid their student fees, and that group was involved in lobbying efforts, the circumstances in Smith were very much like those in the union cases of Abood, Keller, and Lehnert — automatic membership through the payment of mandatory student fees to a political organization (association), as a condition of matriculation. However, Smith served to compound the great dissention among the lower courts and between the circuits as to what precedents to rely on and how best to interpret First Amendment rights as they applied to mandatory student fees. It also represented a departure from the challenge to an isolated, single group approach to a strategy of challenging the entire student fees program and the university's power to collect and disburse these fees (O'Neil, 1999).

Many legal scholars agreed that the U.S. Supreme Court should have granted certiorari in the Smith case in order to provide lower courts with some direction. Still others attempted to put the Smith ruling into legal perspective by
pointing out that the University of California Berkley administrators failed to prove sufficient First Amendment protection to its students (Gibbs, 1999).

The court admonished the administrators and instructed them how to bring their student fees program within constitutional compliance (Gibbs, 1999). The constitutional compliance imposed by the Smith decision required the university to allow students to opt out of funding groups they found objectionable. There was concern among legal scholars that this opt out provision could, in reality, merely reflect the student's unwillingness to pay student fees rather than taking a stand on their true political ideological beliefs (Schmitz, 1996).

In Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), students who published a Christian newspaper at the University of Virginia challenged the university's denial of their request for funding from mandatory student fees. They argued that they were denied funding by the university based upon the newspaper's religious viewpoint.

The authority of the university to impose mandatory student fees was not at issue in Rosenberger. The issue before the U.S. Supreme Court was the fee allocation process, and the university's regulations governing the process. Justice Kennedy wrote the majority opinion for the Court and held that student activities created a limited forum (to become known in Southworth as the Rosenberger forum) of money and that when established, the forum had to be operated on a viewpoint neutral basis. To Kennedy, religion provides a variety of opportunities for debate within the marketplace of ideas without violating the Establishment Clause. Therefore, the Court held that the University of Virginia
had failed to grant funding based on the religious viewpoint of the newspaper and, thus, it had violated their First Amendment rights.

Justice Souter wrote a scathing dissent joined in that dissent by Justices Stevens, Ginsburg, and Breyer. The dissenters expressed the view that the Supreme Court was, for the first time, approved direct funding of core religious activities by an arm of the State. Thereby the State supported evangelism by the direct funding of the newspaper and violated the Establishment Clause of the U.S. Constitution. Justice Souter argued concluded that there was no viewpoint discrimination in the application of the university’s guidelines to deny funding to the newspaper (in the dissenters’ minds, the newspaper was an arm of religion). Justice Souter concluded his dissent by predicting that the Rosenberger decision would make a “shambles out of student activity fees in public colleges” (Rosenberger at 422 (Souter, J., dissenting)), as there was no longer a clear distinction between the Establishment Clause and free speech rights.

The Rosenberger case created considerable confusion between content discrimination, which is constitutional, and viewpoint discrimination, which is not (Sadurski, 1997). While the Court acknowledged that such a distinction is not a precise one, viewpoint neutrality was the standard the majority chose to rule in Rosenberger. The result, however, was a blurring between content neutrality and viewpoint neutrality. The Rosenberger Court also limited its judicial focus on a student fee program already in place. It did acknowledge that there might be a question entertained in the future concerning the legitimacy of such fee programs. Justice O’Connor, in her concurring opinion, raised the possibility that
mandatory student fees were susceptible to a Free Speech Clause challenge by objecting students who may argue that they should not be compelled to pay for speech with which they disagree (Rosenberger, at 59 (O'Connor, J., concurring)). This statement led some legal scholars to conclude that student fee programs were on their way out. Others, at least, saw this to mean that the U.S. Supreme Court would no longer limit its focus to just the allocation of mandatory student fees, but instead, would broaden its scrutiny to include the issue of imposing and collecting the fees (O'Neil, 1999).

The Southworth Lower Court Decisions

Where Rosenberger was concerned with the rights of students to funding from an extracurricular speech program already in place, Southworth addressed the question that was recognized in Rosenberger but left unresolved. That is, whether a public university may require its students to pay a fee which funds the opportunity for extracurricular speech they object to (Regents of Univ. of Wis. Sys. v. Southworth, et al., 120 S. Ct. 1346 (2000)).

Wisconsin is one of several states in which state statutes mandate student participation in the governance of the public's university. Student government is supported by student fees and determines the distribution of allocable student fees at each of the 26 University of Wisconsin campuses had developed processes for making their decisions – soliciting applications from student organizations – holding hearings – conducting referenda. If the students and chancellor disagreed regarding distribution of fees, the students presented their
case to the Board of Regents who made the final decision each year about the mandatory student fee amount (Rouse & Howard, 1998). During the 1995-96 academic year, the total activity fee per student was $380. Seventy-four dollars of the $380 was allocable to student activities. The total allocable fees at the University of Wisconsin, Madison amounted to $2,548,570 and the student governance process earmarked funding to a wide variety of student organizations. Groups receiving these activity fees had to follow state guidelines in spending the funds. Student government elections at the Madison campus rarely attracted more that 5% to 7% of the student body to vote for their representatives (Rouse & Howard, 1998).

While students challenged eighteen student organizations, at the center of this controversy, like other lower court cases, was the PIRG (Public Interest Research Group). As mentioned earlier, PIRGs were the creation of Ralph Nader and they were intended to associate with universities, hire students, and train them to be advocates and activists. Given their origins, PIRGs tend to espouse liberal doctrine. They also receive a great deal of funding from mandatory student fees.

The attorney for the students, Jordan Lorence of the Northstar Legal Center for the Family and Constitutional Rights, was funded by the very conservative Scottsdale, Arizona-based Alliance Defense Fund. Its literature describes its goals as "defunding the Left and reclaiming legal ground for the body of the Christ" (Greenhouse, 1999, p. A20). Thus, this case represented the
growing trend of a legal challenge from fundamental conservatives (O'Neil, 1999).

In *Southworth*, the students claimed that when they paid fees to support various student groups, it violated their First Amendment rights to freedom of speech, association and free exercise of religion. They had no objection to student groups using the university's facilities to meet, collecting voluntary contributions, or organizing for their causes. But they were opposed to being required by the university to pay fees to directly subsidize student groups and especially student groups engaging in political and ideological advocacy (*Southworth v. Grebe*, No. 96-C-0292-S (W.D. Wis.1996)). The following are a few of the eighteen groups that received funding from the student activity fees that complaining students found objectionable: WISPIRG received $49,500 and volunteers lobbied the State legislature on a variety of environmental issues; The Lesbian, Gay, Bisexual Center received $22,000. Its charter included a promise to advocate for gay-positive University policies. It also supported various events to publicize gay issues; The Campus Women's Center received $34,000. It published a newsletter that included articles urging the defeat of legislation initiatives to limit access to abortion; The Madison Aids Support Network received $26,000. Some of its programs gave explicit information about the use of condoms; The International Socialist Organization received $350. They oppose the Republican Contract on America; The Progressive Student Network received $590. They also opposed the Republican Contract on America and lobbied the legislature to oppose mining in Wisconsin.
The responsibility for governing the University of Wisconsin System is
vested by law with the Board of Regents. Students share in aspects of the
university's governance; one aspect is the disposition of those student fees which
constitute substantial support for campus student activities (Construing Wis. Stat.
§36.09(1-5) (1993-1994)). Fees were distributed in a large measure by the
student government, Associated Students of Madison (ASM) and its
subcommittees. Once fees were collected, they were deposited by the university
into State of Wisconsin accounts. Such fees were classified into two types: non-
allocable (80% of the total fees) which are used for student health services,
intramural sports, debt service, upkeep and operations of the student union
facilities; and allocable (20% of the total fees) that support endeavors pursued by
the university's registered student organizations (RSOs).

To qualify as an RSO, students had to organize a not-for-profit group, limit
membership primarily to students, and agree to undertake activities related to
student life on campus. In the 1995-96 school year, 623 groups had RSO status
on the Madison campus. The expressive activities undertaken by RSOs were
diverse in range and content, from displaying posters and circulating newsletters
throughout the campus to hosting campus debates and guest speakers, and
political lobbying.

Allocable student fees were distributed three ways. First, student
organizations could seek funding from the Student Government Activity Fund
(SGAF) administered by the ASM. SGAF funds were issued to support an
RSO's operations and events, as well as travel expenses central to the purpose
of the organization. Second, an RSO could apply for funding from the General
Student Services Fund (GSSF) administered through the ASM’s finance
committee. In the 1995-96 academic year, 15 RSOs received GSSF funding —
campus tutoring center, the student radio station, a student environmental group,
a gay and bisexual student center, a community legal office, an AIDS support
network, a campus women’s center, and the Wisconsin Student Public Interest
Research Group (WISPIRG). In addition to providing counseling and tutoring,
RSOs that received GSSF funding also engaged in political and ideological
expression (according to the university). Third, a student referendum allowed the
student body to vote either to approve or disapprove a funding for a particular
RSO. The WISPIRG received $45,000 via a student referendum during the
1995-96 academic year. According to the university, a referendum could also
operate to defund an RSO or to veto a funding decision of the ASM.

GSSF and SGAF funding decisions were made in an open session where
interested students attended when RSO funding was discussed. In addition,
ASM approved the results of the student referendum. Counsel for the university
advised that the student government voluntarily viewed the referendum as
binding. Approximately 30% of the university’s RSOs received funding during the
1995-96 academic year.

In 1996, Southworth, et. al. v. Grebe, et. al. was argued in U.S. District
Court before Judge John C. Shabaz. Students requested declaratory and
injunctive relief for the alleged violations of their First Amendment rights to
freedom of speech, freedom of association, free exercise of religion. Students
sought a declaration that the university's imposition of mandatory student fees upon students enrolled at the University of Wisconsin was unconstitutional because it compelled them to fund private ideological and political groups on the Madison campus. They contended the university must grant them the choice not to fund those recognized student organizations (RSOs) that engage in political and ideological expression offensive to their personal beliefs.

The university responded that the fees enhanced the educational experience by stimulating advocacy and debate on diverse points of view, enabling participation in campus administrative activity and provided opportunities to develop social skills, all consistent with the university's broad educational mission. The state law defined the university's mission "to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities....and a sense of purpose" (Construing Wis. Stat. §36.07(1) (1993-1994)). Further, the University of Wisconsin Board of Regents argued that the mandatory fee doctrine established by the U.S. Supreme Court in Abood and Keller was not applicable for two reasons. First, the student organizations that were being subsidized by the allocable fee did not purport to speak for all students. Second, unions and bar associations did not offer the opportunity for dissenting members to work in the democratic process, unlike ASM.

It appeared that, like other previous lower court decisions, the United States District Court's goal was to strike a balance between two very significant
competing interests - the student's constitutional right not to be compelled to financially subsidize political or ideological activities balanced against the Board of Regent's authority to promote the university's educational mission by providing opportunities for the free expression of diverse viewpoints on difficult and challenging issues. Judge Shabaz found the Regents' first argument to be without merit and the second to be without difference because in Keller, attorneys were required to be members of the state bar association and were provided an opportunity to work within the democratic system to elect their own representatives. He seemed to be swayed by Justice O'Connor's concurring comments in Rosenberger. O'Connor stated that, "although the question is not presented here, I note the possibility that the (mandatory) student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees" (Rosenberger at 2527 (O'Connor, J, concurring)). Thus, would the student have the First Amendment right to demand a pro rata return of fees allocated for speech he/she does not agree with? Justice O'Connor also cited Abood and Keller suggesting that these cases were pivotal in determining the constitutionality of mandatory student fees being used to subsidize political and ideological student organizations.

Judge Shabaz also appeared to agree with the Smith v. Regents of University of California, 4 Cal. 4th 843, 844 P.2d 500, cert. denied, 510 U.S. 863 (1993), for direction. That court addressed the educational function of the state university, describing it as "extremely broad; it potentially encompasses all of life"
Because of the broad function a state university served, the Smith court recognized the possibility that activities germane to the educational function of a university could impermissibly infringe upon a dissenting student’s constitutional rights. The California Supreme Court then reasoned that it must set a rational limit on the use of mandatory student fees in order to protect the constitutional rights of dissenting students.

The court relied on earlier school fee cases in reaching its decision. The court noted that in Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992), also known as Carroll I, the Second Circuit Court recognized that forcing students to contribute to the NYPIRG was an infringement on their First Amendment rights not to be compelled to speak. The Second Circuit did rule that the on-campus NYPIRG activities were germane to the university’s mission and, therefore, could justify an infringement; however, the NYPIRG off-campus’ activities were not narrowly tailored to the university’s mission and could not be justified as germane. In Galda v. Rutgers, 772 F.2d 1060, 1065 (1985), cert. denied 106 S. Ct. 1375 (1986), also known as Galda II, the Third Circuit Court recognized that NJPIRG offered some educational benefits to students; however, the court found that such benefits were incidental to the organization’s primarily political and ideological purpose. Accordingly, the Galda II court found that the incidental educational benefits NJPIRG offered were insufficient to justify the infringement of the dissenting students’ speech and associational rights (Southworth).

Judge Shabaz found that the California State Supreme Court in Smith determined that the cumulative holdings in Carroll I and Galda II, in addition to
Abood and Keller, stood for three principles. First, a state university may support student organizations through mandatory student fees because the use of the funds can be germane to the university's educational mission. Second, at some point, the educational benefits that funded student groups offer may become incidental to the group's primary function of advancing its own political and ideological interests. Third, while the funding of those student groups may still provide some educational benefits to students attending the university, the incidental benefit to the students' education will not justify the burden on the dissenting students' constitutional rights. The U.S. District Court in Southworth found these principles to be persuasive.

The district court decided that it was not necessary for that court to determine if each of the eighteen groups challenged offered educational benefits that might justify an infringement upon the students' speech and association rights. The court held that so long as more than an insignificant number of student organizations were using their funding from allocable fees to engage in primarily political or ideological activity, the university infringement upon the students' First Amendment rights could not be justified.

The trial court concluded that there were clearly many instances where portions of the mandatory student fees were being used to create a forum for student organizations to express their views. However, there were a number of situations where portions of the allocable fees were being used clearly to fund political or ideological activity and not to provide a forum for the free exchange of ideas. Furthermore, the court concluded that it would be distorting the facts to
say that these activities, which were purely political and ideological in their nature, were offering students services or creating a forum for the exchange of ideas.

The U.S. District Court found in favor of the students' First Amendment right not to be compelled to speak or associate. Because it had been determined that the educational benefits of some of these student organizations were only limited and incidental to their primary political or ideological purposes, the funding of these student organizations was not germane to the university's function and, accordingly, not narrowly tailored to avoid the unnecessary infringement of the students' First Amendment rights. The U.S. District Court granted the student's declaratory relief and injunctive relief. The court ordered the Regents of the University of Wisconsin to stop the funding of private groups that engage in political or ideological advocacy. Further, the Regents were ordered to publish written notice of student organizations engaging in political and ideological speech, the type of activities these organizations were engaged in, recipients of these fees, and the pro rata share of mandatory fees devoted to these organizations; and to establish an arbitration process for disputes over the amount of fees being paid. The injunction also established detailed and specific procedures that the Regents were to undertake to administer the distribution of mandatory student activity fees. The court's injunction further rejected the referendum mechanism as a proper procedure for distribution of student fee.

The Regents appealed Judge Shabaz's decision to the 7th Circuit Court of Appeals. In 1998, Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998), was heard
and decided. The question before the appellate court was very limited: Can the Regents force objecting students to fund private organizations, which engage in political and ideological activities, speech, and advocacy?

Circuit Court Judge Manion wrote the opinion for the unanimous panel and issued the decision on August 10, 1998. The court concluded that the Abood and Keller analyses, and the three-prong test of Lehnert, governed the students' First Amendment challenge of the Regents' mandatory student fee policy. No other court had ever relied upon Lehnert before. The Lehnert test is a three-prong test consisting of germaneness, vital policy interests of government, and burdening of free speech. The court held that the Regents had failed to sustain their burden under the three-prong analysis. Even if funding private political and ideological organizations was germane to the university's mission, the forced funding of such organizations significantly added to the burden of the students' free speech rights. Therefore, the court held that the Regents could not use the allocable portion of objecting students' mandatory activity fees to fund organizations, which engage in political or ideological activities, advocacy, or speech. The court also held that the eighteen challenged private organizations engaged in ideological and political activities and speech, and could not be constitutionally funded with objecting students' fees.

The court described the U.S. District Court's injunctive relief by saying that it established detailed and specific procedures that the Regents must undertake to administer the distribution of mandatory student fees. However, the court held that it was inappropriate to issue such an injunction stating that federalism...
required caution in ordering states what to do (Southworth). The Seventh Circuit Court reversed the injunction stating that “until it appears that the state will not comply with (an injunction commanding compliance with the law), there is no occasion for the entry of the complicated decree that treats the state as an outlaw and requires it to do even more than the ...law requires” (Southworth at 734). The court further stated that detailed mandatory injunctions should be last resorts and the U.S. District Court’s injunction went much further than enjoining the Regents from using objecting students’ mandatory fees to fund organizations that engage in political and ideological activities. The injunction set forth detailed measures that the Regents had to undertake. Because the Constitution did not mandate this exact procedure, and because the state had not yet refused to comply with a general negative injunction – saying what the State cannot do – the Seventh Circuit struck down the injunction.

The students also contended that each individual student, not the university, should have the final decision to fund an advocacy group before his or her fees were paid to the university and that the university should not define private groups’ advocacy as a service to other students in order to require students to fund those groups. The Seventh Circuit Court agreed and reiterated that the university could not even temporarily collect from objecting students the portion of the fees that would fund organizations that engage in political and ideological activities, speech, or advocacy, whether or not the organization also provided some a service by doing so. In doing this, the Seventh Circuit Court endorsed
the remedy allowing students to opt out of the mandatory student fee that would be ultimately earmarked for objectionable groups.

On August 31, 1998, the Board of Regents filed a petition for rehearing with a suggestion for rehearing en banc. The three judges on the original panel voted to deny rehearing and a majority of the judges in active service voted to deny rehearing en banc on October 27, 1998. Four judges wrote two dissenting opinions. Judges Walter J. Cummings, Ilana Diamond Rovner, Terence T. Evans and Diane P. Wood dissented from the denial of rehearing en banc. Judge Rovner wrote a dissenting opinion joined by Judges Wood, Cummings, and Evans. According to Rovner, the question concerning First Amendment issues warranted being heard before the full court, first, because the Seventh Circuit panel's opinion conflicted with the Second Circuit Court; and second, the Seventh Circuit panel had extended the prohibition against compelled speech beyond what had been recognized by the Supreme Court.

While acknowledging Abood and Keller to be the precedents for compelled speech, Judge Rovner made an argument that there is a distinct difference between the fees in Abood, Keller, and university study fees in Southworth. In Abood and Keller, the recipients of funding were engaging in direct and indirect political and ideological speech. In fact, they were funded because of their political and ideological positions, and for the purpose of enhancing those positions. In Southworth, the recipient of funding (student government) was not engaging in challenging speech and the challenged speech was not attributable to student government. Rovner argued that the students were not paying fees to
challenged groups, but instead to student government. Student government, in
turn, used the money to fund its own operations and over 100 student groups
regardless of viewpoint. Student government did not align itself with any political
or ideological viewpoint and, therefore, was not speaking. If student government
were not speaking, Rovner posed the question, how could that be considered
compelled speech?

Rovner disagreed with the circuit panel’s decision not to address each
challenged expenditure individually and to analyze the proper balancing of each
one. Instead, the circuit panel declared that political and ideological speech, as a
whole was not germane to the university’s educational mission. Rovner asserted
that such a position defied previous U.S. Supreme Court decisions regarding the
importance of robust debate and free expression in a university setting (Healy v.
James, 408 U.S. 169, 180-81 (1972); Keyishian v. Board of Regents, 385 U.S.
believed that the panel’s interpretation of Galda I & II was flawed because in
those decisions the fee was targeted specifically for the objectionable group, not
a forum of all groups, and was granted for the purpose of funding the challenged
group’s objectives.

Finally, Rovner argued that the panel failed to recognize that the burden
on the students’ speech (Lehnert) was lessened because of the availability of the
same funding for opposing speech. Again, this illustrated a difference between
Southworth, Abood and Keller. In Abood and Keller, the union was the sole
determinant of the speech. In Keller, the bar association received the funds and
controlled the speech. In Southworth, the mandatory student fees were available to a variety of student organizations and supported multiple viewpoints. Student government was the vehicle by which the fees were disbursed and espoused no particular views of its own. According to Rovner, where the same funds were available for them to express their disagreement, the burden of their speech was minimal.

Rovner's dissenting opinion drew distinct differences between Abood, Keller, and Southworth in particular within the context of viewpoint neutrality. The dissent made mention of the forum that the Southworth funding created and criticized the panel for not recognizing the important role universities play in creating marketplaces for ideas.

Judge Diane Wood wrote another opinion dissenting from denial of rehearing en banc. Judges Rovner and Evans joined. Judge Wood laid out three principles in her dissent. She believed that the en banc review was appropriate for several reasons: There was a conflict between the circuits; important and unsettled questions of law persisted, particularly because the panel had relied so heavily upon Lehnert; and the panel's decision appeared to create serious conflicts with the premise that supported the Rosenberger decision.

Wood took issue with the panel's premise that the fees were a compelled subsidy of speech itself, rather than a compelled subsidy of a neutral forum for speech. According to Wood, Rosenberger provided strong support for the premise that the mandatory student activity fees created a forum for expression.
available to a diversity of views from private speakers. Access to that forum, according to Rosenberger, had to be handled on a nondiscriminatory basis. Wood disagreed with the panel's position that there is no distinction between a forum for speech and the speakers who use that forum. Wood, again, turned to Rosenberger to argue that there are different principles that control the analysis of compelled funding of a neutral forum than just compelled funding of particular group. She illustrated this point by noting that taxpayers support the Mall in Washington, D.C., where speakers with a variety of viewpoints use the facility. Students also paid tuition and undoubtedly disagreed with the viewpoints of some faculty. However, the university did not endorse the viewpoint of the faculty members and the ASM did not endorse the viewpoints of speakers. Wood concluded that the university and the ASM did nothing more than creates a forum for expression with tuition and student fees.

Wood continued by contending that it was more appropriate to utilize the forum-creation analysis, associated with Rosenberger, rather than the Germaneness Test that was associated with Abood. According to Wood, Abood and Keller provided very little guidance for deciding student fee cases. Neither the union nor the bar association in Abood and Keller created a viewpoint neutral forum. These organizations were actually pursuing their own political agendas and specifically funded only those activities or organizations that supported the viewpoints of the union or bar association. In the Southworth case, students were required to fund the ASM and the ASM funded a variety of organizations regardless of viewpoints, even encouraging conflicting viewpoints. The unions or
bar associations were subjected to additional First Amendment constraints because the service fees collected did not create a forum for expression. Hence, it was appropriate to allow dissenters to opt out of the funding of political expression. According to Wood, the university satisfied the First Amendment's concerns with the plurality of views inherent in viewpoint neutrality by using mandatory student fees to create a public forum. Wood was asserting that Abood and Keller simply did not apply in the Southworth case. Wood also did not agree that Lehnert was a compelling precedent for Southworth. The Lehnert decision, like Abood and Keller, was involved with the constitutional limitations upon the use of union dues, required as a condition of employment, to be used for payments to organizations engaged in one-sided political speech and not a viewpoint neutral forum.

Wood feared that an opt out remedy would result in hit lists of organizations that students objected to. Also, the heavy administrative requirements to solicit and process the individual preferences of over 40,000 students would most likely result in elimination of the forum altogether. To Wood, the opt out remedy would lead to less speech when what was need on a university campus was more speech, not less. The elimination of such forums would also deprive the students of the opportunity to develop skills required to run a student association, student union, etc.

On January 25, 1999, the University's Board of Regents petitioned the United States Supreme Court for a writ of certiorari arguing that the Southworth case should be added to its docket because of its great national importance. The
arguments presented in the dissenting opinions for a rehearing *en banc* in the
Seventh Circuit Court would find their way into the Board of Regents' Petition for
*a writ of certiorari* and, ultimately, their written and oral arguments presented to
the U.S. Supreme Court.

