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Constitutional Law - First Amendment: University Fees Can Speak for Students: The Constitutionality of a University's Right to Fund Student Speech via a Mandated Activities Fee

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CONSTITUTIONAL LAW—FIRST AMENDMENT: UNIVERSITY FEES CAN SPEAK FOR STUDENTS: THE CONSTITUTIONALITY OF A UNIVERSITY'S RIGHT TO FUND STUDENT SPEECH VIA A MANDATED ACTIVITIES FEE

Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217 (2000)

I. FACTS

The Board of Regents of the University of Wisconsin, like many other universities, requires full-time students to pay a mandatory non-refundable student activity fee separate from tuition.[1] The activity fee is designed to create a forum for extracurricular student speech.[2] The university dispenses portions of the fee to registered student organizations (RSO) in order to fund activities engaging in a wide variety of political or ideological speech.[3] A student organization must meet certain criteria to become eligible for funding.[4] The organization must: (1) be not-for-profit; (2) consist primarily of students; (3) have students direct and maintain the organization; (4) connect with student life on campus; (5) adhere to all federal, state, city, and university nondiscrimination laws and policies; (6) identify a student as a contact person; (7) provide information required on the registration form; and (8) abide by all regulations set out in the Student Organization Handbook.[5] Students' interests in RSOs are represented by the student government, which includes the Associated Students of Madison (ASM) and its Student Services Finance Committee (SSFC).[6]

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1. Southworth v. Grebe, No. 96-C-292-S, 1996 U.S. Dist. LEXIS 20980, at *2 -*8 (W.D. Wis. 1996). The nonrefundable fee (otherwise referred to as the segregated fee), which was $165.75 per semester during the 1995-96 school year and $190.45 per semester during the 1996-97 school year, was directly deposited in the state treasury by the university. *Id; see also* WIS. STAT. ANN. § 36.09(1) (West 1992 & Supp. 2000) (stating that the Board of Regents governs the direction and maintenance of the University of Wisconsin). For a discussion of student activity fees in North Dakota universities, see *infra* Part IV.B.

2. Southworth v. Grebe, 151 F.3d 717, 718 (7th Cir. 1998), *cert. granted*, 526 U.S. 1038 (1999). The students do not dispute that the activity fee supports a public forum for student speech. *Id.* at 722.

3. *Southworth*, 1996 U.S. Dist. LEXIS 20980 at *7. The finance committee of the student government is allowed to give direction and approval only on how the non-allocable funds are distributed; however, the chancellor and the Board of Regents always have the final decision. *Id.*

4. *Id.*

5. *Id.* at *5-*6. During the 1996-97 school year approximately 140 of the 623 student organizations were funded through the disbursement of the allocable portion of the student activity fee. *Id.* at *8 (stating that the majority of the organizations funded were devoted to academic, cultural, or recreational purposes and only a few could be characterized as furthering political or ideological activities). Funding is only available to those private student organizations that have become RSOs. *Southworth*, 151 F.3d at 719-20.

6. *Southworth*, 1996 U.S. Dist. LEXIS 20980, at *3. SSFC is an affiliate of ASM, which reviews ASM budgets and University budgets funded by the activity fee. *Id.*

The activity fee is divided into two separate categories: allocable and non-allocable.[7] The non-allocable portion of the fee makes up eighty percent of the total and is expended on student health services, intramural sports, and maintenance of the student union and debt services.[8] The allocable portion of the fee funds the General Student Service Fund (GSSF) and the GSSF is used to subsidize registered student organizations.[9] In the 1996-1997 school year, the allocable portion of the funds went to subsidize 140 of the 623 total registered student organizations.[10] Both the Board of Regents and the ASM govern how the allocable portion of the activity fee moneys will be disbursed among the organizations.[11] All students are invited to run for election to ASM or SSFC in order to participate in the allocation of funding to student organizations.[12] If students do not choose to run, however, they still may sit in on ASM and SSFC meetings where funding decisions are made.[13]

Organizations may seek funding in one of three ways.[14] First, a student organization can apply to the SSFC for GSSF funds.[15] Second, it can seek funds through ASM's Student Activity Fund.[16] Finally, a student organization can attempt to get funding via a student referendum.[17] The first two ways are administered by the ASM in a session open to everyone.[18] The ASM then makes the initial funding decision that is reviewed and finalized by the chancellor or the Board of Regents.[19]

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7. *Id.*

8. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 223 (2000).

9. *Southworth*, 1996 U.S. Dist. LEXIS 20980, at *4-*9. The GSSF is used to fund such organizations as the Child Care Tuition Assistance Program; the Wisconsin Union Directorate Distinguished Lecture Series; the third year of the recreational sports budget; the ASM budget; the Wisconsin Public Interest Research Group (WISPIRG); and the United Council. *Id.* at *4-*5.

10. *Id.* at *8-*9.

11. *See* WIS. STAT. ANN. § 36.09(5) (West 1992 & Supp. 2000), titled *Responsibilities*, which states in part:

> Students in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees that constitute substantial support for campus student activities. The students of each institution or campus shall have the right to organize themselves in a manner they determine and to select their representatives to participate in institutional governance.

Id.

12. *See Southworth*, 1996 U.S. Dist. LEXIS 20980 at *5 (discussing that all students have the opportunity to become a part of the ASM through the democratic process).

13. *See id.* (stating that the funding decision meetings are open to the public).

14. *Id.* at *6.

15. *Id.* The GSSF provides funding for all registered organizations that supply ongoing services assisting a substantial number of students. *Id.*

16. *Id.* This funding is also "divided into three different types of grants: operations grants, event grants and travel grants." *Id.*

17. *Id.* A student referendum is where the student body votes in a campus election whether to approve or disapprove an assessment for funding. *Id.*

18. *Id.*

19. Bd. of Regents v. Southworth, 529 U.S. 217, 225 (2000).

Both parties in *Southworth* stipulated that the university administered the first two ways of funding in a viewpoint neutral manner.[20]

In the referendum program, the student body can vote to approve or disapprove funding for a specific RSO.[21] The ASM approves the vote of the students in the referendum process by voluntarily viewing the referendum decision as binding.[22] Then, in order to obtain the funding, an organization must submit a form to request reimbursement of a specific cash amount.[23] The student body has more power in the referendum process than in the other two processes because the student body has the ability to vote on funding as well as the ability to veto an ASM funding decision.[24] Because of the difference between this process and the first two processes, the parties agreed that viewpoint neutrality did not extend to the referendum process.[25]

Three students registered at the University of Wisconsin-Madison challenged the collection of the activity fee.[26] They challenged the university's ability to fund student organizations involved in expressive activity that is political or ideological in nature and against their individual beliefs.[27] The students specifically objected to eighteen student groups that were pursuing political or ideological goals.[28] In federal district court, the students claimed that the collection of the fee violated their First Amendment rights to freedom of speech, freedom of association, and free exercise of religion, as well as their rights under the Religious Freedom Restoration Act.[29] The parties filed cross-motions for summary judgment, and the court granted the students' motion, finding

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20. Southworth v. Grebe, No. 96-C-292-S, 1996 U.S. Dist. LEXIS 20980, at *5 (W.D. Wis. 1996).

21. *Southworth*, 529 U.S. at 224.

22. *Id.*

23. *Southworth*, 1996 U.S. Dist. LEXIS 20980, at *7.

24. *Southworth*, 529 U.S. at 224. In the year 1995-96, the student body, through the referendum process, gave an RSO named WISPIRG $45,000 from the GSSF. *Id.* In the same year, the student body vetoed another RSO from receiving any GSSF funding. *Id.*

25. *See id.* at 224-25 (explaining that the parties stipulated to this during oral arguments).

26. *Southworth*, 1996 U.S. Dist. LEXIS 20980, at *1-*2.

27. *Id.* During the 1995–96 school year, the SSFC distributed a total of $974,200 of student fee moneys to private student organizations. Southworth v. Grebe, 151 F.3d 717, 719 (7th Cir. 1998).

28. *See Southworth*, 1996 U.S. Dist. LEXIS 20980, at *9 (stating examples of the eighteen groups as WISPIRG; the Lesbian, Gay, Bisexual Campus Center; the Campus Women's Center; the UW Greens; the Madison AIDS Support Network; the International Socialist Organization; the Ten Percent Society). Most of the eighteen groups further at least an incidental educational goal along with the political or ideological goal; however, the goals of four of the eighteen RSOs specifically further political or ideological views and not educational views. *Id.* The UW Greens' purpose is to advance environmentally related causes; they pursued the introduction of bills to the Wisconsin Legislature, along with supporting the Green Party and Ralph Nader for President. *Southworth*, 151 F.3d at 720-21. The International Socialist Organization's goal is to encourage Socialism on campus. *Id.* at 720. The Lesbian, Gay, Bisexual Campus Center's goals are to promote pro-homosexual attitudes and political activism. *Id.* The Ten Percent Society's goal is to educate the student body on issues that affect the homosexual population. *Id.* at 721.

29. *Id.*; *see also* 42 U.S.C. § 2000bb (1994).

that the segregated fee violated their First Amendment rights to freedom of speech and association.[30]

The district court relied on two prior Supreme Court decisions that addressed the mandatory fee doctrine along with a California Supreme Court decision that directly addressed mandatory student fees used to fund student organizations involved in political or ideological speech.[31] These prior cases set out the strict scrutiny standard that a state may compel individual funding of an organization only if there is a sufficiently compelling reason to do so, and only if the organization's use of such funding is "germane to the purposes that justified the requirement of support."[32] In adopting the California Supreme Court's holding, the district court found that a state university has a compelling interest in funding free expression on campus through organizations furthering educational benefits.[33] If the educational benefits are only incidental to the organizations' political or ideological mission, then the funding is no longer found to be germane to the purpose.[34] At the point that it is no longer germane, the court stated, it is not narrowly tailored to avoid unnecessary infringement of the students' First Amendment rights.[35]

The court found that all of the eighteen organizations infringed on the students' rights because more than a de minimis number of them used the funding from the segregated fee to support a primarily political or ideological mission.[36] Therefore, the court held it was unconstitutional for the state to compel students to fund an organization to which the students objected when the organization offered no more than incidental educational benefits to the university campus.[37] The court noted that all organizations may be funded by the mandatory fee; however, there must be an opt out system in place for those objecting students who do not wish their fee portion to support specific organizations.[38] The court did

30. *Southworth*, 1996 U.S. Dist. LEXIS 20980, at *36.

31. *See id.* at *13-*24 (discussing the United States Supreme Court cases Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) and Keller v. State Bar of Cal., 496 U.S. 1 (1990), and the California Supreme Court case Smith v. Regents of the Univ. of Cal., 844 P.2d 500 (Cal. 1993)). The court noted that California law was not controlling but highly influential since it was the only decision that had directly considered the issue of a First Amendment challenge to compelled funding of student organizations that engaged in political or ideological speech. *Id.* at *24.

32. *Id.* at *16 (quoting *Smith*, 844 P.2d at 508).

33. *Id.* at *23.

34. *Id.*

35. *Id.*

36. *See id.* at *26-*27 (describing the four organizations that primarily involved political or ideological missions and did not offer educational benefits).

37. *Id.* at *29.

38. *Id.* at *30.

not address the issues of First Amendment rights to free exercise of religion and rights under the Religious Freedom Restoration Act.[39]

The Seventh Circuit Court of Appeals upheld the district court's decision, and the university was restrained from requiring students to fund RSOs pursuing political or ideological expression.[40] The court stated that if the university chose to mandate funding it was then required to provide its students with an optional opt out program.[41] The university argued that the fee and the speech it funded were appropriate to further its mission and, thus, constitutional.[42] Certiorari was granted, and the United States Supreme Court *held* that the First Amendment allows a public university to mandate its students to pay an activity fee that is used to fund a student program that furthers extracurricular student speech as long as the program is viewpoint neutral.[43]

II. LEGAL BACKGROUND

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."[44] Implicit in those rights is the freedom of association.[45] The First Amendment prohibits restrictions or limitations on the right to speak or associate.[46] Therefore the government is only able to prevent an individual from speech or association if such a restriction is necessary to achieve a compelling state interest.[47] The Supreme Court has recognized that along with the rights to speak and associate are the rights not to speak and associate.[48] The First Amendment, thus, offers protection for the freedom against compelled

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39. *Id.* at *36; *see also* 42 U.S.C. § 2000b (1994).