The Board of Regents' Petition for a  

*Writ of Certiorari*

The Regents' petition for *certiorari* argued that the first question before the
U.S. Supreme Court was whether the First Amendment was violated when a
public university used a portion of student activity fees paid by students, who
have chosen to matriculate, to fund forums for the expression of a wide-range of
ideas on diverse topics. The parties had stipulated that the funds were
distributed on a viewpoint neutral basis (Stip. at 13). So the question presented
to the Court was that previously reserved in *Rosenberger*, whether an objecting
student has the First Amendment right to demand a pro rata return to the extent
the fee is expended for speech to which he or she does not subscribe
(*Rosenberger* at 851 (O'Connor, J., concurring)).

The second question presented involved whether the First Amendment
was violated when a public university uses a portion of student fees to fund
organizations that provide student services. This question arose out of by the
parties' stipulation that these organizations provided services to a significant
number of the students on campus (Stip. at 13). Up to that time, courts had not
addressed these two questions separately but instead treated student service
organizations and/or the services themselves as though their principal purpose was political or ideological advocacy and subjected them to strict First Amendment analysis (Petition for writ of certiorari, at 9, Southworth).

The Regents requested that the U.S. Supreme Court grant their petition for a writ of certiorari for the following reasons. First, the circuits were split on how or whether to apply the analysis of Abood and Keller to the disputes regarding mandatory student activity fees. In Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992) (Carroll I), the Second Circuit ruled that it was in the university’s interest to promote extracurricular activities, teach civic duty, and to provide for energetic student debate and thus justified an infringement upon students’ First Amendment rights. On appeal and after remand, the Second Circuit held in Carroll v. Blinken, 42 F.3d 122 (2d Cir. 1994) aff’d 899 F.Supp 1214, (Carroll II), that student activity fees could be used for activities that foster a marketplace of ideas; activities that provide students with hands-on educational experiences; and extra-curricular activities for students both on and off the campus to fulfill SUNY educational objectives. In Hays Guardian v. Suopple, 969 F.2d 111 (5th Cir. 1992), cert. denied, 605 U.S. 1087 (1993), the Fifth Circuit found that a university’s educational goals justified the subsidy of a university-sponsored newspaper. In Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983), the Fourth Circuit held that the university’s partial funding of a student newspaper through mandatory student fees was constitutional. In Galda II, the Third Circuit Court used the Abood and Keller Germaneness Test and concluded that the New Jersey Public Interest Research Group’s educational benefits were incidental to
the organization's primarily political and ideological purposes. However, that
court also acknowledged the importance of, and the distinction when, a forum is
created with funds.

State supreme courts were also split on this First Amendment issue. In
Smith v. Regents of University of Cal., 4 Cal. 4th 843, 844 P.2d 500, cert. denied,
510 U.S. 863 (1993), the California State Supreme Court held that no student
group could claim to be a public forum. When the educational benefits a student
group offers to the campus community become incidental to the group's primary
objective of advancing its own political and ideological interests, it cannot be
funded with compulsory fees. In Good v. Associated Students of University of
Washington, 86 Wash. 2d 94, 542 P.2d 762 (1975), the court held that
mandatory fee funding was constitutional when balanced against the university's
purpose of presenting a broad spectrum of ideas, so long as expenditures were
within the laws that authorized them. In Larson v. Board of Regents of University
of Neb., 204 NW2d. 568 (1973), the court held that mandatory fees to fund a
student newspaper, student government and speaker's program to be
constitutional because they are part of the educational process so long as many
viewpoints are expressed.

The Regents also argued that the Seventh Circuit Court's decision
undermined the traditional role of universities as centers of free speech and the
tradition of student-run activities. The U.S. Supreme Court had long recognized
the unique role of universities in providing opportunity for a wide range of
expression even if that speech is political and ideological. The mission of the
University of Wisconsin System had been established by statute and represented the broad role a public university plays in the community. This was in stark contrast to the narrow roles of unions and bar associations as stated in Abood, Keller, and Lehnert (Petition for writ of certiorari at 23, Southworth).

Petitioners also contended that the Seventh Circuit Court also failed to recognize the critical difference between being forced to support the speech of a particular group and being compelled to provide funding to create a forum for speech by any group. To the Board of Regents, this was a fundamental distinction at the heart of First Amendment jurisprudence. The whole point of a forum and its special First Amendment status is that anyone and everyone can use it, no matter how offensive their speech may be to some (Petition for writ of certiorari at 23, Southworth). So, the Seventh Circuit Court clearly erred in using the compelled speech analysis rather than the forum creation analysis. By using the compelled speech analysis, the court failed to recognize that both parties had agreed that a forum was created with the student activity fees, that the funded student organizations did not speak for the university or even for the student body (Petition for writ of certiorari at 23, Southworth).

Petitioners also faulted the Seventh Circuit's decision because it included all organizations that provided services to students within an umbrella of political and ideological advocacy. This appeared to disregard the stipulation that certain student organizations provided services to significant numbers of students and failed to consider the importance of these services, separate from any advocacy (Petition for Writ of Certiorari at 23, Southworth). The Board of Regents ended
their petition by saying that a decision by the U.S. Supreme Court was needed to give guidance to public universities across the nation concerning collecting and distributing student activity fees.

While the Regents' petition was pending before the U.S. Supreme Court, another similar case was decided in the Ninth Circuit Court. Students at the University of Oregon sought relief under the First and Fourteenth Amendments to the U.S. Constitution, in Rounds, et. al., v. Oregon State Board of Higher Education, 166 F.3d 1032 (9th Cir. 1999). Oregon statutory law allowed the imposition of student fees to finance programs under the supervision and control of the Oregon State Board of Higher Education. The State Board argued that such financing of programs contributed to the cultural and physical development of students. Over eighty university organizations received funding from fees during the 1995-96 academic year, including two campus newspapers, the Muslim Student Association, Amnesty International, Students for Choice, the Lesbian and Gay Alliance, Men and Women Against Rape, and the National Lawyers Guild. In addition the OSPIRG EF, a nonpartisan statewide organization run entirely by students to address student concerns, was also funded. Its mission was to "develop students' potential to become educated and responsible citizens who are informed about the American legislative process and political system" (Rounds at 1458). Students complained that the collection of the fees was a condition of their matriculation at a state institution and the distribution of a portion of the proceeds to OSPIRG EF compelled them to speak in support of
beliefs they did not hold and infringed upon their freedom not to associate with an organization with which they strongly disagree (Rounds).

The Ninth Circuit Court compared the issues of the Oregon case with other cases that had set precedents in the past. In Carroll I, the Second Circuit struck down automatic membership to organizations that receive student fees. The Oregon system did not compel students to associate with the OSPIRG EF. They were neither afforded automatic membership by paying fees, nor were they required to participate in OSPIRG EF’s activities (Carroll I). In Carroll II, the Second Circuit Court upheld allocations to the New York PIRG as long as that organization spent equivalent of student contributions on campus and served the university’s mission of fostering the marketplace of ideas (Carroll II). In Galda II, the Third Circuit Court disapproved of an earmarked mandatory student fee paid directly to the New Jersey PIRG. The New Jersey PIRG’s mandatory fee was separate from the general student fee as it created a forum that only supported New Jersey PIRG’s viewpoints. Further, the educational benefit afforded by the New Jersey PIRG was only incidental and “subordinate to the group’s function of promoting its political and ideological aims” (Rounds at 1466). In the Oregon case, the court cited the distinct separation between OSPIRG EF’s educational and political functions. Further, the university’s funding was limited to the educational activities only.

Accordingly, the Oregon case differed from Abood in terms of the communication issue. In Abood, the plaintiffs alleged that they had no control over the union’s communications, and these communications were one-sided.
presentations of the union's viewpoint. The mandatory fees in *Abood*, therefore, enhanced the power of one, and only one, ideological group to further its political goals. In contrast, the OSPIRG EF in the Oregon case increased the overall exchange of information, ideas and opinions on the campus *(Rounds)*.

While the court had already stated that this was not a case of compelled association, it concluded that the principles of *Abood* and *Keller* were still applicable. Therefore, ideological activities funded by the mandatory incidental fee had to be germane to the purposes for which the compelled association was justified to pass strict constitutional scrutiny *(Keller)*. Thus, the Germaneness Test was applied in *Rounds*. The Ninth Circuit Court first held that the goals of the university were much broader than the goals of a labor union or a state bar, and they were inextricably connected with the underlying policies of the First Amendment *(Rounds)*. The Ninth Circuit Court then turned its attention to *Rosenberger*, which held that there are extracurricular activities that are related to the educational purpose of a university. In the Oregon system, according to the court, the mandatory student fees were authorized by Oregon statute, Or. Rev. Stat. §351.070(3)(d) (1997), to finance programs the Board of Higher Education deemed to be advantageous to the cultural or physical development of students. According to the Ninth Circuit Court, the university had developed an adequate system of dispersing fees that would ensure legal compliance *(Rounds)*.

In order to qualify for funding, an organization had to first be recognized by the University of Oregon's Associated Students. Criteria for recognition included
a requirement that the organization engaged in activities of common interest of students. If recognized, the organization could apply for funding by submitting a budget request. Organizations were funded by either approval of a majority vote of the entire student body (referendum) or through a budget process that included approval by various committees of the Associated Students as well as the Student Senate. The university president and the Board of Higher Education then approved the budget allocation. Specific disbursements were monitored. In order to obtain payment, organizations had to submit documentation and a certification that the funds were expended for the purposes authorized by the Associated Students and the university. In accordance with Rosenberger, the university created a limited public forum that encouraged a "diversity of views from private speakers" (Rosenberger at 834).

The Ninth Circuit Court held that in this context, the activities of OSPIRG EF were germane to the university's purpose. OSPIRG EF differed from other PIRGs in that it was a nonpartisan organization whose objective was to provide college students hands-on experience in recognizing, researching and solving the problems of society through offering internships, sponsoring conferences and workshops, providing research reports and leadership training. The U.S. District Court held that OSPIRG EF did not have programs that do not meet the university's educational objectives. The district court further noted that the plaintiffs conceded that there clearly was an educational benefit from the Education Fund's programs. When asked for something more specific in the
record indicating a lack of constitutionality, the plaintiffs provided nothing persuasive.

The Ninth Circuit Court agreed with the U.S. District Court and ruled that OSPIRG EF's activities were germane to the purpose for which the mandatory exaction of fees was imposed as a matter of law and that the distribution of funds to OSPIRG EF served a legitimate governmental interest that did not violate the First Amendment. In its concluding remarks, the Ninth Circuit Court mentioned the Southworth case and concluded, "To the extent that Southworth holds that a public university may not constitutionally establish and fund a limited public forum for the expression of diverse viewpoints, we respectfully disagree" (Rounds at 1470). The Ninth Circuit Court sided with the university by affirming the judgment of the U.S. District Court. Finally, the Rounds decision emphasized the split in the federal circuit courts re-enforcing the Regents' argument that the issue was ripe for a Supreme Court review.

Supreme Court Brief Petition Analysis

The U.S. Supreme Court granted the Board of Regents' petition for a writ of certiorari on March 29, 1999. The following outlines the written argument the Board of Regents filed in their brief before the Court. The first question set for consideration by U.S. Supreme Court was whether the First Amendment was violated when a public university used a portion of student activity fees paid by students who have chosen to matriculate to fund a forum for the expression of the wide-range of ideas on diverse topics.
The second question involved whether the First Amendment was violated when a public university used a portion of student fees to fund organizations that provide student services.

The Board of Regents argued that compelled funding of student services and creation of a limited public forum for robust debate in a university setting did not constitute compelled speech or association in violation of the First Amendment. While the First Amendment included a right not to speak and a right not to associate in certain circumstances, the Regents argued that the Court had also recognized the unique role of universities as places for development, expression, debate, and synthesis of ideas, inside and outside the classroom, citing Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978); Healy v. James, 408 U.S. 169, 180-81 (1972); Keyishian v. Board of Regents of the University of the State of New York, 385 U.S. 589, 603 (1967). The appellants also contended that the Court had recognized that a public university, at least for its students, possesses many characteristics of a public forum (Widmar v. Vincent, 454 U.S. 263, 267 n5 (1981)).

They also stated that in Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983), the Court further recognized three different types of forums. First, the traditional public forum – parks and streets; second, the limited or non-traditional forum where government opens up its property, for a specific purpose, for public expression – schools after hours; and third, the non-public forum simply not a forum at all. For the first time since Perry, the Court, in Rosenberger, held that a public university created a limited
public forum by providing funds to cover publication costs of student organizations. The U.S. Supreme Court also held in Rosenberger that the student activity fees created a limited public forum (funds) of money and that once established, the forum had to be made available on a viewpoint neutral basis. In fact, what had become the Limited Public Forum Doctrine (and it is still evolving) demands that when a university imposes viewpoint-based restrictions in limited public forums, the university must justify such restrictions by a compelling interest that is narrowly defined. However, a university may restrict a limited public forum to certain subjects (topics) (McGill, 2000). The facts concerning student funding in Rosenberger were very similar to the University of Wisconsin’s funding program. Rosenberger addressed the disbursement and Southworth addressed the collection.

The Board of Regents of the University of Wisconsin further argued that the compulsory payment of a fee to establish a limited public forum for student expression and to provide services to a significant number of students did not fall within the category of compelled speech under the Abood and Keller precedents. Adopting the argument of rehearing dissenters Judges Rovner and Wood, the Regents noted that the panel had erred in using a compelled speech analysis instead of the forum creation analysis (Petitioner’s Brief, Regents of the Univ. of Wis. Sys. et. al. v. Southworth et. al. 120 S. Ct. 1346 (2000). Further, the Regents claimed that no argument was ever made in Abood and Keller that the expressive activities of the union and bar association were forum related. The fees collected in Abood and Keller were used to support a single point of view. In
Southworth, the student activity fees collected by the university were used to fund a variety of points of view on a viewpoint neutral basis. This collection and disbursement of funds to RSOs on a viewpoint neutral basis was very similar to the construction of a classroom, auditorium, university mall, or other university facility made available to student groups for meetings, rallies or speeches.

Further, the Regents' brief noted that there has never been a decision by the U.S. Supreme Court that recognized a First Amendment right to opt out of funding a forum. The fundamental First Amendment response to individual sensitivities to ideas found objectionable has always been more speech, not less. Since political speech is the central concern of the First Amendment, it is appropriate for government to establish a forum for it to take place.

The Regents' brief also challenged the conclusion of the Seventh Circuit Court that it was imperative that students not be compelled to fund organizations that engage in political and ideological activities. That, according to the Seventh Circuit Court, was the only way to protect individual rights. The Regents argued, instead, that the First Amendment was not offended when liberal and conservative students were required to share equal costs for creating a forum that allows the expression of all viewpoints. Objecting students are, therefore, free to associate and participate in the forum to ensure their opinions and views are expressed.

Then the Regents' brief outlined the circumstances of creating a forum funded by student activity fees at the University of Wisconsin, Madison: First, the university had created a forum open to all RSOs; second, the objecting students
admitted that the views of the groups were not likely to be considered individual
groups and the ASM required a disclaimer that the views of the funded
organization were not the views of the student government; third, neither the
Board of Regents nor the student government was dictating a specific message
as both parties had already agreed that the forum was viewpoint neutral; and
fourth, the objecting students and other students were free to form their own
student groups and receive the same funding to express their views or
disagreements with the views of any other student group.

Wis. Stat. § 36.09 (1993-1994) authorized the student governments to
distribute the mandatory student fees and these fees were maintained separately
from tuition revenues. It was not uncommon for funded organizations to engage
in some type of client advocacy. There also had been no recognized right to opt
out of supporting government programs funded by general tax revenues on the
basis of objection of conscience.

This case, as in Rosenberger, student groups were funded in order to
facilitate the expression of a broad spectrum of ideas. The Regents argued that
students were not being compelled to speak or associate, and their challenge to
providing general support to the creation of a limited public forum should be
rejected. The Wisconsin Legislature had specifically authorized the collection of
student activity fees by the Board of Regents, directing that primary responsibility
for distributing such funds be delegated to the students, in accordance with the
principle of shared governance (Petitioner's Brief, Regents of the Univ. of Wis.
§36.09(5) (1993-1994)). The Wisconsin Legislature had also defined as part of the University of Wisconsin’s mission the extension of the application of knowledge beyond the classroom, even beyond the campus (Petitioner’s Brief, Regents of the Univ. of Wis. Sys. et. al. v. Southworth et. al. 120 S. Ct. 1346 (2000)) (Construing Wis. Stat. §36.01(2) (1993-1994)). The difference between a university’s function and that of a labor union or professional association rendered the financing of diverse public expression on a viewpoint-neutral basis proper. That is, it was germane to carrying out the university’s essential function of education.

The Students’ Response Brief Submitted to
The U.S. Supreme Court

The students’ response to the Regents’ brief is outlined. According to the students, analysis of the university’s mandatory student fee program should have begun with the right not to speak. Because the fundamental right of freedom of speech is at the heart of this challenge, the students argued that the university must show compelling state interest to compel student speech, and further, that the restriction on free speech must be implemented by the least restrictive means to justify the compelled funding. The mandatory student fees program was not necessary to promote diverse and robust debate on campuses because over 70% of the student organizations receive no funds from the mandatory fee.

Next the students set out to distinguish the Rosenberger precedent. The use of a nonspatial forum (as in Rosenberger) did not apply in this case.
Rosenberger addressed how student fees are disbursed and, therefore, was of limited value in deciding Southworth. The coerced fees cases (like Abood and Southworth) addressed how student fees money was collected and thereby provided relevant guidance to the Court. Thus, the Seventh Circuit judgment should be affirmed.

There is a fundamental First Amendment principle that a person has a right not to speak. Government cannot compel individuals to speak or to fund the advocacy of others. The respondents' brief noted that in Abood the Court ruled that government requirements compelling teachers to contribute to the union's political advocacy violated the teacher First Amendment rights when the advocacy was not germane to collective bargaining. This ruling was extended to mandatory bar association dues in Keller.

The respondents' continued claiming the university violated the First Amendment by forcing students to contribute to a fund that gives money to various campus groups in order to accomplish an advocacy. Further, there was no way for students to be excused from paying a portion of the fees to groups they objected to. This was also an infringement on the First Amendment.

The students' brief also asserted that when government infringes on a person's First Amendment rights, it must demonstrate a compelling interest to do so and the Strict Scrutiny Test should be applied (Widmar v. Vincent, 454 U.S. 263 (1981)). In addition to the obligation to show a compelling state interest, the university must fulfill the Germaneness Test to satisfy constitutional mandates established by prior court precedent.
In holding the student fee program unconstitutional, the Seventh Circuit Court did not use the Compelling State Interest Test. Instead, it applied its own version of a Germaneness Test, distinct from and less rigorous than the Compelling State Interest Test (Lehnert), and found that the Regents' program could not stand. Lehnert was an awkward application and should not apply in Southworth because the university had not first demonstrated that it had a compelling interest to support the use of the coerced funding of student activities and organizations. The students contended that the U.S. Supreme Court should correct the Seventh Circuit's mistake and analyze this case according to a straightforward Compelling Interest Test outlined in Abood and Keller. In addition, the Court should clarify that the Germaneness Test was a specific application of the Strict Scrutiny Test, used only when a portion of a mandatory fees was justified by compelling state interest. The Germaneness Test would sort out which expenses may be charged to the unwilling contributors as necessary for furthering the compelling state interest and which expenses may not.

The brief continued stating that the university had failed to show a compelling state interest to support collection of fees accomplished by the least restrictive means. The students also asserted the university could not define its educational mission so broadly that it violated the First Amendment rights of students. Since government generally cannot use compelled fees to promote the First Amendment; so neither should the university.
The brief continued that in a marketplace of ideas at a state university or elsewhere, the First Amendment prohibits government from compelling people to fund the speech of others. The reason for this is that the First Amendment leaves the ultimate decisions of which ideas to accept or reject to the individual, not the state. The reason why the First Amendment leaves the decision of what ideas to support financially to the individual is because the decision of whom to fund is ultimately based on personal values and moral systems. In this case, the university distorted the natural workings of the marketplace of ideas with its fees coerced from the students.

The brief then turned to arguments showing that the university student fee system was not the least restrictive means to further student exposure to a wide range of ideas. First, many student groups expressed a wide range of viewpoints on campus without receiving any funding from the mandatory fee. Approximately 70% of the student groups operated successfully on campus without using money coerced from other students. Second, the university did not actively work to make sure it actually funded diverse or under represented viewpoints. The university did not determine what viewpoints were under represented on campus and then fund those groups espousing those ideas in order to broaden the viewpoints expressed on campus. Third, the university contradicted its goal of promoting diverse viewpoints by prohibiting funding to partisan political groups and religious groups. This shows that the university’s formal fee system policies did not promote all viewpoints when other countervailing interests became more significant. The policy created the interesting anomaly that the mandatory fee
would not fund the Republicans or Democrats but would fund the political activism of the nonpartisan groups like the International Socialist Organization, WISPIRG and the UW Greens.

Rosenberger did not answer the question in this case because Rosenberger addressed how student fees are distributed. Abood and Keller were applicable in this case since they addressed the principle for how fee money is collected. However, there was no inherent tension between Abood and Rosenberger as it addressed the protection for those who receive funding and not those who pay mandatory fees. Rosenberger principles and the Abood principles both flow from the First Amendment, thus, the university should implement both sets of principles at the same time. First, the Rosenberger-Widmar line of cases should be implemented by allowing RSOs, whatever their viewpoint, to apply for funding; and the Abood-Keller line of cases should be implemented in order to exempt all objecting students from paying for the forum by funding certain student groups. To implement both sets of principles would protect people from viewpoint discrimination in two different ways. All student groups, no matter what their viewpoint, would be eligible to seek funding from the student fund, whatever the size of the fund (Rosenberger-Widmar). Students would be protected from funding viewpoints they did not wish to voluntarily support financially (Abood-Keller) – no exclusions due to viewpoints, no compulsions due to viewpoints.

Rosenberger should not apply to this situation in which a campus group received funding by direct referendum, because no Rosenberger limited public
forum existed in a referendum context. Through the referendum process, the students approved a per capita assessment on each student for WISPIRG alone. The referendum process did not create a Rosenberger forum of money because only one group was funded. The referendum mechanism was flawed because it allowed a majority of students to force every student to fund WISPIRG.

The Abood-Keller principle applied to the referendum funding system because the university compelled the student to pay the fee imposed by the referendum. Abood-Keller applied to collection situations involving mandatory fees, whether generated by referendum or a Rosenberger limited public forum. The argument that the student fees funded many groups rather than one union as in Abood or one bar association as in Keller was constitutionally irrelevant.

To claim that the students were funding a non-spatial forum and were not funding the various organizations obscured the reality of what actually happened. The mandatory student fees funded actual speech the groups expressed. Choosing to fund multiple voices did not nullify the employees' or the students' right not to fund political and ideological advocacy they found objectionable. "The money leaves the hands of the student and remains in the form of money when it reaches the various campus groups. The fee money funds the actual speech the groups express" (Southworth at 39).

Allowing students to opt out of paying the fee will not permit taxpayers to opt out of paying for parks, sidewalks and schools. Mandatory student fees were not tax revenue, as they did not produce general operating revenues. The typical university system gave the student government and Board of Regents significant
involvement in the process and wide discretion to decide which groups would have access to the forum money; unlike governments' passive role in scheduling use of parks and other physical forums for expressive activities by private groups. Then private groups or individuals may decide whether they want to use the physical forum. According to the students, the only way to protect the students' First Amendment rights is to allow them to decline to pay the mandatory fee. It would then allow the dissenting students to express their opposition to the ideas advocated by the funded groups.

The students argued that when a Rosenberger limited public forum was created with student fees, the funded group's expressive activity actually consumed the forum of money. That is, the group expended the money in order to advocate their ideas. Once finished the money was gone, so a second group could not reuse the same money to express opposite ideas; there was no guarantee of funding for the opposite views. Because the act of advocacy consumed a Rosenberger limited public forum, allowing the students Abood rights to opt out of paying the fee before the advocacy group spent it would be the appropriate way to protect the objecting students' right of conscience and right not to speak.

The objecting students requested the Court to issue the following remedies: Individual students, and not university officials, should decide which campus groups to support financially. The university's mandatory student fees program should not take students' money first and then require students to seek
a refund, as it did not meet Constitutional standards. Students should consent to the taking of their fees by the university.