40. Southworth v. Grebe, 151 F.3d 717, 735 (7th Cir. 1998).

41. *See id.* (stating that the opt out program could be of any variation but must provide objecting students with a way to not use their portion to support views to which they object).

42. *Id.*

43. Bd. of Regents v. Southworth, 529 U.S. 217, 221 (2000). The Court held that the collection of funding by the university was constitutional and remanded for further proceedings on the distribution of the funding on a referendum basis. *Id.*

44. U.S. CONST. amend. I.

45. *See, e.g.*, Baird v. State Bar of Ariz., 401 U.S. 1, 6 (1971); NAACP v. Button, 371 U.S. 415, 430 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S 449, 462-63 (1958).

46. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943) (holding that the government can not constitutionally compel students in a public school to give a flag salute each morning before the start of school).

47. *See* Burson v. Freeman, 504 U.S. 191, 211 (1992) (holding that a ban on electioneering within 100 feet of the election poll was narrowly tailored to achieve the compelling state interest of providing its citizens the right to vote freely without the interference of those lowering the integrity and reliability of the voting process).

48. *Barnette*, 319 U.S. at 641-42.

speech.[49] The government is subject to limitations when it compels funding for speech from individuals who oppose such speech.[50]

The Supreme Court has held that an organization with limited association[51] may not use member dues for political or ideological speech not germane to the organization's purpose when a member opposes such use.[52] If the speech is germane to the organization's purpose, however, the dues may be used for political or ideological speech despite any member objections.[53] This holding extends into limited association areas such as unions, union dues in the public-employment sector, and bar associations.[54]

When addressing the issue in a higher learning setting, however, a university may make judgments regarding how to best allocate its own funds and to make its own academic decisions.[55] The Supreme Court has held that teachers should be able to cultivate and practice a free spirit in teaching because if that is stifled by the government a chilling effect would occur.[56] Having such control is vital for the survival of a university's purpose of creating an atmosphere conducive to a broad range of speech.[57] Since it is vital for a university to have control over its own decisions, the Supreme Court has specifically stressed that First Amendment protections must be afforded to objecting students in a higher learning institution.[58] The protection granted by the Supreme Court to objecting students is that the institution must distribute its student fee expenditures in a viewpoint neutral manner.[59]

A. GOVERNMENTAL FUNDING WITHIN A PUBLIC ORGANIZATION

The First Amendment is a safeguard for freedom of speech, assembly, and association; thus, it protects individuals from government

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49. *Id.*

50. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222-23 (1977) (discussing the limitation on the government that requires it to use mandated funding in a limited association in a way that is germane to the purpose of the association); *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830-31 (1995) (holding that the government may only compel or restrict speech if it is done in a content-neutral manner).

51. *See* Lehnert v. Farris Faculty Ass'n, 500 U.S. 507, 515 (1991). The Supreme Court has not specifically defined a limited association; however, Supreme Court cases infer that it is an association of persons to further a limited purpose or purposes. *See, e.g., Abood,* 431 U.S. at 221-22.

52. *Lehnert*, 500 U.S. at 515.

53. *Id.*

54. *Id.* at 532; *see also* Keller v. State Bar of Cal., 496 U.S. 1, 16 (1990).

55. Widmar v. Vincent, 454 U.S. 263, 276 (1981) (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).

56. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

57. *Id.*

58. *Id.*; *see also* Healy v. James, 408 U.S. 169, 180-81 (1972).

59. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U. S. 718, 829 (1995).

restrictions or limitations on the right to speak or associate.[60] In order for the government to lawfully restrict speech, it must be able to show that such restriction is necessary to further a compelling state interest.[61] Just as the government cannot restrict speech without incurring limitations, it also cannot compel speech without incurring limitations.[62] The government compels individuals to hear, adopt, or associate with speech when it furthers such speech by funding the speech with the use of the individuals' funds.[63] Since the First Amendment protects individuals from compelled speech, the Supreme Court has limited the government's ability to compel individual funds to further speech, assembly, and association.[64]

The Supreme Court first addressed the constitutionality of government redistributing funds within an organization in a line of cases on union-security issues.[65] The first decision, *Railway Employees' Department v. Hanson*,[66] involved the issue of an agency-shop arrangement.[67] The arrangement was permitted by the Railway Labor Act, which was enacted to allow a union to compel union membership and dues.[68] The Court found that this compulsion should only extend to the financial support of the collective-bargaining activities of the union.[69] The Court warned that a different issue would arise if the activities funded by the compelled member dues were used for purposes not germane to collective bargaining.[70] The Court inferred that unions would not be able to compel funding for expressive activity that was not germane to

60. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641-42 (1943).

61. Burson v. Freeman, 504 U.S. 191, 198 (1992).

62. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 238 n.38 (1977) (discussing the limitation of government in its use of mandated funding in a limited association); *see also Rosenberger*, 515 U. S. at 830 (discussing the limitation that the government must only compel speech in a content-neutral manner (citing Perry Ed. Ass'n v. Perry Local Eng'r Ass'n, 460 U.S. 37, 46 (1983))).

63. Ry. Employees' Dep't v. Hanson, 351 U.S. 225, 235 (1956); *see also* Machinists v. Street, 367 U.S. 740, 743-46 (1961); Ry. Clerks v. Allen, 373 U.S. 113, 116-17 (1963).

64. *Abood*, 431 U.S. at 211; *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 522 (1991).

65. *Hanson*, 351 U.S. at 235; *see also Machinists*, 367 U.S. at 743-46; *Ry. Clerks*, 373 U.S. at 116-17; *Abood*, 431 U.S. at 211; *Lehnert*, 500 U.S. at 515 (discussing the union-security issue being addressed in the case as an agency-shop agreement).