Objecting students then proposed Constitutional alternatives for campus groups receiving funding that would not violate First Amendment rights. First, each student should designate which group he/she would like to fund. The adjusted total should be added to the fee statement and the student would voluntarily pay that amount. The university would pass the money through to the student groups. Each student should decide whether to fund a subsidized speech fund. The university would bundle all the advocacy groups' funding into one category and decide how much money it would award each group. On the fee statement, there would be a line for the subsidized speech fund. Each student would decide individually whether to check that box and add that amount to his/her statement.

The Regents' Reply Brief Submitted

To the U.S. Supreme Court

In their response, the Regents argued that the students never challenged the university's mandatory student fees program as not being in compliance with the Rosenberger requirement of viewpoint neutrality. In fact, according to the Regents, the students explicitly stipulated, "the process for reviewing and approving allocations for funding (to student groups) is administered in a viewpoint neutral fashion" (Petitioner's Reply Brief, Regents of the Univ. of Wis. Sys. et. al. v. Southworth et. al. 120 S. Ct. 1346 (2000) at 1). Further, the
students also acknowledged that the university had created a non-spatial forum for speech with the mandatory student fees. The students never presented evidence that there was a denial to a particular RSO based upon viewpoint neutrality. And, the U.S. District Court and U.S. Circuit Court of Appeals never based their decisions on the noncompliance with the viewpoint neutrality requirement. There is ample evidence presented in this case that the ASM grants funded diverse student speech. The regents agreed with the students that the referendum mechanism that funded a single group could not be regarded as a Rosenberger forum.

The Regents responded that the university's compelling interest, extending education beyond the classroom, was defined by Wisconsin Statutes and the mandatory funding of the Rosenberger forum accomplished this. In addition, they contended that provisions for services to a significant number of students was also an important function of the university. In the case of organizations that provide such services, political speech occurred. But it occurred in the forum created by the fees. The Regents further argued that the Compelling Government Interest Standard was not appropriate in this case because the students were compelled to fund a forum rather than fund the speech of a particular organization. The mandatory student fees created the Rosenberger forum. The compelled funding of a non-spatial Rosenberger forum should be treated the same way as compelled funding of a traditional, spatial forum, "it is the free choice of the student groups to apply for grants that determine which ideas will be expressed" (Petitioner's Reply Brief, Regents of
the Univ. of Wis. Sys. et. al. v. Southworth et. al. 120 S. Ct 1346 (2000) at 6).

Further, no membership or speech was compelled through the implementation of the mandatory student fees program. When speech through the forum is found objectionable, students have the right to use the forum to express their own ideas or views. Thus, an opt out remedy was not warranted. The mandatory student fees program actually established a process that would respond to objectionable speech rather than silence it. The student's slogan "no exclusion due to viewpoint, no compulsions due to viewpoints," offered no basis for this decision since, in *Abood* and *Keller*, dues were not distributed on a viewpoint neutral basis.

*Amicus Curiae Briefs Submitted on Behalf of the Board of Regents*

A total of fourteen *amicus curiae* briefs were filed in support of the Board of Regents of the University of Wisconsin System. All of them contained the general theme of the public forum creation and viewpoint neutrality being applicable to *Southworth* as opposed to the union cases and the Germaneness Test of *Lehnert, Abood* or *Keller*.

Fourteen states joined in writing one *amicus curiae* brief on behalf of the Board of Regents. They put forth the argument that since the student fees created a viewpoint neutral forum the university's mandatory student fees program did not burden the First Amendment. The states further argued that *Abood* and *Keller* were erroneously applied by the Seventh Circuit Court as these
cases compelled association with one particular group as opposed to an open, public forum that they contended was created with the student fees (Brief for the States of New York, et al., Southworth).

The State of Oregon presented its own amicus curiae brief and argued that Lehnert had no relevance to Southworth; that the Germaneness Test did not apply as it was the vital interest of the university to expose students to a variety of viewpoints. Rosenberger had implied that the fee exaction was different from the union cases. The State of Oregon feared most that forums would disappear under the burden of the Seventh Circuit Court's opinion (Brief for the State of Oregon, Southworth).

Many of the other organizations and interest groups that filed an amicus curiae brief on behalf of the Board of Regents echoed the above arguments. The ACLU agreed with the states that the student fees created a limited public forum that operated on a viewpoint neutral basis. The ACLU also argued that the opt out remedy was not appropriate in a limited public forum where the student fees supported the entire forum and not the speech in the forum. The ACLU likened the opt out remedy to a "financial heckler's veto" (Brief for the American Civil Liberties Union, at 22, Southworth).

The NYPIRG filed an amicus curia brief stating that Carroll I & II in the Second Circuit Court provided proper balance to the issues that were at stake in Southworth and the court correctly deferred to the educational judgment of the university. The NYPIRG argued that the Seventh Circuit Court had misapplied the Germaneness Test by analyzing whether students groups, rather than the
activities in which those groups engaged, were germane to the university’s mission. The NYPIRG stated that the university should not be required to determine which groups engaged in political and ideological speech and then restrict funding to those groups from the student fees. Such action would force the university to engage in potential viewpoint neutrality violations. Thus, monitoring the student groups would mean making value judgments about where the exact point a student group became too political or too ideological. Such a requirement could force the university to shut down a forum completely in order to satisfy concerns of a vocal minority. This would constitute a heckler’s veto. (Brief for the New York Public Interest Research Group, Southworth).

The Student Press Law Center, Associate Collegiate Press, and College Media Advisors joined together in an amicus curiae brief and argued that the university represented a marketplace of ideas with compelling interest in promoting a diversity of viewpoints. Student organizations, and especially the press organizations, depended heavily upon the student fees. These organizations stated that they would not be able to continue to publish without the help of student activity fees. They felt it was unnecessary for expressive activities of student organizations to be regulated so long as the funding mechanism was viewpoint neutral (Brief for the Student Press Law Center, the Associated Collegiate Press, and College Media Advisers, Inc., Southworth).
Amicus Curiae Briefs Submitted

On Behalf of the Students

A total of thirteen organizations wrote amicus curiae briefs on behalf of the students. These arguments were much more diverse. The National Legal Foundation argued that the U.S. Supreme Court should embrace the Seventh Circuit Court’s use of Lehnert. Further, the Seventh Circuit Court panel’s analysis was simple and correct. The mandatory fees would not create a conflict with Rosenberger so long as the students were allowed to opt out. Without an opt out remedy, it would constitute compelled speech (Brief for the National Legal Foundation, Southworth). According to the National Legal Foundation, the issue was not forum-creation, but instead, a simple proposition stated by Thomas Jefferson and reiterated in Abood by the U.S. Supreme Court, “To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical” (Abood, at 234, n.31).

Owen Brennen Rounds submitted amicus curiae brief to the Court. Rounds previously challenged mandatory student fees at the University of Oregon. He argued that the compelled funding should be found unconstitutional because there were less restrictive means for government to pursue its educational goals than to require students to pay for political positions with which they disagree. Rounds further argued that unlike collective bargaining and the regulation of the legal community, education did not provide criteria sufficient to establishing the constitutionality of compelled funding. The lower court was correct in holding that subsidized political and ideological speech violated
objecting students' First Amendment rights even if the funding somehow promoted education (Brief for Owen Brennen Rounds, Southworth).

The Atlantic Legal Foundation previously represented the students in Carroll I and Galda II. The Foundation's amicus curiae brief stated that the prohibition of mandatory funding of political and ideological speech by private groups would not impair the educational function of the university as it was not germane to the educational mission of the university. The voluntary contributions would be sufficient to foster diverse political and ideological advocacy (Brief for the Atlantic Legal Foundation, Southworth).

The First Freedoms Foundation wrote an amicus curiae brief and argued that throughout the history of universities, the search for the truth depended on the conscience of the individual scholar to think for himself. Students who are compelled to pay for political or ideological speech don't have the opportunity to walk away from the speech they disagree with. Further, the foundation argued that the university should instill in students an "unassailable, 'Camelot'-like vision – that they should convince others by their enthusiasm and the force of their arguments, not by exercising the power of the state to extract support from their opponents" (Brief for the First Freedoms Foundation at 24, Southworth). The First Freedoms Foundation worried about how the university would implement a program that distributed fees to organizations on a viewpoint or content neutral basis. The act of selecting which group received the funds would almost always demonstrate a personal bias towards viewpoint. A small student committee made the final decisions over which groups would get funding. Such a policy did
not control the bias of the student group, thus, decisions reflected personal preferences and value judgments (Brief for the First Freedoms Foundation, Southworth).

The Family Research Institute’s *amicus curiae* brief argued that the forum analysis was workable only when addressing expenses paid from the fund. Income deposited into the fund, however, should be screened for compulsion. Further, if the purpose of the fund had only the incidental effect of promoting the expression of an idea or ideas, there was no constitutional harm. However, since in this case, the purpose of the money, at least in part, was to promote the advocacy of ideas or opinions, the First Amendment prohibited such compelled contributions (Brief for the Family Research Institute, Southworth).

In separate briefs, the Christian Legal Society, the Rutherford Institute, the National Right to Work Legal Defense, the Liberty Counsel, the Pacific Legal Foundation, and the National Smoker’s Alliance all provided the following same argument. First the Germaneness Test from *Lehnert, Abood* and *Keller* should have applied in *Southworth*. In addition, students should be allowed a remedy to opt out. The Pacific Legal Foundation represented Rounds in *Rounds, et. al., v. Oregon State Board of Higher Educaton*, 166 F.3d 1032 (1999), and argued that the university may have had compelling interest to expose students to various conflicting viewpoints, but it did not have compelling interest to coerce support for those viewpoints. Further, the Pacific Legal Foundation argued that providing an opt out remedy would serve three important purposes. First, an opt out remedy would require thought on the part of the students; second, it would encourage
students to organize and articulate to attract financial support; and third, it would send a strong message to the student body that the university respected the constitutional rights of all students and would make every effort to protect their rights (Brief for the Pacific Legal Foundation, Southworth).

Oral Arguments Before the

U.S. Supreme Court

On November 9, 1999 the U.S. Supreme Court heard the oral arguments of Southworth. Original transcripts were recorded verbatim and did not identify the justices who posed the questions. In some instances, justices were identified by the attorney when he or she responded to their questions. In the following presentation of the oral arguments, justices are presented in association with their questions when it could be ascertained.

Ms. Susan Ullman, on behalf of the Board of Regents, was first to present the University of Wisconsin System's argument to the Court. Through their questions, the justices immediately identified three different issues of interest to them. First, the funds were allocated through the student government in a viewpoint neutral manner. Second, they reaffirmed that funding also resulted from a referendum (the WISPIRG was funded through referendum, and the Court questioned whether such a mechanism was viewpoint neutral). Third, the justices confirmed that some of the funds were used or could be used for political activity. As dialogue continued, the Court focused upon the fact that student fees created the metaphorical, not physical, public forum. This led to another
question posed by the Court as to what were the reasons for adopting the forum analysis rather than to look directly at who gets the money (Germaneness Test)?

The Court gave close attention to the referendum that awarded significant funding to the WISPIRG. It appeared to the writer that Attorney Ullman did not convince the Court that the referendum, where 51 percent of student votes awarded $40,000 to the WISPIRG was viewpoint neutral. The Court articulated that the referendum was much different from the public forum analogy (Record at 14, Southworth) as there was little or no protection of the speech of the minority.

It was at this point, the Court and Counsel Ullman appeared to agree that the issues were culled down to two. First, there was the referendum. The Court questioned its viewpoint neutrality status, but also acknowledged that it might be necessary when such an entity provided a service. The second issue involved the use of funding to create a public forum (Record at 15, Southworth). The Court questioned Counsel Ullman about how she would defend the WISPIRG funding if she could not defend it according to the public forum analogy. Ms. Ullman replied that she would defend it as a service organization funded through a service mechanism (referendum). The Court pointed out that it is an organization that provided a service but also propagated its political views as well. When the Court noted the stipulation that funding was distributed on a viewpoint neutral basis, Counsel Ullman was asked if the stipulation applied to the referendum as well as ASM and GSSF funding mechanisms? Attorney Ullman stated that it did and also admitted that student government voluntarily viewed the referendum as binding.
When Mr. Jordan Lorence, attorney for the objecting students, began his argument before the Court, he claimed that the referendum was not a forum and, therefore, Rosenberger was inapplicable. The Justice O'Connor reminded Mr. Lorence of the stipulation, but agreed to allow him to argue that the stipulation should not include the referendum mechanism. Mr. Lorence argued that the referendum went beyond the precedents of compelled speech, Abood and Keller, and that the two other funding mechanisms, ASM and GSSF were more aligned with Rosenberger (Record at 29).

The Court then attempted to determine exactly where the objection existed. Was the students' objection directed towards the way the funding program was administered, or was the source of funding objectionable? Justices asked Mr. Lorence if the University of Wisconsin could salvage the program by abolishing student fees and increasing tuition in exactly the same amount? Mr. Lorence replied that there would be no challenge because it would be part of government (the University of Wisconsin) extending its agency/sponsorship over the event. Lorence noted that use of tuition would turn these groups into agents of the university and their speech would become part of the instruction program.

One justice then noted the difference between unions, professional organizations and universities and, thus, drew a difference between Southworth, Abood and Keller. Justice Breyer said that rather than one organization having one opinion as in the case of unions and professional organizations, universities give many dollars out to a variety of organizations, in a viewpoint neutral way. Therefore, all organizations have a chance to engage students in a certain
amount of activity that was at least distantly related to an educational objective (Record at 44). Justice Kennedy was troubled with Mr. Lorence's position that students have the right not to speak. According to Lorence, to fund some voices they do agree with, some that they don't care about, and some they disagree with, still violated the principle. To Justice Kennedy, Mr. Lorence was asking the Court to do something that was against the traditions of universities for many centuries. Justice Kennedy reflected that since ancient times, universities had been places where ideas, including political ideas, were debated. Mr. Lorence interjected that he believed that the wide range of debate would not disappear or be significantly diminished by allowing objecting students to opt out.

The Court again posed the question as to why they should look at this case as being funding for individual groups as opposed to funding a forum where a variety of voices and viewpoints have access (Record at 44)? Further, the Court noted that union organizations are membership organizations and that Southworth did not pose this issue. Attorney Lorence replied that unions do run multiple candidates. The justices appeared skeptical of that argument and stood by the very strong distinction they were making between unions and universities.

Finally, all the justices turned their attention to the issue of an opt out policy according to Abood by posing this question to Mr. Lorence, "could students who opt out then make a demand for viewpoint-neutral funds" (Record at 56)? Attorney Lorence, replied that there might be a free rider question, but he was not sure.
Counsel Ullman was then given the opportunity for a short rebuttal. She reiterated that setting aside the WISPIRG (and the referendum mechanism for funding it), the other groups that were funded through the GSSF were services and there was no claim for any viewpoint discrimination. She also reiterated that the University of Wisconsin had determined that it was important to facilitate the speech of diverse groups and this furthered the university’s educational mission and First Amendment values (Record at 57).

If oral arguments were any indication, it seemed that the Court was posturing to deal indirectly with the controversial issues that evolved around the WISPIRG. The justices were focusing their questions upon the referendum mechanism and indicated their doubts that the process adhered to the Viewpoint Neutral Standard. It seemed that the Court was not going to take the approach taken by lower courts of focusing on the services provided by WISPIRG and whether or not these services were germane to the university’s mission. The Court appeared to be leaning towards the forum analysis as it applied to the process for funding rather than analyzing each challenged organization, its activities, and how those activities related to the overall mission and role of the university (Germaneness Test). There was little indication concerning how the Court would handle the opt out remedy.

Summary

In this chapter, significant court decisions associated with jurisprudence of mandatory student fees programs were reviewed and analyzed. For the past
thirty years, the courts struggled with the issue of universities utilizing mandatory student fees to create the limited public forum.

Two cases, *Abood* and Keller, became the precedents by which lower courts formulated their decisions. Circuit courts focused their legal reasons upon the challenged groups and attempted to evaluate whether the groups' activities were germane to the universities' educational missions. Ultimately, conflict between the circuits occurred.

The U.S. Supreme Court granted *certiorari* to the *Southworth* case. At issue was the role of universities in establishing their educational environment; the rights of students not to speak; operating fees programs in accordance with viewpoint neutrality; whether students may opt out of paying fees to support groups they object to; and whether it is more appropriate to evaluate the entire forum or to evaluate individual groups to determine if their activities are germane to the university's role or mission.
CHAPTER III

METHODOLOGY

The Qualitative Research Design

The purpose of this study was to assess the impact of the Supreme Court Decision, Board of Regents of Univ. of Wis. Sys., et al. v. Southworth, et al., 120 S. Ct. 1346 (2000), on student fee policies of selected major public universities within the Ninth Circuit Court's jurisdiction. It was intended that this research would assist administrators to audit and modify their respective mandatory student fee policies so that they best comply with the U.S. Supreme Court's ruling in Southworth.

An inductive analysis design means that categories and patterns emerge from the data rather than being imposed on data prior to data collection (McMillan & Schumacher, 1997). The first step in this research effort was to apply the Social Science Approach to qualitative research, using NEON and LEXIS NEXIS to identify secondary sources, such as journals, law reviews, and books, to facilitate the exploration of more general subject matter associated with student fees and the First Amendment rights. By utilizing these procedures, specific legal issues and pertinent court cases emerged. These legal issues and court cases were then arranged in a logical order so that the legal research could
be presented in a more organized and efficient manner. Evaluation of the usefulness of these cases for the topic of student fees and the First Amendment, and their relationship to the Southworth decision in particular proceeded from there.

An internal evaluation (Wren & Wren, 1986) was conducted on all relevant cases. The first step in the analytical process was to determine how similar the facts of each case were to the facts of the research problem. Second, an internal evaluation was carried out to determine the legal significance and impact of each case with respect to the research problem. When it was determined that a specific case applied to the research problem, an external evaluation (Wren & Wren, 1986) was conducted to determine how subsequent court decisions have interpreted and applied the principal cases. Secondary sources, law reviews, journals, newspapers, and other similar materials were utilized for legal commentary concerning judicial interpretations.

Further legal research involved case analyses of all Southworth briefs, petitions, amicus curiae briefs, oral arguments, and all pertinent court cases that were identified during the fact analysis stage. All cases and associated briefs were then arranged in a consistent brief format that made the case analysis more efficient; allowed for pertinent issues to be teased out of the cases; and ultimately guarded against research bias.

In addition to case analyses, I attended the oral arguments and utilized the transcripts of the oral arguments before the U.S. Supreme Court to draw
analogies about their significance and impact upon the Court. Telephone interviews were also conducted with both attorneys who argued this case before the Court. I asked the following questions of each attorney: What has the Court resolved and not resolved? What does this mean for future litigation? What aspects of the decision offer guidance to universities regarding their programs? What is the scope of the remand? Will this remand go back to the Seventh Circuit Court and then will it remand to the U. S. District Court? What were the key aspects that led you to stipulate to the viewpoint neutrality of the Wisconsin student fees plan? Why did Justice Souter write the concurring opinion the way he did? What was he ultimately concerned about? These interviews were more helpful in deciding how to best approach the issues and controversies of the case. However, I found their responses to be very tactful in nature as they were too close to the conflict and could not make the kind of academic observations and contribution to this study that was necessary. I conducted an hour-long interview with law professor and former President of the University of Wisconsin, Madison, Dr. Robert O’Neil. Dr. O’Neil has written extensive legal commentary on this subject and was a Harvard Law School student with Justice Kennedy. He was very helpful in providing interpretation and perspective to the developing jurisprudence. I was in correspondence with Dr. O’Neil as the remand of Southworth (Fry) occurred. Dr. O’Neil’s perspective and observations were very valuable in helping be determine the judicial intent.

Extensive legal analysis was performed on the decision, Fry, et. al. v. Board of Regents of the Univ. of Wis. Sys., No. 96-C-0292-S (W.D. Wis. 2000 &
2001). This decision was rendered by Judge John C. Shabaz after the Southworth decision and represent the first interpretations of viewpoint neutrality requirements in accordance with Southworth.

Ten large public universities within the jurisdiction of the Ninth Circuit were selected that are similar to the University of Wisconsin, Madison. Student fee policies were solicited from each and they were analyzed to determine compliance with Southworth. The universities selected were the University of California Los Angeles; University of California Berkley; University of Oregon; University of Arizona; Arizona State University, Main; University of New Mexico; University of Nevada Reno; University of Nevada Las Vegas; University of Idaho; and University of Montana Missoula. Pertinent issues, associated with these policies, that emerged from that decision were noted and presented.

At the time when the research methodology was determined, the Rounds, et. a. v. Oregon State Board of Higher Education, 166 F.3d 1032 (1999) had just been decided. It was considered a very important development in that the Ninth Circuit Court cited the Seventh Circuit Court's decision in Southworth and respectfully disagreed with it. Thus, while the U.S. Supreme Court was considering the petition for a writ of certiorari for Southworth the disagreements and conflict between the circuits came to a climax. It was decided that the university policies selected for this study should come from the Ninth Circuit Court's jurisdiction as the impact of the U.S. Supreme Court's decision in Southworth would be noteworthy.
CHAPTER IV

FINDINGS OF THE STUDY

The Southworth Decision

The research questions posed in Chapter I will be answered in this chapter. The U.S. Supreme Court's final decision will be presented in this chapter along with important issues that emerged as a result of this decision; and an analysis of impact of the decision on the selected, major, public universities' student fee programs.

Research Questions and Analyses

How did the U.S. Supreme Court resolve the conflict between the circuits in Southworth?

The oral arguments were heard before the U.S. Supreme Court on November 9, 1999 and the final decision was handed down on March 22, 2000. It was a unanimous decision with three justices joining in a concurring opinion. Justice Kennedy wrote the opinion for the Court and Justice Souter wrote the concurring opinion with which Justices Breyer and Stevens joined.
Justice Kennedy began his opinion by reviewing the lower court opinions. The Federal District Court, in summary judgment, declared the University of Wisconsin, Madison's mandatory student fee program invalid under Abood and Keller and enjoined the university from using the fees to fund any Registered Student Organizations (RSO) engaging in political or ideological speech. The Seventh Circuit Court affirmed with the U.S. District Court and concluded that the program was not germane to the university's mission; did not further a vital university policy; and imposed too great a burden on the student's free speech rights. The Seventh Circuit Court based its decision on the three-prong test in Lehnert. The Seventh Circuit reasoned that, like the objecting union members in Abood, the students had a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflicted with their own personal beliefs. It added that protecting those rights was a heightened concern following Rosenberger, because, "if the university could not discriminate in distributing the funds, students could not be compelled to fund organizations engaging in political and ideological speech – that is the only way to protect the individual's rights" (Southworth at 730, n11). The Seventh Circuit Court extended the U.S. District Court's order and enjoined the university from requiring students to pay that portion of the fee used to fund RSOs engaged in political or ideological expression. The Seventh Circuit Court did not extend the U.S. District Court's injunctive relief and held that the Regents were free to devise a fee system consistent with the opinion of the Seventh Circuit Court and the U.S.
Supreme Court precedents. The Seventh Circuit Court refused to mandate a system at that time.

The U.S. Supreme Court reversed, in part, and remanded this case to the Seventh Circuit Court. The Court held that the First Amendment permitted a public university to charge its students an activity fee to fund a program to facilitate extracurricular student speech if the program was viewpoint neutral; however, the Court questioned whether the student referendum mechanism of the university’s program permitted the exaction of fees in violation of the viewpoint neutrality principle. The case was remanded for further proceedings to focus upon the referendum process.

The U.S. Supreme Court’s Reasoning

The university’s justification for fostering the challenged expression was that it sprang from the initiative of the students, who alone gave it purpose and content in the course of their extracurricular endeavors. Unlike the Smith case, neither the university nor the State (government) was using its own funds to advance a particular message. While objecting students may insist upon certain safeguards with respect to the expressive activities that they are required to support, the Standard of Viewpoint Neutrality grounded in the public forum cases was found to be controlling. Based upon this, Justice Kennedy explained that the viewpoint neutrality requirement of the university program was generally sufficient to protect the rights of the objecting students. To Kennedy, the Southworth decision represented a logical progression from Rosenberger by
concluding that the University of Wisconsin could support the extracurricular activities of its programs by using mandatory student fees with viewpoint neutrality as the principle for operation (Southworth). The student referendum aspect of the program for funding speech and expressive activities, however, appeared to be inconsistent with the viewpoint neutrality requirement. Justice Kennedy wrote that the whole purpose of viewpoint neutrality is to ensure that access to the forum is not determined by a majority vote. He found this to be a controlling principle and remanded the case to resolve this issue.