66. 351 U.S. 225 (1956).

67. *Hanson*, 351 U.S. at 228; *see also Lehnert*, 500 U.S. at 511 (describing an "agency shop" arrangement as a contract between the government and a union in which employees within a bargaining unit of the employer may be forced to pay union dues regardless of whether they join or decline to join the union itself). An agency shop arrangement is typically a union security provision contained in a collective-bargaining agreement between the government and a union in which the union is able to ensure funds by compelling non-union members to pay a service fee that is equivalent to the dues paid by members. *Id.*

68. *Hanson*, 351 U.S. at 228-29. The enactment of the Railway Labor Act was the first time that unions were allowed to compel non-union members in the bargaining unit to contribute to expenses. *Machinists*, 367 U.S. at 811.

69. *See Hanson*, 351 U.S. at 235 (distinguishing the compulsion of the membership from merely compelling a payment of a fee equivalent to that of a member's dues by a nonmember employee).

70. *Id.*

collective bargaining.[71] The Court did not define germaneness but stated that an arrangement cannot be implemented as a mechanism for forcing ideological accordance or other action that conflicts with the First Amendment.[72]

The Court found an infringement on First Amendment rights when the government's use of compelled funding was applied toward objectionable speech that was political or ideological in nature, rather than toward speech germane to collective bargaining.[73] As the Court began deciding that the government was infringing on First Amendment rights, it started to define the germaneness standard.[74]

In *Machinists v. Street*,[75] the Court directly confronted the extent to which dues may be collected by unions to support ideological or political activities opposed by some of the union members.[76] As in *Hanson*, the agency-shop arrangement was permitted by the Railway Labor Act.[77] Distinct from *Hanson*, the Court found "specific factual findings" that the union dues of opposing members were being used to fund political and ideological speech.[78] The Court directly denied unions the authority to use the dues of individual union members to fund political or ideological activities to which the individuals had objected.[79]

Two years later, *Railway Clerks v. Allen*[80] upheld *Machinists*.[81] The Court stressed the importance of distinguishing between the disbursement of expenditures for union activities "germane to collective bargaining," and those used for political activities that may be challenged.[82] The Court specifically reiterated in *Railway* that it is constitutional in the private-sector to charge nonunion member employees dues equivalent to

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71. *Id.*
72. *Id.* at 235-37.
73. *Id.*
74. *Id.*
75. 367 U.S. 740 (1961).
76. *Machinists*, 367 U.S. at 746-49.
77. *Id.* at 742-43.
78. *See id.* at 744 n.2 (noting the lower court's findings that the funds were specifically being used by defendants to support the political campaigns of candidates for offices of President and Vice President of the United States, for state and local public offices, and to create political and economic doctrines to further legislative programs).
79. *Id.* at 768-69 (reasoning that Congress was protecting the objecting employees' expressive freedom and promoting collective representation by passing section 2 of the Railway Labor Act).
80. 373 U.S. 113 (1963).
81. *Ry. Clerks*, 373 U.S. at 118-23.
82. *Id.* Two separate questions must be asked to distinguish between funding that is considered germane and funding that may be challenged. *Id.* First, a determination is made of what funding, based on the record, is political. *Id.* Second, a determination is made of what funding, based on the union's total funding expenditures, is political. *Id.* Here, the Court did not draw a line between what funding was or was not political. *Id.*

those of member dues if they are used for purposes germane to the union's collective bargaining functions.[83]

Abood v. Detroit Board of Education[84] was the first opportunity for the Court to address the constitutionality of union-security provisions in the public-sector.[85] *Abood* involved the public-employment sector, specifically a public school and the governmental collection of union dues of teachers within the school.[86] In Michigan, local government employers and unions were given permission by the legislature to implement an "agency shop" arrangement.[87] This arrangement allowed a union to compel school employees to pay union dues as a condition of employment with the school, regardless of the individual employee's willingness to become a member of the union.[88]

A number of teachers filed a class action law suit, which claimed, in part, that they did not approve of the union's involvement in "economic, political, professional, scientific and religious [expression]."[89] The teachers stated that this was a violation of not only their state rights but also their constitutional right to freedom of association protected by the First and the Fourteenth Amendments.[90] The issue presented to the Supreme Court was whether it was constitutional to use mandatory service charges to further "political purposes" which were unrelated to collective bargaining.[91]

The Court found it unconstitutional for the government to condition employment upon the funding of union speech that was not in agreement with an employee's individual beliefs.[92] The Court held that a union could not use the agency-shop provision to mandate individual members to pay dues that furthered political or ideological activities not germane to the purpose of the association.[93] The purpose of the

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83. *Id.* (stating that the desire for labor peace and the avoidance of the risk of "free riders" were no less important in the private sector than in the public sector).

84. 431 U.S. 209 (1977).

85. *See Abood*, 431 U.S. at 211 (distinguishing between this case, which involves government employment, and Ry. Employees' Dep't v. Hanson, 351 U.S. 225 (1956), which involved private employment). The differences that arise between a union representing public rather than private employees in the area of collective bargaining do not amount to differences in First Amendment rights. *Id.* at 229-31 (discussing the nature of both public- and private-sector collective bargaining).

86. *Id.* at 211-12 (discussing teachers who were required to pay union fees as a condition of employment within the public school).

87. *Id.* at 212.

88. *Id.* This fee was an amount equal to the regular fees paid by union members. *Id.* All teachers, whether they were union members or non-union members, were required by the agency-shop arrangement to pay the fee within sixty days of hire or they would be subject to discharge. *Id.*

89. *Id.* at 213.

90. *Id.*

91. *Id.* at 215.

92. *Id.* at 241-42.