According to Kennedy, Abood and Keller were found to be neither applicable nor workable in the context of extracurricular student speech at a university. In these cases the constitutional rule took the form of limiting the required subsidy to speech germane to the purposes of the union or bar association.

However, the Court held that recognition must be given to the important and substantial purposes of the university, which sought to facilitate a wide range of speech. The Standard of Germane Speech as applied to student speech at a university was unworkable, and gave insufficient protection both to the objecting students and to the university program itself. According to Kennedy, it was difficult to define germane speech with precision where a union or bar association is the party. The standard became all the more unmanageable in the public university setting, particularly where the State created a forum that invited a wide variety of speech and ideas. It was not for the Court to say what was or was not germane to the ideas being pursued in an institution of higher learning.
The Court declined from imposing a system where each student may list those causes which he or she will or will not support (opt out remedy). Such restriction, according to the Court, could be so disruptive and expensive that the program to support extracurricular speech would be ineffective. The Court concluded that the First Amendment did not require the university to put the student fees program at risk.

The Court concluded that the proper measure and principal standard of protection for objecting students was the requirement of viewpoint neutrality in the allocation of funding support. Viewpoint neutrality was given substance in *Rosenberger* when the University of Virginia feared that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause. There the Court was concerned with the rights a student had to use an extracurricular speech program already in place. *Southworth* represented the antecedent question (acknowledged but left unresolved in *Rosenberger*), whether a public university may require its students to pay a fee that creates a mechanism for the extracurricular speech in the first instance. When a university required its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. The Court held that there was symmetry in its holding here and in *Rosenberger*. Viewpoint neutrality was the justification for requiring the student to pay the fees in the first place and for ensuring the integrity of the program's operation once the funds have been collected. The Court concluded that the University of Wisconsin, Madison could sustain the
extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle. Further, the Court made no distinctions between on-campus and off-campus activities. Such activities, according to the Court, extended to the borders of the State. The Court stipulated that this decision did not imply that in other instances the university, its agents or employees, especially its faculty, were subject to the First Amendment analysis which controlled this case.

In turning their attention to the referendum, the justices concluded that, while not clear, it appeared that by majority vote of the student body a given RSO may be funded or defunded. The Court concluded that it was unclear what protection there was for viewpoint neutrality in that part of the process. To the extent the referendum substituted majority determinations for viewpoint neutrality, it would undermine the constitutional protection that the program required. The whole purpose of viewpoint neutrality was to insure that minority views are treated with the same respect, as are majority views. Thus, the Court reversed the decision of the Seventh Circuit and remanded the referendum portion of the case to the Seventh Circuit Court for further investigation.

Justice Souter wrote a concurring opinion and was joined by Justices Stevens and Breyer. The justices agreed that the university's funding scheme was permissible, but did not believe that the Court needed to take the occasion to impose a broad viewpoint neutrality requirement to uphold it. Instead, concurring justices argued that the First Amendment interest claimed by the objecting students here was simply insufficient to merit protection by anything
more than the viewpoint neutrality already accorded by the university. Thus, to the concurring justices the question should not have been, is viewpoint neutrality required? The question should have been whether the students had claim for relief from this specific viewpoint neutral scheme? The university program required viewpoint neutrality and both parties stipulated that the funds were distributed accordingly. To the concurring justices, the majority should have focused on the Southworth specific circumstances only and should not have been so broad in its application of viewpoint standard.

The concurring justices agreed that Abood and Keller did not apply in this case, as the situations of students were significantly different from that of union or bar association members. Unlike Smith, student fees funded a distributing agency (student government) that had no political, social, or ideological character and engaged in no expression of any distinct message. According to the concurring justices, unions and bar associations were organizations with specific opinions and promoted specific messages. The concurring justices agreed that an opt out remedy should not be established in this case as the speech in question represented a variety of viewpoints rather than one, direct, offensive form. The weakness of the students' claim was underscored by its setting within the university, where students were inevitably required to support the expression of personally offensive viewpoints in ways that could not be constitutionally objectionable unless one was prepared to deny the university its choice over what to teach. Since tuition payments (not optional for anyone who wishes to stay in college) may fund offensive speech far more obviously than the student
activity fees did, it was difficult to see how the activity fee could present a stronger argument for a refund. The concurring justices agreed with the relief administered, but would go no further, and concurred with the judgment.

Prior to the Southworth decision, some lower courts were relying on the narrow focus of union cases and focusing upon the activities of each challenged group to determine if such activities were germane to the universities’ missions. Lower courts were also not in agreement over exactly what represented the mission of the university. As a result, university fees programs and the matriculated students were treated very differently from jurisdiction to another.

The Southworth decision represents a broad application of the Standard of Viewpoint Neutrality. The decision was a unanimous decision, however, concurring justices believed that the decision should have been restricted to the Southworth specific circumstances only and not be so broadly applied. The fact that both parties agreed that the mandatory student fees program at the University of Wisconsin, Madison was operated on a viewpoint neutral basis, concurring justices believed that the Court should have decided the case on that limited ground, based solely upon the stipulation without deciding whether the Standard of Viewpoint Neutrality was a requirement. Kennedy and the majority of justices preferred to ensure that lower courts received the message, that viewpoint neutrality is a requirement or standard by which legal analysis of mandatory student fees programs will occur. Dr. Robert O’Neil, law professor and a former University of Wisconsin Madison President, believes that the Court created a template by which lower courts will balance First Amendment
rights and the Court's broadly recognized educational mission of universities. This action was taken in response to the decisive environment that existed between the circuit courts prior to the Southworth decision (Telephone Interview with Dr. Robert O'Neil, Professor of Law, University of Virginia Law School (Nov. 8, 2000)).

Justice Kennedy completed what had begun in the Rosenberger decision. Like in Rosenberger, the Southworth Court held that the student fees created a non-spatial limited public forum. In Rosenberger, the Court held that disbursement of mandatory student fees within the limited public forum must conform to the viewpoint neutral requirement. In Southworth, the Court held that collection of mandatory student fees for the purpose of creating a limited public forum is also justified so long as the disbursement process conforms to the viewpoint neutral requirement.

The Southworth Court held that the Germaneness Test of the union cases, Abood and Keller was not the appropriate standard. Previous lower court decisions had relied upon Abood and Keller and focused upon each group that received funding to determine if that particular group's activities were germane to the university's mission. In Southworth, the Court held that the applicable standard was viewpoint neutrality and they opted to place the university's role or mission into a special category that was much broader than the unions involved in Abood and Keller. Ultimately, the Southworth Court held that as long as the university adheres to the viewpoint neutral requirement for collecting and disbursing mandatory student fees the Court would defer to the university when it
comes to determining the educational environment both in and out of the classroom. Kennedy articulated the Court's acknowledgement that the university's compelling interest included creating a robust marketplace of ideas where a variety of ideas, opinions, and viewpoints may be debated. The only proper remedy would be more speech not less or restricted speech. Thus, students who disagree with opinions, views, and ideas of funded student organizations may, themselves, organize and apply for funding for their own agendas.

While the justices did not completely rule out the opt out remedy, they did not impose a requirement for an opt out policy as it could be detrimental to the entire student fees program. Justice Kennedy said, "The First Amendment does not require the university to put the program at risk" (Southworth at 1356).

The Court questioned whether the referendum mechanism that had been used to fund the WISPIRG met the viewpoint neutral requirement. The whole purpose of viewpoint neutrality is to insure that the majority does not force its will upon the minority. Student referendums that require 51% of the vote to award funding, had the potential of doing just that. The Court remanded this portion of the decision to the Seventh Circuit Court to further analyze the referendum process and whether it met the Viewpoint Neutrality Standard.
What were the major arguments in the judicial process that influenced the U.S. Supreme Court's decision?

The two dissenting *en banc* opinions by Judges Rovner and Wood in the Seventh Circuit Court carried considerable influence with the U.S. Supreme Court. Together they argued that *Abood* and *Keller* did not apply to the *Southworth* question. According to Rovner and Wood, *Abood* and *Keller* represented single organizations with single viewpoints and, therefore, they were not viewpoint neutral. In *Southworth*, they argued, the university enjoyed a unique role and educational mission of providing an environment where issues and ideas could be explored and debated. According to Judge Wood, the only remedy in *Southworth* would be more speech not less. Judge Wood argued that the *Rosenberger* forum (a limited public forum) was created in *Southworth* with mandatory student fees and Forum Analysis was more appropriate than the Germaneness Test associated with *Abood* which did not apply. Judge Wood argued that an opt out remedy would place the university's fee program in jeopardy under severe administrative costs. Finally, the judges argued the best remedy in *Southworth* was more speech not less. The Court concurred with the reasoning of the dissenters.

In the brief for the petitioners, attorneys for the Board of Regents echoed Judges Rovner and Wood's arguments that *Abood* and *Keller* did not apply in *Southworth*. The Board of Regents argued that *Rosenberger* should apply as it created a limited public forum with the student fees and operated on the principle of viewpoint neutrality. Thus, again, Forum Analysis was appropriate instead of
the Germaneness Test of Abood. The Board of Regents also reminded the Court that the Supreme Court had never recognized an opt out remedy.

Where previous circuit and state courts focused on the activities of individual groups, particularly the PIRGs, and whether those activities were germane to the university's role (Germaneness Test), the U.S. Supreme Court opted not to do this. The justices acknowledged and deferred to the university's broad educational mission and then limited their focus upon how fees were collected and distributed and set the Viewpoint Neutral Standard for such. Thus, the justices agreed with Judges Rovner, Wood, and the Board of Regents that the Forum Analysis Approach and the Viewpoint Neutrality Standard were more appropriate in Southworth. The result appears to be the creation of a template by which lower courts may decide student fees-related litigation.

The students' attorney, Jordan Lorence, was able to convince the Court to question whether the referendum process met the Standard of Viewpoint Neutrality. Ultimately, this question was remanded to the Seventh Circuit Court.

What areas were left in doubt?

Justice Souter's concurrence officially announced the new category and standard of First Amendment interests. The category rests on the premise that universities differ significantly from unions and professional associations. Unlike the unions or professional associations, universities provide an environment of deliberate debate on converging and conflicting issues. The recognition of this unique role or mission led the U.S. Supreme Court to conclude that more speech
is the best remedy over restricting or limiting speech. This also justified the mandatory student fee system.

The new standard for collection and distribution of student fees is viewpoint neutrality. But to say that viewpoint neutrality is the key to analysis of university student fee programs does not eliminate controversy. In fact, scholars were puzzled by Justice Kennedy's opinions in *Rosenberger* and *Southworth*. He was adamant that all fee systems be operated under the umbrella of viewpoint neutrality. However, in the *Southworth* case, both sides stipulated or agreed that the University of Wisconsin's fee programs was, in fact, viewpoint neutral. This new Standard of Viewpoint Neutrality deserves further exploration as it is bound to present some confusion among legal scholars and university administrators.

The First Amendment implications of content discrimination first occurred in *Police Dept. v. Mosley*, 408 U.S. 92 (1972). A city ordinance was passed by the City of Chicago that prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. Seven months prior to the passage of this ordinance, Earl Mosley picketed Jones High School objecting to discriminatory practices and quotas. His was a lonely crusader and it was a peaceful picketing. Mosely petitioned the U.S. District Court for the Northern District of Illinois. He first sought declaratory and injunctive relief and alleged that the ordinance violated of his constitutional rights in that the statute punished activity protected by the First Amendment; and second, by exempting only peaceful labor picketing from its general prohibition against picketing, the
statute denied him equal protection of the law in violation of the First and Fourteenth Amendments.

The U.S. District Court dismissed the complaint and the Seventh Circuit Court reversed it. Justice Marshall wrote the opinion for the U.S. Supreme Court affirming the Seventh Circuit's decision. It was a unanimous decision with Chief Justice Berger filing a concurring opinion with which Justices Blackmun and Rehnquist concurred. The central problem with Chicago's ordinance was that it described permissible picketing in terms of subject matter.

Peaceful picketing on the subject of a school's labor-management dispute was permitted, but all other peaceful picketing was prohibited. The operative distinction was the message on the picket sign. Above all, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. The essence of this forbidden censorship was content control. Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. (Mosley at 96).

Justice Marshall further stated that there was an "equality of status in the field of ideas," (Mosley, at 96, n4) and government must offer all points of view an equal
opportunity to be heard. Once the forum is open to assembly or speech by some
groups, government may not prohibit others from assembling or speaking on the
basis of what they intend to say. Selective exclusions from a public forum may
not be based on content alone, and may not be justified by reference to content
alone (Mosely).

Justice Marshall used the terms content and views interchangeably. Many
legal scholars do the same. The jurisprudence continued to develop concerning
this standard, however, the distinctions between these two terms have never
really evolved. The judicial applications, particularly in the Rosenberger decision
only contributed to greater confusion.

In Widmar v. Vincent, 454 U.S. 263 (1981), the University of Missouri at
Kansas City, a state university, made its facilities available for the activities of
RSOs. A registered student religious group, Cornerstone, had been utilizing the
facilities when the university informed the group that a university regulation
prohibited the use of its buildings or grounds for purposes of religious worship or
religious teaching. The RSO sued in U.S. District Court alleging that the
regulation violated their Free Exercise of Religion and Freedom of Speech under
the First Amendment.

The U.S. District Court upheld the regulation. The Eighth Circuit Court
reversed the decision stating that the regulation represented content-based
discrimination against religious speech, for which the university had not
demonstrated a compelling interest. In the majority opinion of the U.S. Supreme
Court, Justice Powell stated that the state’s interest in achieving greater
separation of church and state was already ensured under the Establishment Clause and it was not sufficiently compelling to justify content-based discrimination against religious speech of the student group. The U.S. Supreme Court affirmed the Circuit Court's decision in favor of the religious student group. However, Powell recognized that the First Amendment must be analyzed in light of the special characteristics of the school environment and cited Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969). According to Powell, a university differed in significant respects from public forums such as streets or parks. A university's mission was education, and previous decisions of the U.S. Supreme Court has never denied a university's authority to impose reasonable regulations compatible with that educational mission upon which the use of its facilities are decided. While the Court ruled against the university, Justice Powell made this important acknowledgement about the unique role of the university and Justice Kennedy would do the same when writing the Southworth opinion.

In Perry Education Association v. Perry Local Educators' Association, 406 U.S. 37 (1983), the Court held that all public owned property or channels of communication fell into one of three categories: the traditional public forum, the limited public forum, or the non-public forum. Justice White wrote the opinion for the majority and made some important distinctions between the limited public forum and the traditional public forum. First, the limited public forum consisted of public property that the State had opened for use by the public as a place for expressive activities. According to White, the government held control over the designation of property, unlike public parks or streets. Second, the limited public
forum remained open for expressive activity only at the pleasure of the government. For instance, the State can create a limited public forum open only to university students, and the State could later change the limitations on that forum (for example, from discussing Greek Mythology to discussing Military History); or it may shut it down altogether (McGill, 2000). Since 1983 the Court has held on several occasions that government property was designated as a traditional public forum or a non-public forum. It was not until Rosenberger that the Court held that government property fell into the category of a limited public forum. Under that doctrine, content-based (subject matter) restrictions on speech within the forum are subject to strict scrutiny; must be justified by a compelling state interest; and be narrowly tailored. However, a university is entitled to restrict a limited public forum to certain subjects (McGill, 2000). In the 1990's content discrimination (subject matter) became constitutionally acceptable in a limited public forum (like the Rosenberger and Southworth forum) when determination of the purpose of the forum is made. However, viewpoint discrimination would never be constitutionally acceptable to the Court. Viewpoint discrimination is the act of allowing speech that adopts one point of view while prohibiting speech that takes an opposite or another position (Greenawalt, 1996). Content (subject matter) neutrality and viewpoint neutrality are grounded in the Limited Public Forum Doctrine.

supporters posted election signs on utility poles and similar objects. They were
ordered removed by the city based on its responsibility of preventing visual
clutter, minimizing traffic hazards, and preventing interference with the intended
use of public property. The Vincent supporters filed suit in U.S. District Court
against the city and various city officials, alleging that §28.04 abridged their
freedom of speech within the boundaries of the First Amendment. They sought
damages and injunctive relief. The U.S. District Court concluded that §28.04 was
constitutional and granted the city's motion for summary judgment. The U.S.
Circuit Court reversed the decision stating that the ordinance was presumptively
unconstitutional because significant First Amendment interests were involved
and that the city had not justified its total ban on all signs on the basis of its
asserted interests in preventing visual clutter, minimizing traffic hazards, and
preventing interference with the intended use of public property.

The U.S. Supreme Court reversed and remanded this decision. Stating
that §28.04 was not unconstitutional as it applied to the supporters' expressive
activity. The Court held that the property covered by §28.04 did not constitute a
public forum that would be subject to First Amendment protection.

Public property, which is not by tradition or designation
a forum for public communication may be reserved by the
government for its intended purpose, communicative or
otherwise, if the regulation on speech (as here) is reasonable
and not an effort to suppress expression merely because

Thus, the city was free to decide that the aesthetic interest in avoiding visual clutter justified a removal of all signs creating or increasing that clutter.

Justice Brennen wrote a dissenting opinion where Justices Marshall and Blackmun joined. While acknowledging the important governmental function of improving and preserving the aesthetic environment, these justices feared that implementation of these functions created special dangers to First Amendment freedoms. Thus, there needed to be more stringent judicial scrutiny than the Court was willing to exercise in this case.

In Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788 (1985), by Executive Order, participation in the Combined Federal Campaign (CFC), a charity drive aimed at federal employees, was limited to voluntary, tax-exempt, nonprofit charitable agencies that provide direct health and welfare services to individuals or their families, and legal defense and political advocacy organizations are specifically excluded. The NAACP filed suit in U.S. District Court challenging their exclusion under the First Amendment right to solicit charitable contributions. The U.S. District Court granted summary judgment in the NAACP's favor and enjoined the denial of their pending or future applications to participate in the solicitation of CFC contributions. The U.S. Circuit Court affirmed this decision on the grounds that the government restrictions in question were not reasonable.
The U.S. Supreme Court held that the CFG, rather than the federal workplace, was the relevant forum. Although, as an initial matter, a speaker must seek access to public property or to private property devoted to public use to evoke First Amendment concerns. Forum analysis was not limited to only identifying the government property at issue. Rather, in defining the forum, the focus should be on the access sought by the speaker. Here, the NAACP sought access to a particular means of communications, the CFG. And the CFG was a nonpublic forum. This conclusion was supported both by the government's policy in creating the CFG to minimize the disturbance of federal employees while on duty formerly resulting from unlimited ad hoc solicitation activities; and by the government's practice of limiting access to the CFG to those organizations it considered appropriate. The government's reasons for excluding the respondents from the CFG appeared, at least facially, to satisfy the reasonableness standard that required such reasons be assessed in the light of the purpose of the forum and all surrounding circumstances. Thus, avoiding the appearance of political favoritism was a valid justification for limiting speech in a nonpublic forum; and the First Amendment did not forbid a viewpoint neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.

In R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), R.A.V. burned a cross on a Black family's lawn and was charged under St. Paul, Minnesota's Bias Motivated Crime Ordinance, that prohibited the display of a symbol which one knew, or had reason to know, would arouse anger, alarm, or resentment in
others on the basis of race, color, creed, religion, or gender. The U.S. Supreme Court held that the ordinance was unconstitutional because it imposed special prohibitions on those speakers who express views on the disfavored subjects of race, color, creed, religion, or gender. In its practical operation, the ordinance went beyond mere content, to actual viewpoint discrimination. The ordinance would not regulate the non-racist fighting words of opponents of racism, but prohibit statements made by the proponents of racism (Wiggin, 1994). Compelling interest of the State in ensuring the basic human rights of groups historically discriminated against did not justify content discrimination.

In Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 385 (1993) a New York law authorized local school boards to adopt reasonable regulations permitting the after-hours use of school property for 10 specified purposes, not including meetings for religious purposes. Moriches School District issued rules and regulations allowing social, civic and recreational uses of its schools, but prohibiting use by any group for religious purposes. The school board denied two requests filed by an evangelical church and its pastor to use school facilities for a religious-oriented film series on family values and childbearing on the grounds that the film appeared to be church-related.

The church filed suit in U.S. District Court claiming that the school district's actions violated the First Amendment Freedom of Speech Clause. The U.S. District Court granted summary judgment to the school district and the U.S. Circuit Court affirmed. The Circuit Court reasoned that the school property, as a limited public forum open only for a designated purposes, remained nonpublic.
except for the specified purposes and ruled that the exclusion of the church's film was reasonable and viewpoint neutral.

The U.S. Supreme Court reversed the Circuit Court's decision and held that denying the church access to school facilities to exhibit the film violated their freedom of speech. The Court held that the school district discriminated on the basis of viewpoint neutrality by permitting school property to be used for the presentation of all views about family issues and childbearing except those dealing with the subject from a religious standpoint.

The Rosenberger decision served as prelude to Southworth, but not without its own controversies. As mentioned earlier the Rosenberger Court held, for the first time since Perry, that the State created a (metaphysical) limited public forum through the disbursement of the mandatory student fees. Also as mentioned earlier, in order for the university to impose viewpoint-based restrictions in the Limited Forum Doctrine, the university must justify this by a compelling interest that is narrowly defined. However, the university may restrict a limited public forum to certain subjects (McGill, 2000). Justice Kennedy's central theme in Rosenberger was that the university chose not to exclude religion as a subject matter but chose to not fund student journalistic efforts with religious editorial viewpoints. According to Kennedy, religion represents a vast area of inquiry, but it also provided here a specific premise, a perspective, or a standpoint from which a variety of subjects may be discussed and considered. The prohibitive viewpoint, not the general subject matter, resulted in the refusal to make payments (Rosenberger).
As mentioned in Chapter II, Justice Souter (joined by Justices Stevens, Ginsburg and Breyer) wrote a dissent accusing the Rosenberger majority of, for the first time in Court history, approving direct funding to core religious activities by an arm of the State; and supporting evangelism by the direct funding of the newspaper that the dissenting justices believed to be an arm of religion. The Rosenberger Court ruling added further confusion to the exact distinction between content discrimination (subject matter discrimination), which is constitutional in a limited public forum, and viewpoint discrimination, which has never been tolerated by the Court. The decision ultimately resulted in a blurring of the two standards. It perpetuated further confusion among legal scholars that is reflected in current literature addressed earlier in this chapter. Even the Rosenberger Court acknowledged that the distinction between content discrimination (subject matter) and viewpoint discrimination was not a precise one. Certainly, "any content discrimination is likely to have some indirect effect in helping certain viewpoints in preference to others" (Greenawalt, 1996, p. 707).

"The ultimate impending impact of Kennedy's opinion concerning the viewpoint discrimination in Rosenberger (and Southworth) is that government (the university) controls content (subject matter), but courts may decide that certain forms of content (subject matter) are, in fact, viewpoint" (Waring, 1997, p. 247).

Obviously, there is an element of confusion between the two. If Waring's observations are true, administrators may struggle with implementing public policy as it applies to content and viewpoint in the limited public forums. Their actions will continue to be the focus of judicial scrutiny. This implies that the
roles of lower courts, in student fees challenges, will take on a greater degree of activism and, thus, may explain the broad application of the Southworth decision as it applies to viewpoint neutrality.

In Southworth there was a stipulation between the parties that the University of Wisconsin's mandatory student fees program was operated on a viewpoint neutral basis. Yet, Justice Kennedy and the majority of the Court chose to broadly prescribe the Standard of Viewpoint Neutrality. Justices Souter, Stevens and Breyer concurred with the majority but argued that because of the stipulation, the Southworth decision did not warrant such a broad endorsement of the Viewpoint Neutrality Standard. "The question before us is thus properly cast not as whether viewpoint neutrality is required, but whether Southworth has a claim to relief from this specific viewpoint neutral scheme" (Southworth at 1358 (Souter, J., concurring)).

Under its own reasoning, the majority need not reach the question whether viewpoint neutrality is required to decide this case. The University program required viewpoint neutrality and both parties have stipulated that the funds are disbursed accordingly. If viewpoint neutrality is a sufficient condition, the majority could uphold the scheme here on that limited ground without deciding whether it is it is a necessary one (Southworth at 1358,
Justice Souter's concurring opinion was much different from his dissent in *Rosenberger*. While he believed that the *Southworth* decision should have been more *Southworth*-specific and not so broadly applied, he was not so vehemently opposed to the Viewpoint Neutrality Standard being imposed upon a free speech issue like he was when it was imposed upon the Establishment Clause. Between *Rosenberger* and *Southworth*, we may be seeing an evolving disagreement between Kennedy and Souter about how to apply viewpoint neutrality in an Establishment Clause case like *Rosenberger* and with more tolerance for the same application in Free Speech Clause controversies.