93. *Id.* at 222-23; *see also* Ry. Clerks v. Allen, 373 U.S. 113, 122-23 (1963). This was limited to only those employees who made their objection known to the union. *Id.*

"agency shop" arrangement was collective bargaining, and therefore, as long as the activities furthered collective bargaining, it was not a constitutional violation.[94] A First Amendment violation can be shown to exist if the agency-shop agreement furthers an objecting party's political or ideological views.[95]

The Court stressed that there exists core First Amendment concerns regarding unions mandating financial support because of the long tradition unions possess in engaging in a wide variety of political expression.[96] The Court also stated that "something more"[97] than merely compelling the expenditures of employees is needed to make a First Amendment challenge if the funds are used in the collective-bargaining capacity of the union.[98] The decision in *Abood* coincides with the decisions in the private sector cases since in both situations the Court is allowing the agreement to further the benefits of union labor relations.[99] There is equal importance in the public-sector for employee peace and eliminating "free-riders."[100] Lastly, the Court clearly established that a state cannot condition employment on membership in a political party or religious affiliation.[101]

Abood did not attempt to define specifically what collective bargaining activities are constitutionally permissible or which ones are prohibited.[102] Nor did the Court attempt to specifically define "germane,"[103] leaving those interpretations for a case-by-case analysis on the relevancy of the funding to the purpose of the organization.[104]

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94. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 217 n.10 (1977) (stating that the expenditures must further the purpose of the association or "agency shop" agreement for the collection of the fees to be constitutionally allowed for political or ideological activities).

95. *Id.* at 237 (stating that there is a First Amendment violation if it can be shown that an individual objects to the government using funds to promote political or ideological speech that does not further the purpose of the association).

96. *Id.* at 222.

97. *Id.* The court did not define the "something more" that may invoke a First Amendment violation if the purpose is found to be germane to the purpose of collective bargaining. *Id.*

98. *See id.* (stressing that there must be an objection by a member in order for a violation to exist).

99. *See id.* (stating "the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress").

100. *See id.* ; *see also* Ry. Clerks v. Allen, 373 U.S. 113, 121 (1963); Keller v. State Bar of Cal., 496 U.S. 1, 12 (1990) (describing "free riders" as those employees who are gaining the benefits of union negotiations without joining the union or paying dues).

101. *Abood*, 431 U. S. at 235.

102. *See id.* at 236 (stating that a precise definition would be even harder in the public sector than in the private sector because the "process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process").

103. *See id.* (stating the difficulty of determining what is germane to collective bargaining).

104. *Id.* at 236-37.

The principles developed by the Court in *Abood* regarding government funding of political or ideological activity were continued in 1991 in *Lehnert v. Ferris Faculty Ass'n.*[105] *Lehnert* set forth a test of specific guidelines to determine when the government may constitutionally authorize the compulsion of nonmember employees to fund union activities.[106] In order for employee funds to be distributed to a union activity, the expenditures must: (1) be germane to collective bargaining activity and (2) be justified by the government's vital policy interest in labor peace and collective-bargaining agreement.[107] The decision in *Lehnert* defined more precisely what is not germane to collective bargaining.[108] The Court found that there was not enough of a connection between the activities funded by public employees and the union's role as a bargaining representative in a legislative context.[109]

The principles set by the Court in *Abood* regarding government funding of political or ideological activity were extended to bar associations in *Keller v. State Bar of California.*[110] *Keller* held that the government does not have the authority to distribute fees collected in a bar association in a manner that is not germane to its mission.[111] The Bar Association of California conditioned becoming a member on the payment of dues and was using the dues to further political and ideological causes and beliefs.[112] The plaintiffs contended that their personal beliefs were in opposition to the views they were mandated to fund and, therefore, the mandated fee was a violation of their First Amendment rights.[113] The Court determined that the controlling standard in this case was "whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'"[114] The Court held that a state bar may, therefore, constitutionally mandate the funding of political or ideological speech if the speech falls within the purpose of the membership to the bar association.[115]

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105. 500 U.S. 507 (1991).

106. *Lehnert*, 500 U.S. at 518.

107. *Id.* at 519.

108. *Id.*

109. *Id.* at 519-20. The union is allowed to further political interests if they are germane to its collective bargaining purpose, but it must not add to the burdening of First Amendment protections. *Id.* at 520; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236 (1977).

110. 496 U.S. 1 (1990).

111. *Keller*, 496 U.S. at 14.

112. *See id.* (stating that the payment of membership dues was a condition upon employment).

113. *Id.*

114. *Id.* at 14 (citing Lathrop v. Donohue, 367 U.S. 820, 843 (1961) (plurality opinion)).

115. *See id.* at 13-14 (stating that a difficult question arises in defining what is not "germane" to the purpose for which the association is being compelled).

The Court, in analyzing the issue in *Keller*, did not discuss the issues of eliminating the "free rider" because it acknowledged that there is a difference between the relationship of unions and their members and the State Bar Association and its members.[116] Unions were created in part to act as participants in the democratic processes of their states and to be representatives for their members.[117] A union's representation provides its members with benefits such as negotiations with management and peaceful labor relations.[118] It was because of the benefits that unions provided that the legislature enacted the agency-shop laws to cure the problem of "free riders."[119] The State Bar of California was established to provide professional advice and govern the legal profession, not to act as a representative for its members in the state's democratic processes.[120] The members of the State Bar did not receive a direct benefit from their bar membership like the union members who benefited from negotiations with management and peaceful labor relations.[121]

B. THE CONSTITUTIONALITY OF GOVERNMENTAL FUNDING WITHIN A PUBLIC UNIVERSITY

Until *Southworth*, the Supreme Court had not addressed the issue of whether the government could mandate student funds and distribute the funds to organizations furthering political or ideological views.[122] The Court had, however, addressed the issue of how the government must distribute such student funds.[123] *Rosenberger v. Rector & Visitors of the University of Virginia*[124] held that when the government acts to foster student viewpoints that are religious or political in nature, it must do so in a viewpoint neutral manner.[125]

At the University of Virginia, a student group must become a "Contracted Independent Organization" (CIO) before it is eligible for funding reimbursement.[126] CIO status is only given to those organizations

116. *Id.* at 12.