The Court has recently granted *certiorari* to another Establishment Clause case (*Good News Club, et. al. v. Milford Central School*, 202 F.3d 502 (2000)) that involves the Standard of Viewpoint Neutrality. We must wait for this litigation to see where the Court will go with it. However, in an interview with Dr. Robert O'Neil, Director of the Jefferson Center for First Amendment Rights and former President of the University of Wisconsin, Madison, Dr. O'Neil articulated that he believes that as free speech issues relate to mandatory student fees, the *Southworth* Court, in its application of viewpoint neutrality and affirmation of the university's broad role and mission, established a definitive template for lower courts to follow (Telephone Interview with Dr. Robert O'Neil, Professor of Law, University of Virginia Law School (Nov. 8, 2000)).

Viewpoint neutrality as it has emerged from the *Rosenberger*-*Southworth* decisions has left an element of confusion among legal scholars as how to define
and apply the standard; how to make the distinction between viewpoint
discrimination and content (subject matter) discrimination; and exactly where the
fine line is drawn that separates the two concepts. The Court, in Rosenberger,
could not make such distinctions and did not even try to make the distinctions in
Southworth.

In the remand of Southworth, now known as Fry, et. al. v. Board of
Regents of the Univ. of Wis. Sys., No. 96-C-0292-S (W.D. Wis. 2000), Jordan
Lorence, attorney for the objecting students in Southworth returned to the U.S.
District Court for the Western District of Wisconsin, successfully abandoned the
stipulation of viewpoint neutrality, and successfully challenged the University of
Wisconsin's distribution of mandatory student fees by arguing that the
university's students had too much discretion in distributing funds for viewpoint
neutrality to be ensured. U.S. District Court Judge, John C. Shabaz, the same
judge who heard the original trial case in Southworth, gave the University of
Wisconsin 60 days to create a constitutionally acceptable fee program or he
would order it eliminated.

The University of Wisconsin's efforts to bring the mandatory student fees
program into compliance with the U.S. District Court's ruling include the following:
The university created an appeals process for RSOs that challenged decisions
based upon a violation of viewpoint neutrality. The university created a record for
appeal purposes, which included the taping of decisions and the use of a
standardized form that required the rationale for funding decisions. The
university created an avenue for final appeal to the university's chancellor;
announced the prohibition of viewpoint discrimination; and student government decision-makers were required to take an oath to be viewpoint neutral in funding decisions or face removal from office. Twelve criteria were also created to determine funding eligibility and funding amounts.

Judge Shabaz ruled that the university did not fix the central constitutional defect. Students still exercised wide discretion in funding decisions, funding amounts, and, more particularly, in eligibility decisions. The criteria established allowed for too much subjectivity. According to Judge Shabaz, the greatest complication in the case was that the university’s commitment to fund diverse student speech was competing with its commitment to empower student government to be the arbiter of the funding. The mandatory student fees program did not balance those two competing interests. Thus, the U.S. District Court ruled that the mandatory student fees program at the University of Wisconsin, Madison campus was in violation of the First Amendment because the program failed to comply with the Standard of Viewpoint Neutrality (Fry et. al v. Board of Regents of the Univ. of Wis. Sys., No. 96-C-0292 (W.D. Wis. 2001)).

The Standard of Viewpoint Neutrality is evolving very quickly, and Judge Shabaz’s first Memorandum and Order in Fry et. al v. Board of Regents of the Univ. of Wis. Sys, No. 96-C-0292-S (W.D. Wis. 2000), offered the only definitive guidelines of how universities must comply with the requirements of viewpoint neutrality. Judge Shabaz, referring to Rosenberger, stated that student activities fees form the limited public forum. Thus, the implication is that there must be equal access to the forum (in this case the funding) and such access must be
allowed on a viewpoint neutral basis. According to Judge Shabaz's interpretation and application of *Southworth*, a university policy would meet the requirements of viewpoint neutrality when, first, the university is required to refrain from distinguishing among student groups' viewpoints in permitting or denying forum access (to the pool of money); second, decision-makers may not pick and choose any speakers in order to advance one ideology over another; and third, some discretion is constitutionally permissible when expressed objective standards of the limited public forum must be fulfilled (i.e. subject matter), however, discretion may never be based upon viewpoint or opinion of any given speakers (*Fry*). For student government procedures to meet the requirements for viewpoint neutrality, Judge Shabaz offered the following guidance. First, there must be documented, objective guidelines and criteria by which funding decisions are made. Without these guidelines, the funding process could not be distinguished from the referendum process because both the referendum and the legislative decision-making processes are based upon majority rule (the U.S. Supreme Court, in *Southworth*, questioned whether majority rule compromised viewpoint neutrality). Second, the university must not delegate the entire funding decisions to the student government. There must be adequate administrative oversight over the decisions concerning who receives funding and in what amounts. Third, when students make their funding decisions there must be adequate records of written justifications for these decisions in order to have a meaningful review or appeal process. Fourth, appeal processes offer some oversight to decisions made, but those processes must also have objectives and
standards to hear the appeal as well as a record of justification for the original
decision. Fifth, perhaps, even beyond the appeal process, there should be a
documented administrative review process of all student government funding
decisions. This administrative review process should require documented
records of decisions and justifications for such (Fry). Judge Shabaz concluded
by saying, "A viewpoint neutral system for distributing compelled fees cannot
mean a system that completely delegates funding decisions to the student
government without objective criteria or effective oversight" (Fry at 16).

However, Judge Shabaz's second Memorandum and Order in Fry, et. al.
v. Board of Regents of the Univ. of Wis. Sys., No. 96-C-0292-S (W.D. Wis.
2001), leads one to question whether a university could adequately balance the
commitment to fund diverse student speech with the competing commitment to
empower student government to make the funding decisions. While universities
in the Ninth Circuit Court jurisdiction are encouraged to review the guidelines in
the Fry decision, they are not bound by this decision. We will have to await
further judicial guidance on this matter. The Fry decision is appended.

Legal practitioners will continue to bring forth more litigation concerning
mandatory student activity fee programs that challenge free speech and the
Establishment Clause. Certainly, university administrators and their student
government representatives must be adequately trained to ensure that personal
judgments and biases do not dominate their funding decisions. For now, until
further guidance is given from the courts concerning viewpoint neutrality, it will be
a very tenuous First Amendment environment.
Are there continuing disagreements?

There seems to be some disagreements among the justices concerning viewpoint neutrality as it applies to the Establishment Clause and the Free Speech Clause. In Rosenberger, Justice Souter wrote a scathing dissent saying that the decision should not have been based upon student views in a newspaper, but instead, the State should not be authorized to fund a student newspaper that, in the opinion of the dissenters, represented an arm of religion. In Southworth, Justice Souter wrote a concurring opinion agreeing with the Court's decision, but believed that the Viewpoint Neutral Standard should not have been made a requirement since the parties had already agreed that the student fees program of the University of Wisconsin Madison was operated according to viewpoint neutrality. Justice Souter was more tolerant of viewpoint neutrality in challenges involving the Free Speech Clause than he was with Establishment Clause issues; and Justice Kennedy saw little difference between the two cases.

Are there questions left unanswered?

The following questions were presented to the U.S. Supreme Court:

First, whether the First Amendment was violated when a public university used a portion of student activity fees paid by students who have chosen to matriculate to fund a forum for the expression of the wide-range of ideas on diverse topics?
Second, whether the First Amendment was violated when a public university used a portion of student fees to fund organizations that provided student services? Third, the U.S. Supreme Court had previously reserved the Constitutional question of whether an objecting student had the First Amendment right to demand an opt out remedy so not to fund speech that he/she did not agree? The Court answered the first two questions by affirming the constitutionality of the mandatory student fees program at the university. As for the third question, whether a student may opt out so not to fund objectionable speech, the Court ruled that such a policy could put the program at risk and the First Amendment does not require that. Thus, the Court chose not to impose an opt out remedy because objecting students could petition for funding to create their own forum.

The Court challenged the use of a referendum as a means for making funding decisions. Majority rule does not protect minority views and such fundamental rights like free speech should not be left to a vote. Thus, the Court questioned the very nature of the referendum as meeting the viewpoint neutral requirement. This portion of the case was remanded for further consideration. The Court addressed this same issue in a later decision, Santa Fe Independent School Dist. V. DOE, 530 U.S. ____ (2000). The question before the Court was whether policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause. In this case, a student chaplain, elected by the student body, recited prayers before all football games. This practice was challenged in U.S. District Court as a violation of the Establishment Clause.
While pending the district court's decision the school adopted a different policy that allowed, but did not require, prayer that was initiated and led by a student at all home games. U.S. District Court entered an order that modified the school's policy to permit only nonsectarian, non-proselytizing prayer. The Fifth Circuit Court ruled that even as modified, the football prayer policy was invalid. The U.S. Supreme Court, in a 7 to 3 decision, affirmed the Fifth Circuit's decision. Justice Stevens wrote majority opinion the.

According to Justice Stevens, the invocations were authorized by government policy and took place on government property, at government-sponsored events. Although an individual's participation in a government-sponsored forum doesn't necessarily make it government speech (Rosenberger), it was clear to the Court that these pre-game ceremonies were not the limited public Rosenberger forum as it was not open to the entire student body and other views. Only one student, the same student for the entire season, held the stage. Further, the student chaplain was an elected representative of the student body. The concept of majority rule in the election process ensured that one view was presented (the view of the majority) and that minority candidates were effectively silenced. The Court cited the Southworth decision and compared the circumstances in Santa Fe with the referendum process in Southworth. As in Southworth, the student elections did not protect the views of the minority. And, fundamental rights could not be subjected to a vote. This particular reference indicated that for now, even with Southworth on remand, the Court would not
tolerate a referendum as being viewpoint neutral when used in association with creating the limited public forum with mandatory student fees.

**What, if any, new questions or issues emerged from this decision?**

As with most U.S. Supreme Court decisions, many questions are generated as a result of the decision. The Southworth decision is no exception. First, if a case should come forward where viewpoint neutrality is not stipulated, will that change the way the Court analyzes and rules on the case? Second, is there dissention among the justices concerning the Viewpoint Neutral Standard? Will this dissention further change the standard and how it is applied in mandatory student fees programs? In order to ensure the viewpoint neutrality requirement, must administrators be complacent like a public facility or park and allow those who apply to gather and speak? Or, must administrators be active not waiting for requests to come forward, and determine which views are underrepresented, and recruit those views that are not represented in the forum? If the latter were true, wouldn't that involve personal, and in some cases, bias judgment on the part of the administrators? Wouldn't such personal/bias judgment violate viewpoint neutrality? In Fry Judge Shabaz addressed this question by saying, "The principle of viewpoint neutrality requires the University to refrain from distinguishing among student groups' viewpoint in permitting or denying forum access" (Fry, et. al. v. Board of Regents of the Univ. of Wis. Sys., No. 96-C-0292-S (W.D. Wis. 2000) at 13).
Third, what if student activities fees are derived from tuition (no mandatory, separate fee)? This could change the status of student organizations from independent organizations to official agents (like faculty) of the university and that could make their speech the opinions of the State and part of the institution's instruction. Then who would control the speech and to what degree would that speech be controlled? What if a student government enters into a 50-50 funding partnership with an RSO for a political event that some students find repugnant? Would such activity fall under the Abood and Keller precedents? These are a few of the questions that await further clarification.

What is the impact on mandatory student fees policies of specific major, state universities in the Ninth Circuit as a result of the Southworth decision?

In this section, the policies and procedures of ten major, public universities will be examined. The policies were obtained from student government by-laws, student handbooks, and official web sites. A summary of policies and procedures will be presented followed by an analysis of each institution's programs and procedures within the context of the recent Southworth decision.

In this analysis, the focus will be on the literature governing the funding for RSOs that is available to these student organizations for the purpose of writing their proposals and navigating such proposals through the bureaucratic processes that result in funding decisions. University student fees policies were assessed using criteria to determine the degree by which these policies met the
Standard of Viewpoint Neutrality established by Southworth. First, they were examined to determine if the policy included specific deadlines for proposals. Second, each policy was reviewed to see if it clearly explained the decision-making process occurs. Third, the policy was analyzed to see if specific criteria were listed (and the more quantifiable the better) that are taken into consideration when the funding decisions are made. Fourth, the policy was reviewed to determine if written justifications for decisions were required. Finally, the policies were examined to see if there was an explicitly published appeals process with specific objectives or criteria, for a review of funding decisions. This aspect of the policy would provide a mechanism for holding the decision-makers accountable, and provide a basis for decisions to be reconsidered and overridden. The general trends and significant issues that emerge as a result of this analysis will be presented as closure for this chapter.

University of New Mexico

At the University of New Mexico there exists a per student portion of mandated general fees to support student activities. The student government fee is separate and is a fixed dollar amount. There are four components of the mandatory tuition and fee rate: tuition, facility fees, student activity fees, and student government fees.

The Student Fee Review Board (SFRB) recommends to the university president the student activity fee amounts and the allocations. The president
ultimately approves the annual unit allocations of the student activity fee and approves the expenditures from the Student Activity Fee Special Fund.

In the fall of each year, the SFRB initiates the budget process for organizations funded by student fees and organizations seeking funding from student activity fees. The criteria for RSO funding require the activities associated with funding enhance the academic and intellectual environment by encouraging, contributing to, or providing appropriate services, which create a more complete environment for the students at the University of New Mexico.

The SFRB's recommendations for funding require a majority vote for those organizations seeking funding; and 2/3-majority vote for those organizations that are already receiving funding.

In order to enhance the process of long range planning, the SFRB will recommend that organizations be placed on a status that ensures continual funding. The total funding for such organizations will not exceed 95% of the student activity fee and will not be eliminated or reduced from year-to-year. For start up needs or seed money, the SFRB recommends that organizations be placed on a "non-receiving" funding status and will be funded through the Student Activity Fee Special Fund. There is no guarantee of continued funding of such organizations from on a year-to-year basis (Student Fee Review Board Policy, University of New Mexico, 1999).

While the president has final approval of the allocation of student activity fees, it appears that there is not a stringent review or appeal process in place that would hold decision makers accountable. The criteria used to make funding
decisions are very vague. Therefore, funding decisions are open to wide interpretation may be the product of personal judgment and bias on behalf of the student government representatives.

An overwhelmingly large portion of the student activity fees (not to exceed 95%) is dedicated to the long range funding of RSOs. While this policy promotes the process of long range planning, it could also lock out new applicants from access to opportunities funding. There is opportunity to receive seed money for new RSOs but beyond that, there is no assurance that there will be future funding. The policy tends to favor the status quo. This may inadvertently limit the range of expressive activity.

Because of the vague presentation of funding criteria and funding processes, it appears that the University of New Mexico's student fees program could be easily subjected to litigation based on Rosenberger's and Southworth's viewpoint neutrality requirements.

Arizona State University, Main

The State of Arizona does not authorize a student activity fee. A portion of tuition is given to student governments to disburse to RSOs. This practice could raise some legal questions. For instance, because RSO funding is derived from tuition, any RSO activity or speaker might be considered part of the university curriculum, instead of being an independent education experience beyond the classroom. The recipient RSOs and their speech and advocacy endeavors might be considered agents and speech of the university like faculty and
administrators, thus, the university would no longer be considered neutral in the limited public forums. Legal issues such as these could easily entangle an institution in viewpoint neutrality challenges like Rosenberger-Southworth and Abood-Keller. It is recommended that all funding earmarked for student activities be deposited and maintained in separate accounts from tuition or instructional dollars. If the funding mechanism is treated as a student fees program, there might be less likelihood that Rosenberger and Southworth-related challenges would be successful. Because the U.S. Supreme Court, or lower courts for that matter, has not directly addressed this issue, there would be no guarantee.

At Arizona State University, the purpose of the RSO Program is to compliment the academic program and to enhance the overall experience of the students through development of, exposure to, and participation in social, cultural, intellectual and recreational activities.

RSOs are eligible to request funding through student government. They are encouraged to seek funding for programs that strive to further the educational enrichment, cultural development, and institutional integrity of the student body on campus.

Every May, the Senate allocates funding to groups who have completed the application or re-application process. Applications for funding are made available to RSOs in September and all funding applications must be completed by the end of the tenth week of classes. No organization can receive more that $1,500 in funding in a single fiscal year.
The criteria for determining funding include number of students benefited, inside and outside the organization; quantity of students participating in the event or activity; the organization's previous use of funding; efforts by the organization to generate funds or provide services to students (ASASU Funding Application Information, 2000).

Arizona State University, Main has well established funding procedures and timeline that facilitate a good equal access policy. Funding limits are set and funding criteria are explicit. One exception might be the criteria of examining the organization's previous use of funding. When applying this criteria, decision makers could easily draw some conclusions based upon personal judgments and bias and generate a viewpoint neutrality challenge to the overall funding process. One excellent criterion is the number of students benefited inside and outside the organization. Instead of quantifying interest in a certain area or issue, the funding mechanism measures the overall impact of the program.

A procedural review or appeal process is not in place. This negates an opportunity to impose a system of accountability for viewpoint neutrality in funding procedures and overall program/activity intent.

The University of Arizona

At the University of Arizona there are basically two funding sources. McDonalds and Arizona Student Unions, through a contract agreement, offer additional funding for student and student organization initiated campus programs. In order to qualify for funding the program must include, but not be
limited to the following criteria: Opportunities to enhance relations between the faculty and students; campus activity programs that encourage cross-cultural awareness among students; campus-wide programs that recognize student achievement and success; receptions for visiting artists, faculty, and community leaders that are open to the campus.

The criteria used to review the McDonalds-Arizona Student Government funding requests include: A definition of the program and how it meets the intent of the funding mechanism; how the program will provide an opportunity for the entire campus community to be involved; identify the source(s) and amount(s) of matching funds as well as the RSO's own financial commitment; describe the level of collaboration/partnership with another student organization; describe the impact the program will have on the campus community or specific population of students within the campus community; provide a detailed budget that outlines all income and anticipated expenses. All proposals for the McDonalds-Arizona University Student Government funding must be turned in by the first of each month and decisions are announced by the 15th.

The second source of funding at the University of Arizona is through the Arizona University Student Government (Associated Students of the University of Arizona, or ASUA). Funding is offered to RSOs who have undergraduates as the majority of their members. The ASUA Appropriations board is the non-political funding advisory board to the ASUA Senate for all RSOs. All of its procedures ensure fair and proper allocation of funds in accordance with the ASUA Constitution and By-laws.
The primary criteria to be considered for funding includes: Enrichment and growth of the campus community; level of the RSOs fundraising activities; size of the organization's membership; its community or campus service. ASUA provides money to RSOs for the purposes of getting club activities started. Clubs must complete an Initial Funding Request form and sign up for a brief fifteen-minute Initial Funding interview at ASUA. After September 15th, the full Appropriations Board at their regular Monday meetings will hear Initial Funding requests by newly formed recognized organizations.

Special funding for events or activities is also available through the ASUA. Such activities include special events that are open to the entire student body and travel to conferences and meetings. RSOs must complete a Special Funding Request form and meet with an ASUA Club Advocate. Only an ASUA Club Advocate may place an RSO on the Appropriations Board meeting agenda to request funding. The full Appropriations Board at the regular Monday meetings during the regular semester only hears special funding requests. In order to qualify for special funding, RSO representatives must contact the Club Advocate for special funding a minimum of ten business days prior to the event for which funds are being requested. Requests initiated fewer than ten business days prior to an event are not be considered. The Appropriations Board submits recommendations to the Senate for special funding in the form of a detailed consent agenda, and itemizing initial and current levels, no less than 24 hours before the Senate meeting following the Appropriations Board meeting at which action was taken. If an Appropriations Board Director is also a member of the
RSO requesting the special funding, that director is ineligible to take part in the discussion or vote except as a member of the audience in the capacity of a club member. The amount of times an RSO appears before the board will also be taken into consideration.

All appeals must be submitted in writing to the ASUA Executive Vice President within 5 business days and that officer will forward the appeal to an Appeals Committee made up of the Executive Vice President and two other Senate members. The Appeals Committee will forward the appeal to the full Senate with a 2/3 vote. Decisions to forward appeals to the full Senate will be made in five working days after receiving the appeal. The Senate and the ASUA Supreme Court will grant appeals on the bases of one of the following two criteria: First, due process was violated; second, an issue dealing with ambiguity in the ASUA bylaws or with an issue of legality. New information or a change/alternation of the original funding proposal is not be considered grounds for an appeal. All appeals must be initiated by an organization representative of the RSO and a RSO representative must be present at the appeal. If an RSO has been granted an appeal and is dissatisfied with a decision of the Senate, or was not granted an appeal by the Senate Appeals Committee, the organization might file an appeal with ASUA Supreme Court within 10 working days of a Senate appeal decision.

Of particular interest at the University of Arizona, is the position of Club Advocate. Club Advocates receive a stipend and are appointed by the Executive Vice President and approved by the ASUA Senate. They provide assistance to
RSOs in organizational affairs. They hold regular office hours and make themselves available to RSOs 20 hours a week. They are required to have a working knowledge of the ASUA and university funding guidelines; be able to articulate those guidelines to RSOs requiring assistance; provide assistance to RSOs in preparing and present funding requests and appeals; work with the ASUA Business Manager in accounting for monies allocated to and spent by the RSOs; help RSOs navigate bureaucratic difficulties related to recognition and funding; help with all university procedures including room scheduling, facility management, and requisition forms; assist RSOs in developing any programming endeavors, fostering effective recruitment and retention of members, developing strategies to improve club effectiveness; work to staff, develop, and enhance the ASUA Club Recourse Center under the coordination of the Executive Vice President; proactively visit RSOs, meet with presidents and club officers, and serve as liaisons to ASUA for all RSOs (ASUA Student Organization Handbook, 2000-2001).

The University of Arizona's McDonald-Arizona University Student Government funding program contains very specific criteria for funding. It provides an excellent guide for those who are requesting funding, and it is an excellent template by which funding allocation decisions may be made.

However, the student activity fees program that passes funds through student government to RSOs contains criteria for funding that are very vague. This allows for personal judgment and bias on the part of the decision makers. One criteria, the size of the organization, is particularly troubling because it
implies that the program will reward a level of interest within the organization rather than the level of interest the organization generates throughout the campus community. Such criteria could be applied at the expense of viewpoint neutrality. The appeals process is well defined as well as the reasons appeals will be accepted. However, objectives and standards should also be part of the appeals decision-making process so it may fulfill the requirement of viewpoint neutrality. The program’s timeline is well established and written well enough to be evenly applied to all RSOs. Thus, it facilitates equal access to funding.

As a further means to facilitate equality of access, the university employs club advocates through a stipend. The individuals work with RSOs from the very beginning of the budgetary process all the way through to the end of the appeals. It would appear that such advocates are critical to ensuring the integrity of the entire funding process. They ensure RSOs are properly advised, understand the bureaucratic process, and they could identify potential challenges that might result in litigation. If properly trained and adequately supervised, the club advocates could perform critical evaluations as the funding process evolves and progresses so as to ensure that the program complies with the Viewpoint Neutral Standard.

The University of Nevada Reno

Like the State of Arizona, Nevada does not authorize a student activity fee. Any RSO activity or speaker might be considered part of the university curriculum because student activity funding is derived from tuition. Like in the

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case of Arizona, it is recommended that all funding earmarked for student activities be deposited and maintained in separate accounts from tuition or instructional dollars. If the funding mechanism is treated as a student fees program, there might be less likelihood that Rosenberg and Southworth-related challenges would be successful. Because the U.S. Supreme Court, or lower courts for that matter, have not directly addressed this issue, there would be no guarantee.

At the University of Nevada Reno, the Student Government (Associated Students of the University of Nevada, ASUN) receives a portion of the tuition. If a student objects to funding a program, he/she may request a portion of his/her tuition returned which, when pro-rated, amounts to less than $0.25.

The maximum amount that an RSO may request for its operations budget is $150 per semester. An RSO may borrow seed money from the ASUN to get started. The funding must be paid back by May 1st of that academic year. A maximum of $1,500 to each RSO is available as matching funds for a school-wide event that benefits the entire student body. Any profit must be proportionally split between the ASUN and the RSO. The ASUN may also co-sponsor an event with a RSO under a 50-50 partnership. Funding requests for a spring semester must be submitted no later than November 15th in the previous fall semester. A hearing is conducted and each RSO has 10 minutes to make a presentation. If the funds are not exhausted, the RSO may request funding for the entire academic year. All funding decisions are based on the following: Equity in that all clubs are treated equally and have the same opportunity to seek
funds; and balance in that the governing board looks to fund programs that enhance the collegiate experience of students outside the classroom and address six dimensions of growth – social, spiritual, educational, cultural, immediate needs, and recreational (ASUN Clubs and Organizations Manual, 1999). A referendum process to access funds is in place at the University of Nevada Reno, however; the referendum mechanism has not been used to address the collection or disbursement of fees (Telephone Interview with Erik Dickson, Director of Student Activities, University of Nevada Reno (Dec. 8, 2000)).

UNR’s timeline and procedures are well established to ensure that RSOs have equal access to funding. The other criteria, social, spiritual, educational, cultural, immediate needs and recreational, are rather vague and subjective. It does not provide much guidance to those RSOs wishing to request funding and could easily entangle the ASUN in litigation. More quantitative criteria, such as operational expenses, would be easier for ASUN to administer and be easier to justify in terms of equity and viewpoint neutrality issues. There is no appeals process, with its own standards and objectives, spelled out in the university’s policies. An appeal process would allow for further review and ensure accountability of the decision makers.

ASUN provides matching funds for student events and enters into a 50-50 partnership with the RSO. Student government organizations should avoid such activities as there could compromise the organization’s neutrality and, thus, compromise the requirements of viewpoint neutrality. However, UNR has an opt
out remedy which gives the ASUN a little more latitude in adopting political or ideological positions. While the referendum mechanism is in place, it has not been used in relation to student fees for a very long time. ASUN should amend its by-laws to remove the use of referendum for funding decisions.

Nevada State law authorized the creation of campus student governments and determined them to be self-governing and financially independent from the administration of the system (Nev. Rev. Stat. § 396.547 (1999)). In the light of the recent Fry decision, this could be problematic. Fry struck down the University of Wisconsin, Madison's mandatory student fees program because there was no diligent administrative oversight and, thus, too much student discretion in student funding and eligibility for funding decisions. While universities in the Ninth Circuit Court's jurisdiction are not bound by the Fry decision, administrators should pay particularly close attention to the university's appeal of the Fry decision. Should the U.S. Supreme Court affirm the U.S. District Court's decision in Fry, the constitutionality of the student fees program at UNR would compromise the Standard of Viewpoint Neutrality and be unconstitutional.

The University of Nevada Las Vegas

Student activity funding is derived from tuition. An RSO in good standing and not on probation may request up to $300 in one academic year. Requests are taken by Student Government (Consolidated Students of the University of Nevada, CSUN) so long as there is funding available. Such funding may be
used for events, merchandise, publications, or travel, so long as it can be demonstrated that the funding will benefit the UNLV campus community.

All funding is open to all UNLV student organizations that conform to the University Code of Conduct, UNLV policies and procedures, State of Nevada, and federal laws ordinances. For the academic year 2000-2001, funding requests must be made between June 2000 and May 2001 (CSUN Student Activities Packet, 2000). A referendum process is in place. Back in 1993, a ballot question was submitted to CSUN, “Would you pay $1.00 for a recycling program?” The CSUN Senate approved the question with a 2/3 vote and the question was placed on the ballot. UNLV students approved the measure by a three-to-one margin and the new fee was presented to the Board of Regents for approval. It was placed on the Regents’ agenda and it was approved. As a result of this referendum process, UNLV students now pay a separate fee of $1.00 for the Rebel Recycling Program (Telephone Interview with James Moore, Business Manager, University of Nevada Las Vegas (Jan. 5, 2001)).

UNLV has established a well-defined timeline for proposals and decisions to be made. Criteria for decisions are nonexistent. A publicized process for how decisions are made is absent. An appeal process, or review process, is nonexistent. A referendum mechanism was utilized in 1993 that imposed a student fee of $1.00 per student for a service called “Rebel Recycling.”

The university should stop the referendum mechanism, as it applies to decisions concerning services and student fees, based on the Southworth decision. They should also present very specific criteria for making the funding
decisions and conducting the appeals process. This would allow for stricter review and accountability of funding decisions. The constitutional obligation to abide by viewpoint neutrality in funding decision-making should be included in the policy.

As mentioned in the analysis of UNR's student fees policies, Nevada State law authorized the creation of campus student governments and determined them to be self-governing and financially independent from the administration of the system (Nev. Rev. Stat. § 396.547 (1999)). In the light of the recent Fry decision, this could be problematic. Fry struck down the University of Wisconsin, Madison's mandatory student fees program because there was no diligent administrative oversight and, thus, too much student discretion in student funding and eligibility for funding decisions. While universities in the Ninth Circuit Court's jurisdiction are not bound by the Fry decision, administrators should pay particularly close attention to the university's appeal of the Fry decision. Should the U.S. Supreme Court affirm the U.S. District Court's decision in Fry, the constitutionality of the student fees program at UNLV would compromise the Standard of Viewpoint Neutrality and be unconstitutional.

The University of Oregon

Like the University of Wisconsin, the University of Oregon's student fees program is governed by state statute. An incidental fee charged each term to each student produces the revenue to pay for the operations of the Student Government (Associated Students of the University of Oregon, ASUO). All
students who have paid the current term or semester student incidental fee are members of the ASUO and generally have access to all ASUO programs and services. People who are not enrolled as full time students may not be eligible for all services or funding.

Incidental fees, collected from each student on a per term basis, are allocated by the Student Senate with a recommendation from the three Major Program Finance Committees (ASUO Programs Finance Committee, Athletic Department Finance Committee and the EMU Board Finance Committee). These allocations are appropriated to finance student activities and programs. A program must be an ASUO RSO to request incidental fee funding but this does not guarantee funding. Whether a RSO receives funding is the decision of its respective Major Program Finance Committee and the Student Senate.

The Student Senate determines program funding based on recommendations from the three Major Program Committees and the ASUO Executive. The budget approval process begins Fall Terms and continues until April. Funds are released to RSO according to the line items of their approval budgets. Budgeting packets are available in October of each year. The Student Senate and the Finance Committees meet once a week during the year. Any requests for funds not included in the regular budgeting process are considered special requests and will be heard by the full Student Senate.

All meetings concerning student fees are conducted in accordance with the Oregon Public Meetings Law at the University of Oregon. The Finance Committees establish, publish, and disseminate a schedule of hearings affording
at least one public hearing on the budget request of each program seeking funding within their respective jurisdictions. The Student Senate also establishes, publishes, and disseminates a schedule of hearings affording at least one public hearing on each lump sum budget recommended by the three Finance Committees.

Each program within a Major Program must submit a goal statement which allows each Finance Committee to determine for itself whether the program or activity meets the statutory standard which authorizes the university to collect fees to fund programs for the cultural and physical development of students. Multiple-year funding commitments are authorized only through the initiative or referendum process and approved by direct vote of the student body. Multiple funding commitments can only be approved for services for students provided by agencies or programs external to (not managed by) the student union, ASUO, and Athletic Department or for capital projects. The Student Senate and Finance Committee will include the results of any such vote in favor of funding in their fee recommendations.

Incidental fee allocation recommendations are divided into three major categories: Student union activities; educational, cultural, and student government activities; and intercollegiate athletics. Each of these categories is considered a Major Program. A distinct activity within a Major Program that has been funded for six consecutive years is considered a Traditionally Funded Program (TFP). Capital projects and services for students funded in whole or
part with incidental fees typically will be included in the category of ASUO program.

A decrease in the level of fee support for any Major Program shall not exceed 10% of the preceding years allocation unless the Program voluntarily requests such a reduction. The 10% reduction limit may be exceeded if either the university president or the student body, in an initiative or referendum, approves such a reduction. The same criteria are applied to recommendations concerning TFPs, except that the allowable reduction is 25%. A recommendation to reduce funding by more than 25% requires a unanimous vote of the Finance Committee responsible for allocating fees to the affected TFP. The entire Student Senate will hear appeals to the Finance Committee's funding decisions with a 2/3-majority vote. Appeals must be submitted within 72 hours after all lower appeals have been exhausted.

The president of the university notifies the ASUO in writing within seven working days of receipt of the complete incidental fee budget allocation. It is in that written notification that the president indicates approval, denial, or disagreement with any portion, or whether he/she wishes to suggest changes to the recommended allocation(s). If an agreement cannot be reached within ten working days, either the ASUO president or the university president then may request a Hearings Board. Both parties notify the Hearings Board and each other within five working days and in writing whether they accept or reject the recommendations of the Hearings Board (ASUO Green Tape Notebook, 1998).
Oregon law governs the University of Oregon's student fees program. The process is very specific and the timeline provide for equity among RSOs in terms of access to funding. The University of Oregon wishes to ensure that each RSO submits a goal statement so it can be measured against the statute that authorizes the university to collect the fees in the first place. This would be in accordance with Abood, by ensuring that the group's activity is germane to the university's mission. This criterion is not necessary in the wake of the Southworth decision because the U.S. Supreme Court acknowledged and accepted the broad educational mission of universities. Analyzing individual activities to determine whether they are germane to the university's mission is no longer necessary.

Decreasing the level of funding support for major programs does not occur except through a decision by the university president or through initiative or referendum approval by the student body. Constant levels of funding for RSOs may prohibit equal access to the funding for all RSOs, especially new RSOs. This could be interpreted and challenged on the basis of content-based or viewpoint-based discrimination. Since the Southworth decision, the referendum mechanism should be removed as a funding mechanism. The University of Oregon's policies were challenged in the Rounds case, which, although the court upheld the policies, they should be reviewed, evaluated and rewritten to ensure compliance with the viewpoint neutrality principle established by Rosenberger-Southworth.
The University of California System

The Office of the President of the University of California provided guidelines to all University of California campuses concerning their respective policies on mandatory student activity fees. Citing Rosenberger and Smith, the President of the University of California System provided the following guidelines to all campuses. Registered campus organizations and related programmatic activities that are predominantly educational, recreational, or social in nature may be funded, on a content and viewpoint neutral basis by mandatory student fees, and objecting students are not entitled to a pro-rata refund. Registered campus organizations and related programmatic activities that are predominantly political, religious, or ideological in nature may be funded, on a content and viewpoint neutral basis, by mandatory student fees in support of the university’s purposes, and objecting students are entitled to a pro-rata refund. Mandatory student fees available to such student governments may fund official student government lobbying activities on student-related matters, provided that the student is entitled to a pro-rata refund (University of California Guidelines for Funding Registered Campus Organizations and Related Programmatic Activities by Compulsory Student Fees, 1999).

The president further defined educational, recreational, or social organizations as well as organizations that are predominantly political, religious, or ideological in nature. Educational, recreational or social organizations were defined as those organizations that supplement or enhances academic preparation and development; promotes or recognizes academic performance...
and excellence; promotes an awareness and understanding of the ideas, customs, art, languages, and social contributions of a culture or cultures; promotes, sponsors, or provides community service; promotes discussion, debate, or awareness of public issues from a variety of perspectives or viewpoints; promotes participation in voter registration and similar nonpartisan civic activities; develops personal, professional, or career-related skills; or is recreational or social in nature. Political, religious, or ideological organizations were defined as organizations that support or sponsor ballot initiatives, candidates seeking election, or other political purposes; support or sponsor lobbying; support or sponsor religious rites or services; co-sponsor activities in connection with one or more off-campus organizations whose principal purposes are political, religious, or ideological and the RSO either provides substantial financial support to, or receives such support from, the off-campus organization; or is principally dedicate to effecting political, religious, or ideological purposes presented from a single perspective, as distinguished from educational purposes such as promoting discussion or debate from different perspectives (University of California Guidelines for Funding Registered Campus Organizations and Related Programmatic Activities by Compulsory Student Fees, 1999).

All campus implementation plans must be reviewed by the Office of the General Counsel to ensure that the plans are consistent with the court decisions cited earlier and the policies of the University of California. Further, campuses are encouraged to consult with the Office of the General Counsel whenever a question arises concerning whether particular allocations follow the content and
viewpoint neutral requirements, and meets the legitimate mission or purpose of the university (University of California Guidelines for Funding Registered Campus Organizations and Related Programmatic Activities by Compulsory Student Fees, 1999).

The University of California System provided explicit guidelines for campus RSO funding policies. Definitive guidelines like these were absent in other systems analyzed. Relying upon Smith, the UC System determined that student fees could fund any official student government lobbying activities on behalf of students so long as students have an opportunity to opt out. Further, if a group's activities were political, religious or ideological in nature, and such activities were explicitly defined, students must be afforded an opportunity to opt out as well. If the group's activities were educational, recreational or social, and these activities were explicitly defined, students may not have opportunity to opt out. The system relied upon the Rosenberger decision and directed campuses to ensure that RSOs are entitled to funding in a content and viewpoint neutral basis to support the university's purpose.

These guidelines have served the purpose of assisting universities within the system to formulate more specific funding policies that conform to the Rosenberger and Smith decisions. These guidelines were written in October 1999, one month before the U.S. Supreme Court heard the Southworth case. However, by applying the principles of viewpoint neutrality of Rosenberger, these policies seem to be very much in compliance with Southworth. While the Southworth Court chose not to impose the pro rata refund for students, it is
understandable why the UC System chose to adhere to Smith. The challenge in Smith involved the UC Berkeley campus and student government representatives were involved in active lobbying. When students pay their mandatory activity fees, they automatically become members of student government. This scenario appears to fall outside the Southworth precedent (in Southworth, student government did not get involved in political advocacy) and could possibly fall under the precedent set in Abood – Keller union cases. That is, fees that cause an automatic funding for an organization that engages in political advocacy, a pro-rata refund for students who do not agree with the opinions of the student government may prevent compelled speech litigation.

The University of California Berkeley

The Student Government (Associated Students of the University of California, ASUC) allocates the mandatory student fees to qualified RSOs. The ASUC Office of Student Affairs makes the initial review and funding determination within three weeks of receipt of all funding applications. Staff of the Office of Student Affairs compiles the factual information together with recommendations as to whether the RSOs are eligible or ineligible for funding with mandatory student fees. The Finance Committee is charged with the review of all funding applications to determine whether the RSO is eligible for funding. In making its determination, the Finance Committee considers the RSO’s mission statement, character, or constitution; the purpose of the proposed or anticipated funded activities; and the purpose of funded activities carried on by the RSO in
the past regardless of source(s) of funding. When considering allocations for RSOs, the ASUC considers the group’s telephone bill, postage, office overhead, photocopying/printing, guest speaker fees, office equipment, or marketing. RSOs are limited to only $125 in the first year that they receive funding from the ASUC; no more than $200 in the second year; no more than $300 in the third year; and in the fourth year funding will be at the discretion of the Senate. Publication groups receive a little more funding each year.

In order to be eligible for funding an RSO must comply with the following requirements: The RSO must be composed primarily of registered students of the Berkeley campus; the RSO must submit a current constitution to the Office of Student Affairs; the RSO must submit a budget to the Senate and Finance Officer; the RSO must be recognized by the ASUC; the RSO may not use funds for any activities in support of or against ASUC candidates and propositions; all elected and appointed officers of the RSO must be registered Berkeley students; only registered Berkeley students will have access to the funds; only registered UC Berkeley students can vote to form/alter the RSO’s constitution; and the RSO’s activities cannot jeopardize the ASUC’s non-profit status.

In each fall semester, the ASUC advertises a list of ASUC funded RSOs and the amounts they received from mandatory student fees. They also publish instructions and information on how a student may object to the funding of a particular RSO. Any student attending UC Berkeley who pays mandatory fees may object to the funding of one or more student groups by filing a written objection with the ASUC Office of Student Affairs within 15 days of public of
publication of funded groups. A student is entitled to a pro rata refund of their mandatory student fees if they object to an RSO (or an activity of any such organization funded by a separate allocation) that is predominantly political, religious, or ideological in nature. A student is not entitled to a pro rata refund of their mandatory fees if the subject group is predominantly educational, recreational, or social in nature. Once a notice of objection is received, the ASUC Finance Committee determines whether the group in question is religious, ideological, or political in nature using the following criteria that has been spelled out in the ASUC's bylaws: The RSO supports or sponsors ballot initiatives, candidates seeking election, or other political purposes; the RSO supports or sponsors lobbying; the RSO supports or sponsors religious rites or services; the RSO co-sponsors activities in connection with one or more off-campus organizations whose principal purposes are political, religious, or ideological and either provides substantial financial support to, or receives such support from, an off-campus organization; the RSO is principally dedicated to effecting political, religious, or ideological purposes presented from a single perspective, as distinguished from an educational purpose that promotes discussion or debate from a different perspective. If the RSO is found to be predominantly religious, ideological, or political in nature, the committee will then determine the pro rata amount due to the objecting student and deduct them from the budget of the subject group in question. If the RSO is found not to be predominantly religious, ideological, or political in nature, it is not subject to deduction from their budget. Any student who objects to the decision of the Finance Committee may file an
appeal to be heard by a committee appointed by the University and the ASUC (ASUC By-laws, 1999).

The University of California Berkeley's student fees program policies practically mirrors the UC System's guidelines. Of particular interest is the funding criteria used by ASUC. Instead of program goals, intent, and germaneness as found in most universities' policies presented here, ASUC considers the RSO's telephone bills, postage, printing, overhead, speaker fees, office equipment, and marketing expenses. The criteria, thus, is based more on operations and level of activity rather than mission and philosophy. These criteria are much more quantitative and less subjective. Certainly, such criteria meet the Viewpoint Neutral Standard of Southworth. Funding requirements promote equal access among the RSOs and there doesn't appear to be a policy where funding is already tied up in long-range commitments to long established RSOs. The appeals process should be clearly defined and have stated objectives and standards for conduct.

The pro rata refund is very clearly written and well laid out. There is little room for misinterpretation of this process and policy. The UC Berkeley policies are the best written of the ten universities analyzed. UC Berkeley's mandatory student fees program would stand up to judicial scrutiny utilizing both the Rosenberger and Southworth decisions as precedents.
The University of California Los Angeles

The Student Government (Undergraduate Students Association, USA) is responsible for the allocation of USA funding to RSOs. The USA Programming Fund Committee notifies all RSOs of the available programming funds. All RSOs requesting funds sign up for a hearing date and time when they turn in their proposals and all groups will have equal representation before the committee. The RSO funding proposal must contain the RSO’s name; name of the RSO’s representative; program abstract that adequately describes the program; statement of purpose; goals and objectives; projected target population (attendance); proposed program schedule; itemized program budget with justifications; facility/equipment cost estimate sheet, when applicable; ASUCLA facility to be used, or reason why the RSO is not using an ASUCLA facility; USA programming agreement between the USA and the requesting RSO; a signature by the RSO certifying that the proposal has been reviewed and the RSO has been advised on the event. The proposals must be submitted at least four school days prior to the scheduled programming hearing to the USA Programming Fund Chair. The RSO is required to meet with the advisor two weeks prior to the proposal deadline submission date, and any additional meetings required by the advisor. The committee chair proposes a calendar of meetings for the year at the committee’s first meeting (which is no later than September 30th of each year) and this is subject to the committee’s approval. The calendar is then advertised and posted.
The USA Programming Fund Committee designs a program evaluation form that will be used throughout the fiscal year before the proposals are circulated. Each funded organization must submit an evaluation to the USA Programming Fund Chair within two weeks following the program or event. The evaluation must contain the following information: The name of the program; date and location program occurred; evaluation model; programming funds received; programming funds spent; name of evaluator; title of evaluator; whether the program achieved its goals; cost per student; number of students in attendance; ratings of the effectiveness of the program; the quality of speakers; effectiveness of entertainment; publicity impact on the UCLA community, logistics, and planning; and suggested changes for future programs. This evaluation must include a summary of audience questionnaires, news clippings, copies of advertisements, and any handouts and/or documentation passed out at the event as part of the evaluation package. Failure by a RSO to submit an evaluation within two weeks of the program will make the RSO ineligible for the next funding hearing date. A proper evaluation must be submitted before any further consideration will be given to that group.

The USA Council hears appeals to the decisions of the USA Programming Fund Committee. Appeals are not considered based upon merit or quality of the program in question; USAC will investigate to ensure that the RSO was treated fairly by the committee and received is proper due process. Grounds for appeal include: Alleged lack of a reasonable opportunity to appear before the committee; a procedural error or discrepancy which caused a proposal to be
substantially disadvantaged before the committee; alleged unfair treatment or inconsistent treatment by the committee. Petitions for appeals must be typed and must contain the following information: The RSO's name and group representative name; statement of grievance; remedy sought by the RSO; a copy of the original proposal; a copy of the amended proposal (if applicable). Petitions for appeals must be filed within two weeks of the USA Programming Fund Committee's decision, and must be filed with the chair of the committee, the USA president and the internal vice president. It requires three-fourths of the voting members of the USAC to overrule any committee decision.

In addition to the mandatory student fee allocations described above, UCLA students participated in two referendums that approved the increase of student fees to create two additional community service funds. The Undergraduate Academic Success Fund (UASF) was created from a designated portion ($0.50 per quarter per student) of the mandatory student fees in May 1993. In May 1999, the undergraduate students approved the Community and Retention Empowerment (CARE) fund through referendum that provides funds (an additional $0.50 per quarter per student) to support the efforts of student-initiated community, retention, and outreach programs to increase access to the university and serve the surrounding community. Funding allocation and appeal guidelines are very similar to those described above (Associated Students UCLA Undergraduate Student Association Guidelines for Allocation of USA Programming Funds, 1996).
The University of California Los Angeles' policies are also well written, however, they do not go into the detail covering the pro rata refund policy and process like UC Berkley's policy does. The funding process is very explicit so as to facilitate equity in access. One item of particular interest is the event/activity evaluation that must be completed at its conclusion if the RSO is to be eligible for future funding. Such an evaluation allows for a review process that will compare the intent and goals of an event/activity, and then measure the success of attaining the goals as well as describe unexpected controversies that may have occurred. The evaluation could be an excellent tool to ensure viewpoint neutrality and to intervene early if challenges arise.

Two student referendums approved increases in student fees to create two additional community service funds. In light of the Southworth decision, referendums that are associated with student fees to service organizations should be abandoned as it is questionable that such referendums comply with the viewpoint neutrality requirements.

The University of Idaho

The Student Government (Associated Students of the University of Idaho, ASUI) provides funding to RSOs through mandatory student fees that are divided into three categories: Regular fee allocation; special fee allocation; and new organization funding (a one-time funding of up to $250). Funding determinations are made according to the following criteria: That there be no violation of law or university policies; all funding be at the discretion of the ASUI Student Activities
Board; a maximum of $1,000 will be funded to an RSO in any given fiscal year; such funds must be used for programs, events; and services that benefit the students at the University of Idaho and enhance the image of the university; all funding will be considered on a matching-funds basis, thus, requiring proof of income to be verified with bank receipts, and the RSO must develop a total cost budget for the activity.

Regular fee allocation hearings occur monthly in September, October, November, and December and cover the program requests for the fall semester only. Spring fee allocation hearings occur once monthly in February, March, April, and May and cover only the expenses for the spring semester. Any eligible RSO hosting a program that is open to all University of Idaho students may be considered for funding during the regular allocation hearings. Special fee allocation hearings may be held during December and May for additional programs if funds are available. The deadline for allocation requests and the date of the allocation hearings will be publicized each semester. No allocation requests will be accepted after the deadline.

When considering allocation requests, the board will use the following criteria to judge the merits of each: The number of students affected, the quality of the experience and benefits to students, and the contributions to enhancing campus life for all students; the RSO's efforts to raise money from other sources; the amount of financial contribution the RSO is making toward the event/program/service; how well planned the event/program/service was; the timing and spacing of events and programs over the fiscal year; the past
accountability of the RSO, such as its past programming, involvement of students in the RSO, degree of success for the RSO's programs in the past, goals and objectives of the RSO as stated in its constitution; the amount of demonstrated financial need shown by the RSO. No appeal process is mentioned in these bylaws (ASUI Activities Board By-Laws, 1999).