117. *Id.* at 12-13. The Court noted that in the case of unions it would be ironic if the individual members being charged to make government decisions through the democratic process were not able to speak for themselves. *Id.*

118. *Id.* at 12.

119. *Id.*

120. *Id.* at 13.

121. *See id.* (stating that the collective bargaining purpose of a union helps with labor peace, which in turn benefits the union members). The Court in this case found no need to acknowledge the issue of preventing "free riders." *Id.*

122. Bd. of Regents v. Southworth, 529 U.S. 217, 230 (2000).

123. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 835-37 (1995).

124. 515 U. S. 819 (1995).

125. *See Rosenberger*, 515 U.S. at 845 (holding that viewpoint discrimination used by the university not only in content but also in application was a violation of students' free speech).

126. *See id.* at 823 (stating that the University of Virginia is governed by the Rector and Visitors of the University of Virginia according to state law).

that are primarily made up and managed by students and that also comply with specific procedural requirements.[127] Some of the CIOs are able to apply for funding from the Student Activities Fund (SAF) which is governed by the university and managed mainly through the student government.[128] The CIOs that receive SAF support are organizations which "are related to the educational purpose of the University."[129] This relation must not be political, which is defined so that it is limited to electioneering and lobbying, or religious, which is defined as "primarily promot[ing] or manifest[ing] a particular belief in or about a deity or an ultimate reality" in nature.[130]

In *Rosenberger*, a group of students claimed their First Amendment rights were violated when the university denied funding for their student organization newspaper based solely on the newspaper's religious nature.[131] The objecting students in *Rosenberger* were part of an organization, named Wide Awake Productions (WAP), that had become a CIO and was formed as a means to publish a periodical of "philosophical and religious expression."[132] By the first publication, it was established as a religious journal offering Christian viewpoints on college life.[133] WAP applied to SAF for funding for the printing of the periodical and was denied on the basis of the organization's "religious activity," as defined by the university guidelines.[134]

The Court stated that the government's violation of the students' First Amendment rights was even more obtrusive because it was the particular view of the speaker that was being discriminated against, rather than just the subject matter.[135] Viewpoint discrimination is an even more excessive form of content discrimination; thus, the government is not allowed to use it as a basis for its expenditure restrictions.[136] The Court further added that once a state established a limited forum,[137] a state

127. *Id.* One of the university's procedural requirements is that the CIO must provide a written disclaimer to the university stating that the CIO is separate from the university. *Id.* This eliminates the university's responsibility for the CIO. *Id.*

128. *See id.* at 824 (stating that SAF money is received from a portion of the mandatory student fee assessed to full-time students each semester).

129. *Id.*

130. *Id.* at 825.

131. *See id.* at 822-23 (challenging the university's regulation of its funding and the authority to deny funding to the students' particular group).

132. *Id.* at 825. In order to submit a claim for funding from the student activity fees, an organization must first become a CIO. *Id.* at 823.

133. *Id.* at 826.

134. *Id.* at 827.

135. *Id.* at 829 (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)).

136. *Id.* at 829 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (stating that this was true despite the fact that the limited public forum was created by the university itself)).

137. *See id.* (defining limited public forum as confining a forum to a limited purpose solely for

must constitutionally abide by its own guidelines.[138] The Court noted that if a state included a particular subject of speech in the forum, any viewpoint of that subject matter must be allowed.[139] A state cannot exclude a particular viewpoint on a subject matter if it has included every other viewpoint on the same subject matter.[140] This will be upheld even if a state argues that the viewpoint is not considered reasonable in light of the purpose served by the forum.[141] When a limited forum has been created by the government to include the very speech it is now trying to exclude, the Court does not need to determine whether the speech is reasonable to the purpose of the forum.[142] The Court held that if the government creates a limited forum to include a particular subject, all points of view on the subject must be allowed in the forum.[143]

The Court in *Rosenberger* did not discuss the reasonableness factor since the university had created a limited forum that included student speech on the subject of college life.[144] The Court expressed that the state was then unable to discriminate based on the fact that the subject was discussed from a religious point of view.[145] The regulation set forth by the SAF was a clear showing of the university favoring its own messages over the private speech of students.[146] The action taken by the university to try to exclude the students viewpoints on previously acceptable subject matter violated the petitioners' First Amendment right to free speech both in its terms and in its application.[147]

C. PUBLIC FORUM "VIEWPOINT NEUTRALITY" STANDARD

Along with *Rosenberger,* the "public forum" cases are also instructive and lend analogous support to the standard of "viewpoint neutrality."[148] Public forum is one element in determining whether a government regulation that puts restrictions on the "time, place, or manner" of speech violates the First Amendment.[149] If the speech

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the purpose the forum was created, which allows the forum to be confined to certain topics or certain speakers).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *See id.* (noting that a state may create a limited forum but after doing so it may not discriminate the speech that it has defined as acceptable based on a particular viewpoint because to discriminate based on viewpoint is unconstitutional).

143. *Id.*

144. *Id.* at 829-30.

145. *See id.* (citing Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (stating that the state was unable to lawfully exclude the students' speech when the university already included such speech within the boundaries of the limited public forum)).

146. *Id.* at 834-35.

147. *Id.* at 837.

148. Widmar v. Vincent, 454 U.S. 263 (1981); *see also* Cornelius v. NAACP, 473 U.S. 788, 806-08 (1985); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

149. *Cornelius*, 473 U.S. at 806-08. If the government regulation restricts the content of the

occurs in a public forum, which is property intentionally open to the public, the government must show that the content-based restriction on such speech is necessary to further a significant government interest.[150]

On the other hand, a private owner of property, or a non-public forum, is able to use his or her property under private control and for its specifically dedicated purpose.[151] If the speech occurs in a non-public forum, the determination of whether a content-based restriction is constitutionally permissible turns on whether the restriction is a substantial interference with speech.[152] If the interference is not substantial, the government only needs to show that the restriction is rational to the purpose being served.[153] However, if the private facility is opened up to the public, but not considered a public forum, the functioning of the property may still be controlled as long as any restrictions made are reasonable in the context of the forum's purpose and are made in a viewpoint neutral manner.[154]