The University of Idaho's mandatory fees program has a well-defined process for making funding proposals and decisions. The criteria by which funding decisions are made are somewhat vague and subjective. The criteria should be quantitative and based upon operational expenses to promote equity access to funding. A process for appeals needs to be included in the by-laws, with objectives and standards for the process to ensure accountability of the decision makers. A commitment to an operational principles based upon viewpoint neutrality should also be articulated in the by-laws.

The University of Montana–Missoula

The Student Government (Associated Students of the University of Montana, ASUM) makes allocation of approximately $500,000 of student activity fees to RSOs. There are over 100 RSOs and approximately three-fourths receive direct funding from ASUM. The ASUM fiscal policy abides by Smith and has created an opt out remedy by stating, "ASUM may not compel a person to contribute money to support political, religious or ideological causes" (ASUM By-Laws, 2000, p. 2). Thus, all activity fee paying students may request a pro-rata refund of any activity fee monies allocated to support organizations whose sole
purpose is political, ideological, or religious; or organizations or agencies for events or activities that are political, ideological or religious. In following Rosenberger, ASUM will not deny funding to organizations that are religious in nature or promote religion on the basis of the views, beliefs and opinions they promote and support. Further, no student news, information, opinion, entertainment, academic or media communication will be deemed ineligible for funding because of the ideas or viewpoints expressed or advocated by the RSO.

All decisions regarding financial matters must be passed by a simple majority vote of the ASUM Board. Budgeting for each academic year is completed within the first seven weeks of the spring semester. During the second academic week of the spring semester, the business manager and accountant determine the total allocation figures for the coming fiscal year. These figures are forwarded to the president, board and senate. The board holds a minimum of one publicized student forum, held during the second week of the spring semester. The business manager explains the budgeting procedures and the board presents categorical funding percentages at this student forum. The board then categorizes every ASUM RSO into one of the following funding categories: Interest organizations - groups that provide education and activities centered around a specific idea or area of interest; academic/honors organizations – groups that provide enhancement in a field or study by providing a specific service or support to students involved in that field or area of study; ASUM administrative agency/student service organizations – groups that provide service to the campus or community and may develop skills
used when performing the service; sports organizations – groups that provide recreation primarily for students at the university; student support organizations – groups that provide support for minority students on campus and/or ethnic or cultural celebration or education of underrepresented groups; and music organizations. All budget requests are due at the end of the third academic week of spring semester. The executive proposes the overall budget to the Board with the advice of the vice president and business manager. A minimum of three formal lobbying sessions is scheduled in advance for the fifth academic week. Each organization is then scheduled for 10 minutes to explain their respective budget requests. A minimum of one hour informal lobbying occurs after each night of formal lobbying. All budgeting decisions are made in accordance with the open meeting laws and the order by which the categories described above is selected by lottery (ASUM Fiscal Policy, 2000).

The University of Montana-Missoula's funding program is grounded upon the Smith and Rosenberger decisions in that it offers an opt out remedy to objecting students and will not deny funding to RSOs that are religious in nature or promote religious views. This opt out policy is strictly voluntary and could be eliminated with a statement of commitment in the fiscal policy to base all funding decisions on the viewpoint neutrality requirement established in Rosenberger and Southworth. The process by which funding is decided is very specific and timelines are well defined. Such information is the best way to promote equity access to funding for all RSOs. The appeals process is not presented in the university’s policies and procedures. The appeals process, which has stated
objectives and standards for its conduct, would provide critical information to
RSOs that are making proposals and provide some form of review process that
would also ensure accountability of the decision makers.

Summary

Student governance is a long respected tradition in higher education. Like
the student-related activities, student government representation, participating in
the management of student activities fees, and ultimately making the funding
decisions represent valuable educational experiences beyond the classroom. If
university policies and procedures do not adhere to the Standard of Viewpoint
Neutrality, the tradition of student governance could be placed in jeopardy. Add
to this the fact that the Standard of Viewpoint Neutrality is still very vague,
confusing and, thus, controversial. It makes it all the more critical that public
universities establish well defined and published processes for funding objectives
and criteria, making funding decisions, appeals with objectives and criteria, and
administrative reviews. Requiring RSOs to evaluate each funded event for intent
and impact would provide further information that could be used in performing
administrative oversight functions. Such processes should be predictable and
offer guidelines by which RSOs may create their funding proposals. The student
government organizations must ensure that they strictly adhere to timelines and
the stated objectives and criteria for their funding decisions as well as publish a
record of justifications for such decisions. Because there is always a chance that
student decision-makers may base their decisions on personal judgment or bias,
an effective appeal process, based on objectives and criteria, and an on-going administrative review process will offer opportunities to ensure equal access to funding (the Rosenberger limited public forum) and that the Standard of Viewpoint Neutrality is satisfied.

Universities that derive student activity fees from tuition should be mindful that a funded RSO’s political or ideological speech could be linked to the university by identifying an RSO as an official agent of the university, much like a faculty member. All student activity fees should be separated from instructional funding; and student fee allocations processes should ensure equity in access and viewpoint neutrality.

Universities should carefully consider how to best assign staff who assist RSOs through the bureaucratic funding process. The more RSOs understand and can positively predict the funding process as well as understand the criteria by which decisions are made, the less likely litigation will occur.

In Southworth, the U.S. Supreme Court did not impose an opt out remedy for objecting students as it could place extreme administrative burden upon the funding program. However, if the student government chooses to forego viewpoint neutrality in funding decisions and (as in Southworth), instead, chooses to engage in political speech and lobbying efforts, it is wise to allow for an opt out remedy for objecting students. This recommendation should also be applied to those student governments that enter into a 50-50 partnership in campus events with an RSO. Such partnerships could entangle the student government in
political speech and advocacy, undermining their obligation to act in a viewpoint neutral manner.

Those institutions that have the referendum mechanism in place should refrain from that practice in association with student fees. In light of the recent Fry Santa Fe decisions, without well-defined objectives and criteria for funding, and assertive administrative oversight procedures, the entire legislative funding process (also based upon majority rule) might be interpreted as sacrificing viewpoint neutrality as well.

Chancellors, presidents, and regents at the system level should provide explicit guidance to all state institutions that will promote compliance with Southworth and Rosenberger. This will ensure consistency throughout the state. The best available resource for the review process is the guidance provided by the University of California System to all its campuses throughout the State. This guidance represents administrative policy that removes the opportunity for discretion.

Finally, it is imperative that student services administrators, university legal staff, and the student be adequately trained concerning the Southworth decision and the Standard of Viewpoint Neutrality. If university policies and procedures do not adhere to the Standard of Viewpoint Neutrality, the tradition of student governance could be placed in jeopardy. Courts will not tolerate personal discretions in the decision-making process and may revoke student authority altogether. A recent example is the Fry decision. Judge John C. Shabaz ruled that the University of Wisconsin's mandatory student fees program
was unconstitutional because the level of student government's discretion in determining funding, funding eligibility, and funding amounts compromised the Standard of Viewpoint Neutrality (Fry, et. al. v. Board of Regents of the Univ. of Wis. Sys., No. 96-C-0292-S (W.D. Wis. 2001)).

What should administrators do to come into compliance with the Southworth decision/precedent?

Administrators should carefully review all policies pertaining to the collection and disbursement of mandatory student fees in order to provide appropriate safeguards and procedures to minimize constitutional infringements upon student rights. They should also provide extensive training to student representatives and student service administrators to ensure that they understand the required Standard of Viewpoint Neutrality.

Administrators should consult legal counsel to validate the institution's mandatory student fees program policy once it has evolved. If fees are derived from tuition, administrators should ensure that the portions of tuition that constitute student activity fees are deposited in separate accounts. While not completely clear at this time, the institution probably would stand a better chance in litigation if the funding is treated as a student activity fee that is separate from the tuition. By doing this, the university and student government would maintain a posture of neutrality.

Administrators should carefully review and monitor the agendas of the student government. Students become members of the student government
when they pay their fees. If student government is engaged in its own political activity and lobbying, student fees could be challenged as compelled on condition of matriculation. This could place such funding under the Germaneness Test of *Abood* and *Keller* and would involve strict scrutiny of student government activities. Where student governments engage in political speech and lobbying efforts, student fee programs should offer an opt out remedy to objecting students.

Student government advisors must ensure that when student government representatives are engaged in the funding decision-making process, they are not making personal judgments about the viewpoint of the group requesting funding. This necessitates a more diligent administrative oversight process. Administrators should work with student government representatives to publish a timeline for receipt of proposals; adequately explain the bureaucratic process for funding decisions; and ensure that all RSOs are treated equably. Administrators and student government representatives should establish criteria for funding eligibility and awards. The criteria would also serve as benchmarks in the appeal processes and regular administrative reviews. By using the criteria, decision makers can explain the reason for their decisions and, thus, be held accountable. Finally, the referendum process should not be used for funding decisions. Rule by a majority compromises the Standard of Viewpoint Neutrality.
CHAPTER V

SUMMARY, RECOMMENDATIONS, AND CONCLUSIONS

Summary of the Southworth Decision

The Southworth decision established a new category where the U.S. Supreme Court recognizes and defers to the broad, educational mission of the university. The decision also established a standard known as the Standard of Viewpoint Neutrality. The decision was unanimous; however, concurring justices argued that the decision should have been restricted to the issues specific to Southworth. Because the parties stipulated that the mandatory student fees program at the University of Wisconsin, Madison was operated on a viewpoint neutral basis, the concurring justices argued that the Court should have decided the case on that limited ground, based solely upon the stipulation, without announcing whether the Standard of Viewpoint Neutrality was a requirement. Kennedy and the majority of justices preferred to ensure that lower courts received the message that viewpoint neutrality is now a requirement or standard by which the jurisprudence of mandatory student fees programs will be assessed. Dr. Robert O’Neil, law professor and a former University of Wisconsin Madison President, believes that the Court created a template by which lower courts will balance First Amendment rights and the Court’s broadly recognized
educational mission of universities. This action was most likely taken in response to the decisive environment that existed among the circuit courts prior to the Southworth decision.

As in Rosenberger, the Southworth Court held that the student fees created a Rosenberger limited public forum. In Rosenberger, the Court held that disbursement of mandatory student fees within the limited public forum must conform to the viewpoint neutral requirement. In Southworth, the Court held that collection of mandatory student fees for the purpose of creating a limited public forum is justified so long as the disbursement process conforms to the viewpoint neutral requirement.

The Southworth Court held that the Germaneness Test of Abood and Keller was not the appropriate standard for judging student fee disbursements. Previous lower court decisions had relied upon Abood and Keller and focused upon each group that received funding to determine if that particular group's activities were germane to the university's mission. In Southworth, the Court held that the applicable Standard was Viewpoint Neutrality and they opted to place the university's role or mission into a special category that was much broader than the unions involved in Abood and Keller.

Ultimately, the Southworth Court held that as long as the university adheres to the viewpoint neutral requirement for collecting and disbursing mandatory student fees, the Court would defer to the university when it comes to determining the educational environment both in and out of the classroom. Kennedy articulated the Court's acknowledgement that the university's
compelling interest included creating a robust marketplace of ideas where a variety of ideas, opinions, and viewpoints may be debated. Thus, the only proper remedy would be more speech, not less or restricted speech. Those students who disagree with opinions, views, and ideas of funded student organizations may organize, apply for and receive funding for their own agendas.

While the Court did not completely rule out the opt out remedy, the justices decided not to impose a constitutional requirement for an opt out policy as it could be detrimental to the entire student fees program. Justice Kennedy said, "The First Amendment does not require the university to put the program at risk" (Southworth at 1356). The Seventh Circuit Court had previously ruled that any opt out remedy may not include a refund as the taking of students' money, even for a short period of time, would violate their First Amendment rights. The U.S. Supreme Court did not address this in the Southworth opinion. Thus, it is implied that opting out prior to fee payment is not required at this time (Telephone Interview with Dr. Robert O'Neil, Professor of Law, University of Virginia Law School (Nov. 8, 2000)).

The students' attorney, Jordan Lorence, was able to convince the Court to question whether the referendum mechanism that had been used to fund the WISPIRG met the viewpoint neutral requirement. The whole purpose of viewpoint neutrality is to ensure that the majority cannot force its will upon the minority. Student referendums that require 51% of the vote to award funding had the potential of doing just that. The Court ultimately remanded this portion of the decision to the Seventh Circuit Court to further analyze the referendum process.
and determine whether it met the Viewpoint Neutrality Standard. In light of the Santa Fe decision, the referendum mechanism for funding RSOs should be abandoned.

The two dissenting *en banc* opinions by Judges Rovner and Wood in the Seventh Circuit Court were in tune with the U.S. Supreme Court. Together they argued that *Abood* and *Keller* did not apply to the Southworth question. According to Rovner and Wood, *Abood* and *Keller* represented single organizations with single viewpoints and, therefore, they were not viewpoint neutral. In *Southworth*, they argued, the university enjoyed a unique role and educational mission of providing an environment where issues and ideas could be explored and debated. According to Judge Wood, the only remedy in *Southworth* would be more speech, not less. Judge Wood also argued that the Rosenberger forum (a limited public forum) was created in *Southworth* with mandatory student fees. Therefore, the Germaneness Test associated with *Abood* did not apply. Judge Wood argued that an opt out remedy would place the university’s fee program in jeopardy under severe administrative costs. Review of these opinions may be of assistance to administrators wishing further discussion of the issue beyond Justice Kennedy’s terse opinion.

In the brief for the petitioners, attorneys for the Board of Regents echoed Judges Rovner and Wood’s arguments that *Abood* and *Keller* did not apply in *Southworth*. The Board of Regents argued that Rosenberger should apply as it created a limited public forum with the mandatory student fees and operated on the principle of viewpoint neutrality. Thus, again, forum analysis was appropriate
instead of the strict scrutiny associated with the Germaneness Test of Abood. The Board of Regents also reminded the Court that there had never been a recognized opt out remedy by the U.S. Supreme Court.

Viewpoint neutrality as it has emerged from the Rosenberger-Southworth decisions has left an element of confusion among legal scholars as how to define and apply the standard. For example, when and how must the policy make the distinction between viewpoint discrimination and content (subject matter) discrimination? Where is the fine line drawn that separates the two concepts? For now, the recent Fry decision offers excellent guidelines to administrators for ensuring that their respective student fee programs meet the requirement of viewpoint neutrality. Most specifically, Judge Shabaz in Fry has made it very clear that there must be adequate oversight over the student government's decision-making process to ensure that personal biases and discretions do not dominate the funding process. However, because this standard is still evolving, university administrators will continue to work in an environment of confusion as they create the limited public forums with mandatory student fees and try to ensure that such programs meet the viewpoint neutral requirement imposed by the Southworth Court.

Recommendations to Administrators

One thing is for certain concerning viewpoint neutrality. If university policies and procedures do not adhere to the Standard of Viewpoint Neutrality, the tradition of student governance could be placed in jeopardy. Courts will
either do away with mandatory student fees programs all together or they may transfer the funding authority from student governments to university administrators. Unfortunately, the Standard of Viewpoint Neutrality is still very vague, confusing and, thus, controversial. It makes it all the more critical that public universities establish well defined and published processes for funding, objectives and criteria for funding decisions, how and when funding decisions are made, appeal processes with objectives and criteria, and administrative reviews. Such processes should be predictable and offer guidelines by which RSOs may create their funding proposals. The student government organizations must strictly adhere to those timelines and the stated objectives and criteria for their funding decisions. They must publish records of decisions made and justifications for each. Because there is always a chance that student decision-makers may base their decisions on viewpoint or biases, an effective appeals process must be in place, based on objectives, criteria, and the original record of decisions. Finally, there should be a diligent administrative review process to ensure equal access to funding (the Rosenberger limited public forum, and to monitor student government representatives’ decisions so that the Standard of Viewpoint Neutrality is satisfied.

Universities that derive student activity fees from tuition should be mindful that a funded RSO’s political or ideological speech could be linked to the university by identifying an RSO as an official agent of the university, much like a faculty member. All student activity fees should be separated from instructional
funding; and student fee allocation processes should reflect the processes described above to ensure equity in access and viewpoint neutrality.

Universities should carefully consider how to best assign staff who can assist RSOs through the bureaucratic funding process. The more RSOs understand and can positively predict the funding process as well as understand the criteria by which decisions are made, the least likely litigation will occur. The University of Arizona model should be reviewed and considered.

In Southworth, the U.S. Supreme Court chose not to impose an opt out remedy for objecting students as it could place extreme administrative burden upon the funding program. However, if the student government chooses not to be a neutral funding source (as in Southworth), but instead chooses to engage in political speech and lobbying efforts (as in Smith), it is recommended that an opt out remedy be offered to objecting students. This recommendation should also be applied to those student governments that enter into a 50-50 partnership in campus events with RSOs. Such partnerships could entangle the student government in political speech and advocacy.

Those institutions that have the referendum mechanism as a means to allocate student fees should abandon that process. The Court in Southworth questioned whether a vote of the majority compromises viewpoint neutrality in that it does not protect the minority's voice. The Santa Fe decision seems to be a confirmation that the Court will not tolerate use of the vote in free speech issues. Further, in light of the recent Fry decision, without well-defined objectives
and criteria for funding, the entire legislative funding process (also based upon majority rule) might be interpreted as sacrificing viewpoint neutrality as well.

Chancellors, presidents, regents at the system level should provide explicit guidance to all state institutions that will promote compliance with Southworth and Rosenberger. This will ensure consistency throughout the state. I would suggest that all system level officers review the directives provided by the University of California System to all its campuses throughout the State. It is imperative that presidents, student services and academic administrators, system legal staff, and the student government representatives receive adequate training concerning the Southworth decision and the Standard of Viewpoint Neutrality so that adequate, constitutionally sanctioned student fee policies can be constructed and implemented.

Certainly, it is important that universities spend time reviewing their policies to ensure that they are current with the recent Southworth decision, and that the processes associated with funding criteria, making the funding decisions, and the appeals processes are explicit and functional. Administrators should use the Fry decisions as a benchmark by which to review and modify their respective programs.

Recommendations for Further Research

The illusive concept of viewpoint neutrality will provide ample opportunity for further research. There seems to be some dissention within the Court over viewpoint neutrality as it applies to the Establishment Clause and the Free
Speech Clause. In *Rosenberger*, Justice Souter wrote a scathing dissent saying that the decision should not have been based upon student views in a newspaper, but instead, the State should not be authorized to fund a student newspaper that, to the dissenters, represented an arm of religion. In *Southworth*, Justice Souter wrote a concurring opinion agreeing with the Court’s decision, but argued that the Viewpoint Neutral Standard should not have been made a requirement since the parties had already agreed that the student fees program of the University of Wisconsin Madison was operated according to viewpoint neutrality. It seems that Justice Souter was more tolerant of viewpoint neutrality in challenges involving the Free Speech Clause than he was with the Establishment Clause issues; and Justice Kennedy saw little difference between the two cases. It is recommended an analysis be conducted on Justices Kennedy’s and Souter’s opinions on viewpoint neutrality within the context of the Free Speech Clause, and the Establishment Clause, perhaps a more extensive comparison could be made between their opinions in *Rosenberger*.

Further study is warranted as to how a university might create and enforce policy governing speaker programs within the context of political or ideological speech and viewpoint neutrality requirements. Review of speaker selection policies may be appropriate in light of *Southworth* and *Fry*.

In an effort to determine how a university may create and operate a constitutionally sanctioned student fees program, one may wish to conduct a comparative study on the federally imposed requirements for student fees programs and federal laws governing campaign financing.
The Fry decision represents the first judicial application of Southworth's Standard of Viewpoint Neutrality. It occurred on remand by the same judge that ruled in the early Southworth decision. Upon remand, the attorney for the students brought a motion to dissolve the parties' stipulation that the Wisconsin program was administered on a viewpoint neutral basis. The motion was granted. After trial, the judge determined that the student fees program was constitutionally flawed. Where Southworth questioned the right of the University of Wisconsin Madison to collect mandatory student fees, Fry challenged the University of Wisconsin's policies concerning disbursement of those mandatory student fees. The fees collection challenge of Southworth questioned the broad educational role or mission of the university to provide the marketplace of ideas where issues and opinions could be openly debated. The disbursement challenge of Fry now questions the role of student governance. Thus, this issue is very dynamic as demonstrated by the speed with which it has maneuvered through the judicial system. The issue also illustrates a pressure for change that is not occurring within the ivory tower, but instead by forces from the outside.

It is recommended that research be initiated to analyze the ultimate impact of Southworth and Fry, and the appeal to Fry should it occur, upon student governance and viewpoint neutrality in the operation of student fees funding programs at public universities. There has been some question concerning the degree of administrative oversight a university should implement in the student fees funding decisions. In light of the recent Fry decision, it appears that without an aggressive administrative oversight process, viewpoint neutrality might be
considered sacrificed. Such research could also include the change-agents at work that are calling into question the long traditions of the academic culture and elements of self-governance.

Conclusions

In Chapter I, an introduction to the development of First Amendment jurisprudence associated with mandatory student fees programs was presented and the research problem was established. Some lower courts were relying on the narrow focus of union cases and focusing upon the activities of each challenged group to determine if such activities were germane to the universities’ missions. Lower courts were not in agreement over exactly what represented the mission of the university. As a result, university fees programs and their matriculated students were treated very differently from one jurisdiction to another. The intent of this study was to analyze how the U.S. Supreme Court resolved the conflict among the circuits and to provide guidelines to administrators in order to bring student fees programs into compliance with Southworth. Research questions were determined and common terms used throughout the research were provided.

In Chapter II, an extensive review of literature was presented which illustrated the evolution of court interpretations of college student rights, university roles and missions, mandatory student fees programs, and the U.S. District Court’s decision in Southworth. The result was general confusion and extensive conflicts in judicial interpretations among the circuit courts. All briefs
and petitions were presented in this chapter. These briefs and petitions highlighted the issues and controversies that resulted in the writ of certiorari granted by the U.S. Supreme Court. The oral arguments before the U.S. Supreme Court concluded this chapter. A summary of these arguments provided an opportunity to reflect upon the justices' questions to the attorney's arguments and, thus, determine what issues were important to the Court in anticipation of their final ruling.

Chapter III outlined the procedures by which this legal analysis would occur. The first step was to apply the Social Science Approach to qualitative research, using NEON and LEXIS NEXIS to identify secondary sources that facilitated the exploration of the general subject matter associated with student fees and First Amendment rights. As a result, legal issues and pertinent court cases emerge. They were arranged in a logical order so that the legal research could be presented in a more timely and efficient manner. An evaluation of the usefulness of these cases for the topic of student fees and the First Amendment and their relationship to the Southworth decision occurred.

An internal evaluation was conducted on all relevant cases to determine how similar the facts of each case were to the facts of the research problem and the legal significance and impact of each case with respect to the research problem. For those cases that applied to the research problem, an external evaluation was conducted to determine how subsequent court decisions have interpreted and applied the principle cases. Secondary sources were used
throughout the research project for the purpose of gathering legal commentary concerning the legal interpretations.

Case analysis was conducted on all Southworth briefs, petitions, oral arguments, and all pertinent cases identified during the fact analysis stage. The cases were then arranged in a brief format to make the case analysis more efficient; to allow for pertinent issues to be teased out of the cases; and to guard against research bias. In addition to case analyses, I attended the oral arguments and utilized the transcripts of the oral arguments before the U.S. Supreme Court to draw analogies about their significance and impact upon the Court. Telephone interviews were also conducted with key legal scholars and the parties' attorneys, which aided this researcher in determining significant issues and trends.

Ten large public universities within the jurisdiction of the Ninth Circuit were selected that are relatively similar to the University of Wisconsin, Madison. Their student fees programs were analyzed to determine the level of compliance with the Southworth decision. Pertinent issues associated with these policies that emerged were noted and presented.

The final result of this research effort was the development of guidelines that were offered to public university administrators concerning how they could best evaluate and modify their respective student fee policies in order to bring them into compliance with the Southworth ruling.

In Chapter IV, the U.S. Supreme Court's decision in Southworth was reported. Extensive analysis into the Court's reasoning was conducted. Justice
Souter’s concurring opinion was also analyzed. The impact of the decision was also presented in this chapter, along with an analysis of arguments that had the greatest impact on the Court’s decision. The Court created the new Standard of Viewpoint Neutrality and the new First Amendment Category, which distinguished the role and mission of a university from that of a union or bar association. It was determined that the Standard of Viewpoint Neutrality represented a significant development that evolved from Rosenberger and Southworth. Therefore, a focused historical analysis of the legal controversies involving viewpoint neutrality was conducted and findings were presented in this chapter.

All research questions were answered in this chapter. The ten public university student fees policies were also analyzed and recommendations were presented as to how they could better comply with the Southworth decision. Recommendations were provided to administrators concerning how to best create, implement, and operate mandatory student fees programs in accordance with the Southworth decision.
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KENDRA FRY and BENJAMIN THOMPSON,
Plaintiffs,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,
Defendant.

The parties conducted a trial to the Court on December 7-8, 2000 in the above captioned matter. From the evidence submitted by the parties the Court makes the following findings.

FINDINGS OF FACT

The Parties

Plaintiffs are students currently enrolled at the University of Wisconsin-Madison. Defendant has been sued in its official capacity as the governing body of the University of Wisconsin. Plaintiffs object to a policy of the defendant, the segregated university fee, because it is used to subsidize ideological and political expressive speech with which they disagree.
Program Structure

Students enrolled full-time at the University of Wisconsin-Madison must pay a mandatory fee each semester. This fee is called the segregated university fee (SUF). The segregated fee money collected from the students is deposited in state accounts.

Wisconsin law gives both the University’s Board of Regents and the students control over the funds generated by the segregated fee. This is known as "shared governance." The Associated Students of Madison (ASM) exists as the student government entitled to represent University students on campus. The ASM Student Council is composed of 33 representatives elected from the University’s student body. The ASM Finance Committee and the Student Services Finance Committee (SSFC) are sub-committees of the ASM that review internal ASM budgets and external university budgets that are funded by the segregated fee. The ASM Finance Committee is composed of nine members who are appointed by the ASM Student Council. The SSFC is composed of members elected from the student body and members appointed by the ASM and other bodies.

The Board of Regents has divided the segregated fee into two main categories -- allocable fees and nonallocable fees. The allocable fee category includes the General Student Service Fund (GSSF) and the ASM budget. Only allocable fees are relevant to this action.
For the 2000-2001 academic year, full-time students at the University of Wisconsin-Madison are each charged a segregated student fee of $249 per semester. Of this amount, $53.12 represents the allocable portion. Of the allocable portion, $8.53 is allocated to the ASM both to support the operation of the UW-Madison student government and to provide funding for ASM grants to student groups requesting funding. Another $19.06 of the allocable portion is allocated to the GSSF.

The Board of Regents has determined that student responsibility for the direct disposition of student fees exists only for the allocable portion of the segregated fee. Under Wisconsin law students have primary responsibility for the formulation and review of policies concerning "student life, services and interests." At UW-Madison, the Chancellor has agreed that "student life, services and interests" include: (1) the registration and regulation of student organizations; (2) non-academic social, cultural and recreational programs for students; and (3) those services that are initiated and operated by students.

The ASM, in conjunction with the SSFC and ASM Finance Committee, in consultation with the Chancellor and subject to final confirmation by the Board of Regents, has responsibility for the disposition of allocable fee funding. All students are permitted to participate in the process of reviewing and approving allocations by attending and
participating in ASM Finance Committee and SSFC meetings where allocation determinations are discussed. Students are also free to campaign for election or appointment to the ASM and SSFC.

Registered Student Organizations (RSOs)

To be considered for GSSF funding or for an ASM grant a student group must be a Registered Student Organization (RSO). To qualify as a Registered Student Organization, a student group must meet the following criteria: (1) it must be a not-for-profit, formalized group; (2) it must be composed mainly of students; (3) it must be controlled and directed by students; (4) it must be related to student life on campus; (5) it must abide by all federal, state, city and University nondiscrimination laws and policies; (6) it must identify a student as a primary contact person for the organization and provide the Student Organization office with the information required on the registration form; (7) it must abide by the financial and other regulations specified in the Student Organization Handbook.

The RSOs can seek funding from the segregated fee in several ways: (1) GSSF funding through the SSFC; (2) grants through the ASM Finance Committee. The use of a third method to obtain funding, a student body referendum, has been discontinued by the University after the United States Supreme Court noted its inherent problems on appeal.
All hearings relating to GSSF funding and ASM grant funding are public. The committees' allocation process produces a documentary record, as in a legislative branch. In the case of ASM grants that record consists of the grant guidelines, the RSO's application, notation upon the application showing the finance committee's action, and perhaps the notes of a staff advisor attending the meeting. GSSF funding decision records consist of funding guidelines, the group's application, and a spread sheet showing the funding decisions. Neither body records its rationale for funding decisions. Sometimes minutes and roll call votes are included in the records. The records do not contain a formal rationale for any decision to grant or deny funding, or to increase or decrease a requested funding amount.

**GSSF Funding**

Student groups seeking funding from the GSSF apply to the SSFC. Applications for GSSF funding must be submitted in September preceding the academic year for which funding is requested. The SSFC holds hearings from October through December and announces its funding decisions by mid-December. Funding applications are decided by a majority vote of the committee. Members of RSOs and the student body are free to lobby and discuss funding applications with SSFC members.
If a student organization receives GSSF funds, it may not receive an ASM Operations Grant at the same time. However, it may receive an ASM Events Grant while receiving GSSF funds. Student organizations seeking funding through this method must apply for funding to begin the next fiscal year.

The SSFC uses ten guidelines, subject to change, in making GSSF funding determinations:

1. An applicant must be a registered student organization that provides an important, on-going service to significant numbers of UW-Madison students. These services should contribute significantly to student health, safety, well-being, participation, opportunity or education.
2. The service must be not-for-profit.
3. When serving both students and non-students, the SSFC will generally only consider funding portions of programs serving students.
4. The SSFC will generally consider funding only those portions of programs directed by students.
5. Services receiving fees are expected to abide by all SSFC, campus, state and federal wage policies.
6. GSSF funding is not intended to replace any reductions in funding previously exclusively funded through tuition or "GPR" moneys.
7. Capital expenditures are provided for equipment that will substantially enhance the service offered to students only when other funding avenues have been exhausted.
8. All expenditures and revenues by student groups must be documented and made available.
9. Where possible, there must be a record system for measuring the number of students served.

10. Services that receive more than 30% of their budget from student fees and have an advisory board shall have a SSFC-appointed liaison.

"Service" as used in these guidelines has never been defined and has been the subject of contentious debate among SSFC committee members. A group seeking to appeal an SSFC funding decision can appeal to the ASM Council or ASM Judiciary, and then may appeal to the UW-Chancellor.

ASM Grants

Most RSOs seek funding through grants from the Student Government Activity Fund administered by the ASM Finance Committee. These funds come from the segregated fee. Student organizations receiving funding do not get cash or a lump sum payment from the ASM. The organizations must submit a requisition form for a specific expenditure. The RSOs can apply for Operations Grants, Event Grants, or Travel Grants.

Operations Grants - RSOs seeking an Operations Grant must apply in person to the ASM by March for funding in the next school year. Appeals from denials are made to the ASM Finance Committee or the ASM Council. A minimum of 8% of the total allocable funds budgeted for operations grants must be reserved for "last minute" operations grants that are awarded at the beginning of the
following school year. Grant applications are decided by a majority vote of the ASM Finance Committee. Denials of such grants can be appealed to the ASM Council.

Guidelines state that operations grants cannot be awarded or used for (1) fund raisers, (2) food and beverages, (3) gifts, donations or contributions, (4) financial aid, (5) legal services, (6) expenses incurred prior to ASM approval, (7) wages, (8) non-university printing services, (9) event funding, (10) telephone charges, and (11) conference/travel costs.

**Event Grants** - Registered Student Organizations apply in person for funding for a specific event prior to the event. Event grants are subject to the same funding use restrictions as operation grants. Funded events must be in the Madison area and open to all students.

**Travel Grants** - Registered Student Organizations may apply for funding of travel that is central to the purpose of the organization.

**Board of Regents Involvement**

After the ASM Finance, the SSFC, and the ASM have approved the disbursements of allocable money, their decisions are sent to the Chancellor and the Board of Regents for their review and approval.
Under Wisconsin Statute §36.09(5), the Board of Regents has final authority to approve or disapprove the allocations of funds by the student government. However, as a matter of practice, absent an RSO's appeal from a specific funding decision, the Board does not approve or disapprove individual decisions by the student officials. Instead, the Board votes on the approval of a budget which contains a line item or line items representing an aggregate amount of segregated fee expenditures.

In the last five years no student organization has appealed a funding decision to the student government, the Chancellor, or the Board of Regents. In considering any such appeals the Board is required to consider whether the student-proposed budget item requires the university to violate any statute, administrative code, policy or contract.

Since the United States Supreme Court's decision in Board of Regents v. Southworth, the University's president has amended the school's "Financial and Administrative Policies" to include that "[i]t is the policy of the University of Wisconsin System to ensure that SUF is collected, allocated and expended in a manner consistent with the requirements of the United States Constitution, the Wisconsin Constitution and applicable state statutes, regulations and policy directives." Further, "[e]xpeditures of SUF must conform with constitutional requirements, including the
The decision of the United States Supreme Court in *Board of Regents v. Southworth*..." The SSFC and ASM Finance Committee are expected to comply with these provisions.

Additional Findings of Fact

In addition to providing other campus services, some RSOs use segregated fee funding to engage in a wide range of ideological and political expression.

The ASM Finance Committee and the SSFC's objective guidelines for funding do not on their face condition the allocation of funds on the basis of a student group's viewpoint. While both committees' guidelines contain restrictions on funding politically partisan and religious activities the University's president amended the University's superceding "Financial and Administrative Policies" to eliminate these former prohibitions.

The required RSO status and the SSFC and ASM's objective guidelines are only threshold criteria that define what student groups and expenditures are eligible for funding support. Once a student group is deemed eligible for funding these guidelines provide no criteria for determining whether to fund the group and its proposed activity. They do not provide guidance on the funding amount. There are no objective criteria guiding the SSFC or ASM Finance Committee in determining whether to grant funds to an
otherwise eligible student group. The decision to fund an eligible student group, and in what amount, is left entirely to the discretion of student government officials. Each voting member of the ASM Finance Committee and the SSFC choose and use his or her own criteria to judge otherwise eligible funding applications.

The same processes, guidelines and discretionary considerations are used in considering applications for both expressive speech and non-expressive activities. Most of the specific examples of funding applications presented in evidence involve student groups that do not engage in any discernible expressive activity. Where the SSFC's funding decisions involve student groups that do engage in political and ideological expressive activity, such as WISPIRG and the UW Greens, SSFC members often disagree over the propriety of funding them. Attempts have been made effectively to defund WISPIRG and the UW Greens. Students and student groups have lobbied SSFC members both for and against funding WISPIRG and the UW Greens.

CONCLUSIONS OF LAW

The University, through its segregated fee program, promotes both expressive and non-expressive activities. Applications for expressive speech and non-expressive activities are subject to the same guidelines, prerequisites and discretion. The parties have
presented several examples of the allocation process in action relating to non-expressive activities. However, the compelled funding of non-expressive activities does not raise a constitutional issue. It is only the compelled funding of expressive activities which is at issue in this case. Moreover, the Court is unconcerned with the political history of the University of Wisconsin student government. The only issue before the Court is the constitutionality of the current system for compelling and distributing student fees to fund the political and ideological activities on campus.

To require University of Wisconsin students to pay a fee to subsidize expressive speech without any protection for the rights of students who object to the funded speech is a violation of the First Amendment. *Board of Regents v. Southworth*, 120 S.Ct. 1346, 1354-55 (2000). That protection is achieved through the operation of the segregated fee program upon the principle of viewpoint neutrality. The Supreme Court has held that "when a university requires its students to pay a fee to support extracurricular speech, all in the interest of open discussion, it may not prefer some viewpoints to others." *Southworth*, 120 S.Ct. at 1356. Therefore, the University may not compel its students to pay fees to fund expressive speech if those fees are not distributed to
speakers on a viewpoint neutral basis. The University's program must respect and safeguard the principle of viewpoint neutrality.

The segregated university fee program is a limited public forum. 

Rosenberger v. Rectors & Visitors of the Univ. of Va., 515 U.S. 819, 829-31 (1995). The principle of viewpoint neutrality requires the University to refrain from distinguishing among student groups' viewpoints in permitting or denying forum access. Here the access is to a pool of money. Those allocating funds cannot "pick and chose among similarly situated speakers in order to advance or suppress a particular ideology or outlook." Berner v. Delahanty, 129 F.3d 20, 28 (1st Cir. 1997)(citing Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993). Viewpoint neutrality requires that no viewpoint be preferred, and that no viewpoint is disadvantaged relative to other viewpoints. Grossbaum v. Indianapolis-Marion Cty Bldg. Auth., 100 F.3d 1287, 1298 (7th Cir. 1996) "It is incumbent upon the State [] to ration or allocate scarce resources on some acceptable neutral principle." Rosenberger, 515 U.S. at 819.

The use of "unbridled discretion" is not such a neutral principle. The Supreme Court has stated:

[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of . . . viewpoint censorship. The danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a
government official. . . . Because without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the viewpoint of the speaker.

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763-64 (1988). The Tenth Circuit Court of Appeals has noted that allowing government officials to make decisions as to who may speak in a limited public forum and who may not, without any criteria or guidelines to circumscribe their power, strongly suggests the potential for unconstitutional conduct. Summum v. Callahan, 130 P.3d 906, 920 (10th Cir. 1997). In the absence of express objective standards the use of "post hoc rationalizations" and "shifting or illegitimate criteria" by decision-makers hinders the detection of viewpoint discrimination. Id. at 920 (citing City of Lakewood, 486 U.S. at 758). These concerns have been recognized in the context of access to a limited public forum. See id. Some degree of discretion may be both necessary and constitutionally permissible in the segregated fee program, but discretion not limited by express objective standards is insufficient to adequately safeguard the principle of viewpoint neutrality in funding expressive activities.

This Court has found that no objective standards exist to determine which eligible student groups receive the funds compelled from the student body. The University has delegated its power to
the student government. Decisions as to who receives funding and in what amounts are left to the complete discretion of the student officials on student government committees. While appeals processes exist for funding denials, those hearing the appeals are no more bound by objective standards than the original decision-makers. Any body hearing an appeal, however, has no record of the SSFC or ASM Finance Committee’s rationale for its decision. General and vague prohibitions in University policy provide no meaningful constraint on the student government. No meaningful oversight of the allocations decisions exists.

The absence of objective guidelines and criteria creates a second problem. The present system for allocating fees cannot be distinguished from the student referendum. Both the referendum and the student government operate on the principle of majoritarian rule. As the Supreme Court stated in Southworth, and re-iterated in Santa Fe Independent School District v. Doe, "access to a public forum cannot depend upon majoritarian consent. Southworth, 120 S.Ct. at 1357; Santa Fe Independent Sch. Dist. v. Doe, 120 S.Ct. 2266, 2276 (2000). Instead of a decision by 40,000 students the present system places a vote in the hands of committee members who represent those 40,000 students. Direct democratic referenda and representative legislatures both produce majority determinations that necessarily sacrifice viewpoint neutrality. Such
determinations are not sufficient to safeguard diverse student speech. Santa Fe, 120 S.Ct. at 2276.

While the Court recognizes the University's interest in administering an effective program to promote student speech, the absence of express objective standards vests unfettered and unbridled discretion in the program decision-makers in a manner inconsistent with viewpoint neutrality. A viewpoint neutral system for distributing compelled fees cannot mean a system that completely delegates funding decisions to the student government without objective criteria or effective oversight. Because the program fails to protect the rights of objecting students by curtailing the unregulated discretion possessed by the student government the program fails to adhere to and safeguard viewpoint neutrality and therefore compelling fees from students to subsidize expressive activities violates the First Amendment.

In summation the Court determines that the University of Wisconsin's current system for compelling, allocating and distributing segregated university fees to fund expressive activities does not operate in a viewpoint neutral manner and accordingly constitutes impermissible compelled speech in violation of the First Amendment of the United States Constitution, accordingly,
ORDER

IT IS ORDERED that defendant Board of Regents of the University of Wisconsin System is enjoined from compelling, allocating and distributing segregated university fees to fund expressive activities unless and until defendant establishes an allocation system that operates in a viewpoint neutral manner.

IT IS FURTHER ORDERED that judgment as aforesaid shall be in favor of plaintiffs against defendant for that injunctive relief set forth herein together with costs to be entered February 14, 2001, allowing defendant to establish a system which operates in a viewpoint neutral manner.

Entered this 11th day of December, 2000.

BY THE COURT:

[Signature]

JOHN C. SHABAZ
District Judge
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KENDRA FRY, BENJAMIN THOMPSON and SCOTT SOUTHWORTH,

Plaintiffs,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

Defendant.

MEMORANDUM AND ORDER
96-C-0292-S

The procedural history of this litigation is well known. The above-entitled action was tried to the Court on December 7 and 8, 2000, and defendant’s program was found to be violative of the First Amendment. Judgment was stayed pending defendant’s attempts to remedy the constitutional infirmities. Based on its proposed changes to the segregated fee system defendant moves to amend the judgment to state that the revised system is constitutionally adequate, or in the alternative to limit the scope of any injunctive relief to the named plaintiffs. Plaintiffs move to reinstate the original plaintiff Scott Southworth as a plaintiff to which defendant does not object.

MEMORANDUM

This Court concluded that defendant vested the university’s elected student government with unbridled discretion in the
allocation of segregated university fees to groups engaging in expressive ideological activities. It held that such discretion inadequately protected the principle of viewpoint neutrality and the constitutional rights of objecting students where student fees were compelled. Since December 8, 2000 defendant has made extensive efforts to bring its segregated fee system into compliance with this Court's ruling.

Defendant's efforts have centered on attempts to create an effective appeals process for registered student organizations ("RSOs") complaining of viewpoint discrimination in the allocation process. To create a record for appeal defendant now requires that proceedings involving segregated fee allocations be taped and that committee members use standardized forms requiring their rationale in deciding RSO funding applications. After exhausting student review aggrieved RSOs may appeal as of right to the university's chancellor. Review of funding decisions is de novo, although deference is given to the amount of funding granted so long as it is comparable to amounts given to a "substantially representative and accurate set of similar [student] groups." Defendant has also attempted to add enforcement to its announced prohibition on non-viewpoint neutral decision-making. Committee members must take an oath to be viewpoint neutral in funding decisions and face removal from office if they fail to comply.

More significantly defendant has attempted to establish specific criteria for both RSO funding eligibility and funding amounts. Part
Three, Article V, Section 1(c) of the ASM By-Laws lists twelve requirements that must be met before an RSO is eligible for GSSF funding. Eligible RSOs are assured funding equal to a minimum amount taking into consideration their student organization space, one part-time student position and basic supplies. RSOs may be granted additional funds upon meeting six monetary criteria under Part Three, Article V, Section 2(b) of the ASM By-Laws. Similar requirements are contemplated for ASM Grant funding.

Despite defendant's efforts, the measures undertaken fail to address the central constitutional defect in the segregated fee program. The level of the student government's discretion is unchanged. No proffered changes address the discretion held by the student government committees in making their eligibility and funding decisions. Determining funding eligibility remains a discretionary exercise. Only five of the twelve criteria utilized in such decisions can be labeled objective -- the remainder are inherently subjective and malleable and provide for the use of expansive discretion. Questions such as whether an RSO has a "clear" purpose and goals, whether it offers a "substantially equivalent service" as provided elsewhere, and whether it "adequately answered" the questions of the funding committee, to name a few, illustrate the broad discretion to be utilized by the relevant committees. Moreover, the requirement, problematic in the past, that an RSO provide an undefined "educational benefit and service" to university students remains in place. If eligible the RSO must clear additional
subjective hurdles to be funded in excess of an individualized minimum. The RSO must prove to the satisfaction of the committee that it can "effectively expense" additional funds, that it has accomplished its past objectives, that its request is reasonable, and that it is in need of the funds. The system continues to fail to address the apportionment of funds to those RSOs who run the gauntlet of subjective criteria and are entitled to funds in excess of the minimum. Differentials in funding amounts have no objective root but reflect only the discretionary judgment of the student government. Admonishments to student government officials and a de novo appeals process are not sufficient to cure this violation. The appeals process protects the rights of complaining RSOs, not the objecting students.

While this Court declines to impose any system requirements upon defendant, it does note that creating a viewpoint neutral allocation mechanism is not difficult. The complications in this case relate to defendant's pursuit not only of its commitment to fund diverse student speech but its competing commitment to empower student government to be the arbiter of that funding. The present system does not balance those competing commitments, if, indeed, they can be balanced, so that it is viewpoint neutral and protects the First Amendment rights of objecting students.

Having rejected defendant's contention that the revised system is constitutionally adequate, the Court agrees that injunctive relief should be tailored to the named plaintiffs. Plaintiffs have agreed
to defendant's alternative, and, indeed, have informally endorsed it. See Third Affidavit of Peter C. Anderson Ex. B. It is appropriate to provide relief no broader than that requested by plaintiffs.

ORDER

IT IS ORDERED that plaintiffs' motion to add Scott Southworth as a plaintiff is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of plaintiffs with costs declaring that defendant's segregated university fee utilized at the University of Wisconsin-Madison campus is in violation of the First Amendment because it fails to conform to the principle of viewpoint neutrality in allocating fees compelled from plaintiffs to fund RSOs engaged in expressive activities to which plaintiffs object; and that defendant Board of Regents is enjoined from compelling plaintiffs to pay those portions of segregated university fees used to fund expressive RSO activities to which plaintiffs object.

Entered this 15th day of March, 2001.

BY THE COURT:

[Signature]
JOHN C. SHABAZ
District Judge
REFERENCES

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Books


Other Sources

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Telephone Interview with Erik Dickson, Director of Student Activities, University of Nevada Reno (Dec. 8, 2000).

Telephone Interview with James Moore, Business Manager, University of Nevada Las Vegas (Jan. 5, 2001).

University of California Guidelines for Funding Registered Campus Organizations and Related Programmatic Activities by Compulsory Student Fees (1999).

University of New Mexico Student Fee Review Board Policy (1999).


**Court Cases**


_Carroll v. Blinken_, 957 F.2d 991 (2d Cir. 1992) (Carroll I).


_Dixon v. Alabama State Board of Education_, 294 F.2d 150 (5th Cir. 1961).

_Fry, et. al. v. Board of Regents of the Univ. of Wis. Sys._, No. 96-C-0292-S (W.D. Wis. 2000 & 2001).


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Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983).


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Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998).

Southworth v. Grebe, 157 F.3d 1124 (7th Cir. 1998) (on petition for rehearing en banc).


Associated Briefs

Appendix for Petition for a Writ of Certiorari, Regents of the Univ. of Wis. Sys., et. al. v. Southworth, et. al. 120 S. Ct. 1346 (2000).

Brief for the American Center for Law and Justice Supporting Respondents, Regents of the Univ. of Wis. Sys., et. al v. Southworth, et. al. 120 S. Ct. 1346 (2000).


Brief for the Americans United for Separation of Church and State, Anti-Defamation League, and Hadassah, Regents of the Univ. of Wis. Sys., et. al. v. Southworth, et. al. 120 S. Ct. 1346 (2000).

Brief for the Brennan Center for Justice at New York University School of Law, Regents of the Univ. of Wis. Sys., et. al. v. Southworth, et. al. 120 S. Ct. 1346 (2000).

Brief for the Family Research Institute, Regents of the Univ. of Wis. Sys., et. al. v. Southworth, et. al. 120 S. Ct. 1346 (2000).

Brief for the Federation of Labor and Congress of Industrial Organizations, Regents of the Univ. of Wis. Sys., et. al., v. Southworth, et. al. 120 S. Ct. 1346 (2000).

Brief for the First Freedoms Foundation, Regents of the Univ. of Wis. Sys., et. al. v. Southworth, et. al. 120 S. Ct. 1346 (2000).


Brief for the National Education Association, Regents of the Univ. of Wis. Sys., et. al. v. Southworth, et. al. 120 S. Ct. 1346 (2000).

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Brief for Owen Brennen Rounds, Regents of the Univ. of Wis. Sys., et.al. v. Southworth, et. al. 120 S. Ct. 1346 (2000).


Brief for the Student Press Law Center, the Associated Collegiate Press, and College Media Advisers, Inc, Regents of the Univ. of Wis. Sys., et. al. v. Southworth, et. al. 120 S. Ct. 1346 (2000).


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Petitioner's Reply Brief, Regents of the Univ. of Wis. Sys., et. al. v Southworth, et. al., 120 S. Ct. 1346 (2000).

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