Cornelius v. NAACP Legal Defense & Educational Fund,[155] involved a charity drive aimed at federal employees.[156] The drive was limited to voluntary, tax-exempt, nonprofit charitable agencies that provided direct services to individuals and their families.[157] The restriction specifically excluded legal and political advocacy groups of which defendants were classified.[158] Defendants challenged that their First Amendment right to seek designated funds was violated by the restriction.[159] The Court held that the forum was non-public and that the interference with expression was insubstantial.[160] Therefore, the restriction to permit some speakers and subjects while restricting others was allowable.[161] This was allowed, however, only because the distinction that was drawn between one speaker or subject and another was

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speech then it is not important to the analysis if the speech occurs in a public forum or not; it will be constitutionally invalid unless the speech is in a class of unprotected speech. *Id.*

150. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

151. *Lamb's Chapel*, 508 U.S. at 391; *see also Cornelius*, 473 U.S. at 800; *Perry Educ. Ass'n*, 460 U.S. at 46.

152. *Cornelius*, 473 U.S. at 806-08.

153. *Id.* at 806; *see also Lamb's Chapel*, 508 U.S. at 392-93.

154. *Lamb's Chapel*, 508 U.S. at 392-93.

155. 473 U.S. 788 (1985).

156. *See Cornelius*, 473 U.S. at 790-91 (describing the charitable organization).

157. *Id.* The committee organizing the drive was set up by an Executive Order through President Eisenhower. *Id.* at 792. The committee was called the Combined Federal Campaign, and its purpose was to ensure voluntary giving by federal employees. *Id.*

158. *See id.* at 792-93 (describing respondents as the NAACP Legal Defense and Educational Fund, the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the Federally Employed Women Legal Defense and Education Fund, the Indian Law Resource Center, the Lawyers' Committee for Civil Rights under Law, and the Natural Resources Defense Council).

159. *Id.* at 795.

160. *Id.* at 803-06.

161. *Id.* at 807-08.

reasonable in light of the purpose served and was facilitated in a viewpoint neutral manner.[162]

The viewpoint neutrality standard is a protection set by the Court as a safeguard for the protection of First Amendment rights.[163] In *Cornelius,* the Court described a violation of viewpoint neutrality by explaining that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject."[164] It should be noted, however, that a speaker may be excluded from a non-public forum if he is not a member of the class of speakers for whom the forum was created, or if he wishes to express a subject not included within the purpose of the forum.[165]

In *Lamb's Chapel v. Center Moriches Union Free School District*[166] a religious organization had applied for access to the district school facilities after school hours to show a film on family and child raising.[167] It was denied access pursuant to a New York law that only gave access to "social, civic and recreational meetings," which excluded meetings for religious purposes.[168] The district denied access because the film that was to be shown at the school appeared to portray religious affiliations.[169] The Court held that it was unconstitutional to deny access to Lamb's Chapel because the subject matter in the film was not religion, but it was instead family and child rearing from a religious viewpoint.[170]

Just as private owners are allowed control of the use of their property, the district was allowed to control the use of the school property when the property was not functioning for school purposes.[171] Therefore, the district did not have to open the property up after school hours to any speaker or to any subject matter of speech.[172] The district did, however, open the school property to social, civic, recreational, and political organizations that complied with state law.[173] The Court found that since

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162. *Id.* at 809-13. Viewpoint neutrality is mandated when a type of speech, based on the speaker, the content, or the subject, is included in a public forum or a private forum open to the public, and within that includable portion, one is excluded based solely on the view expressed. *Id.*

163. *Id.* Viewpoint neutrality is a safeguard for not only those wishing to speak because their speech can not be discriminated on the basis of its view, but also for those who wish to object to speech because they are given a guarantee that particular viewpoints will not be favored over others. *Id.*

164. *Id.* at 806.

165. *Id.*

166. 508 U.S. 384 (1993).

167. *Lamb's Chapel,* 508 U.S. at 386.

168. *Id.*

169. *Id.* at 396-97.

170. *Id.* at 393.

171. *Id.* at 390.

172. *Id.* at 391.

173. *Id.*

the district opened the property up for such a vast array of expressive purposes, any restrictions put on the property must be subject to the same constitutional limitations as restrictions on a public forum.[174] Since one of the permitted uses for the school property was social meetings pertaining to the welfare of the community, anyone could use the property for such a purpose.[175] Thus, any individual or group could use the property for a meeting on family childrearing, regardless of the point of view by which the discussion was expressed.[176] The Court found that the district was allowing the facilitation of meetings on childrearing from any point of view except a religious point of view.[177] The Court held that the district was discriminating against one viewpoint over others in a subject of speech that was otherwise acceptable on the school premises.[178]

The case of *Widmar v. Vincent*[179] addressed a different aspect of government limitations on individual First Amendment protections.[180] While *Lamb's Chapel* analyzed the issue of viewpoint discrimination within a subject, *Widmar* discussed the issue of whether the state was allowed to discriminate against an entire subject.[181] In *Widmar,* the issue was not whether the government was restricting only speech from a religious point of view in a public forum, but rather whether the university was discriminating against all religious speech based on its content.[182]

This issue still turned on whether the Court found the university to be a public forum or a private forum since it was the state that created the forum and made a distinction as to what speech it allowed on the premises.[183] The university had opened the use of all facilities to registered student groups but did not want to open the use of the facilities for religious groups desiring to use the facility for worship and discussion.[184] The Court stated that since the university created a public forum, it must justify any speech restrictions that it enforces.[185] The Court held that when a university creates a forum open to the public any

174. *See id.* (explaining that the district must show any restriction placed on speech was justified by a compelling state interest and the restriction was narrowly drawn to achieve that state interest).

175. *Id.* at 357-58.

176. *Id.* at 393.

177. *Id.* at 395.

178. *See id.* at 395-97 (stating that there would be no doubt that a meeting on child rearing would be allowed by the district if it would have been sponsored by the school instead of a church organization).

179. 454 U.S. 263 (1981).

180. *Widmar,* 454 U.S. at 277.

181. *Id.* at 266.

182. *Id.*

183. *Id.* at 267.

184. *Id.* at 269.

185. *Id.* at 267.

restriction must either be narrowly drawn to further a compelling state interest or else regulated in a content-neutral manner.[186]

The university argued that a compelling state interest was one of the requirements of the Establishment Clause.[187] The Court found that any religious benefits from having an open forum at a university were incidental to the restrictions outlined in the Establishment Clause.[188] This was true because merely supplying a forum open to all student groups does not mean that the university is conferring or approving the content of speech that may be spoken.[189] The forum was also open to such a wide range of speakers that there were too many types of speech for one subject to gain all or the majority of the benefits.[190] The Court noted that its holding did not undermine the competence of a university to form reasonable time, place, and manner regulations.[191] The Court also added that a university may make individual judgments as to how to best allocate its funds and to make its own academic decision on "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[192]

D. THE UNIQUE ROLE OF A UNIVERSITY

Justice Stevens, in his concurrence in *Widmar,* recognized not only the content-neutrality standard but also the unique role of a university.[193] He stressed that the "atmosphere" of a university includes the activities of campus life where academic freedom becomes a special concern in examining First Amendment issues.[194] Although Justice Stevens was without support in his opinion in *Widmar,* he had not been entirely unsupported in finding the special importance of academic freedom, since the Court on previous occasions had found the same importance.[195]

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186. *Id.* at 278.

187. *Id.* at 270. The Establishment Clause states that "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I. The clause was made applicable to the states through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

188. *Id.* at 274.

189. *Id.*

190. *See id.* (stating that there were over 100 student groups on campus that were all able to use the benefits of the open forum for their specified speech). The Court noted that if the Establishment Clause barred the extension of general benefits to religious groups, "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *Id.* at 274-75.

191. *Id.* at 276.

192. *Id.* (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).

193. *Id.* at 278-80 (Stevens, J., concurring).

194. *See id.* at 279 n.2 (stating that it is a university's purpose to provide an atmosphere that is the most advantageous to speculation, experimentation, and creation).

195. Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967); *see also* Healy v. James, 408 U.S. 169, 180-81 (1972).

In *Keyishian v. Board of Regents of the University of the State of New York,*[196] the Court stated that "our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us."[197] The Court went further in stating that, as such a value is transcribed, academic freedom becomes a special concern of the First Amendment.[198] By limiting the power of the states to restrict the freedom of speech and association there is a higher concern in American schools simply because a learning institution's mission is to foster all types of ideas.[199] Our nation depends on academic freedom to foster future leaders by ensuring that there is exposure to a robust and wide range of ideas in our higher learning institutions.[200] A university is a "marketplace of ideas" and the protection of constitutional freedoms is therefore most vital in such an environment.[201]

In *Sweezy v. New Hampshire,*[202] the Court stressed that academic freedom is essential to our nation's universities and that the vital role of training our youth should not be underestimated.[203] The opinion further emphasized that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[204] Where state-operated schools are involved, there is a recognized need for the state and the school officials to have authority and control of the schools and therefore First Amendment protections become essential.[205] It is imperative that the government be restricted from putting too many limitations on speech in an atmosphere created to foster the future leaders of America.[206] The government may regulate speech but it may only do so with narrow specificity to keep First Amendment freedoms alive.[207]

E. SUMMARY OF LEGAL BACKGROUND

In summary, when a limited association is formed, the government is allowed to compel speech that is political or ideological in nature if

196. 385 U.S. 589 (1967).
197. *Keyishian,* 385 U.S. at 603.
198. *Id.*
199. Shelton v. Tucker, 364 U.S. 479, 487 (1960).
200. *See id.* (stating "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in . . . American schools").
201. *Id.* at 487; *see also* Healy v. James, 408 U.S. 169, 180-81 (1972).
202. 354 U.S. 234 (1957).
203. *Sweezy,* 354 U.S. at 250.
204. *Id.*
205. *Healy,* 403 U.S. at 180.
206. Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967).
207. *Id.* at 604.

such speech furthers the specialized purpose of the organization.[208] However, if the compelled speech is found not germane to the purpose of the organization, upon a member objection, the government is in violation of the First Amendment.[209] When the government creates a public forum either by intention or by opening up private property to the public, any speech may be prohibited if the restriction is narrowly drawn to further a compelling state interest.[210] If there is no compelling state interest, the public forum must be regulated in a content-neutral manner.[211] However, a particular viewpoint on a subject matter that is includable in the forum must not be restricted.[212]

The Court has held that if the government compels funding at a university by way of student dues and then distributes them in a way to foster viewpoints, the distribution must be done in a viewpoint neutral manner.[213] The Court has also noted that a university is a "marketplace of ideas" that needs to be fostered in order to further stimulate future leaders of America, and therefore it is imperative that the government not put too many restrictions on student speech.[214] Where state operated schools are involved there is great importance in allowing the school officials to have authority and control, which in turn creates a need to uphold students' First Amendment protections.[215]

III. ANALYSIS

A. THE COURT'S OPINION

Justice Kennedy, writing for a unanimous Court,[216] began the analysis of the case by noting that this was the second time in this decade that constitutional issues have arose out of a university's facilitation of

208. *See* Ry. Clerks v. Allen, 373 U.S. 113, 121 (1963) (stating that the purpose of the association was collective bargaining); *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 511 (1991) (stating the purpose of the association was collective bargaining); *see also* Keller v. State Bar of Cal., 496 U.S. 1, 6-10 (1990) (stating that the purpose of the association was to regulate and improve the legal profession).

209. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977).

210. Widmar v. Vincent, 454 U.S. 263, 278 (1981).

211. *Id.* at 277.

212. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (holding that the government is constitutionally restricted by the First Amendment to exclude one viewpoint and include all other viewpoints on the same subject matter).

213. *See Rosenberger*, 515 U.S. at 845 (stating that viewpoint discrimination in content and in application by the government is a violation of students' First Amendment rights).

214. Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967).

215. Healy v. James, 408 U.S. 169, 180 (1972).

216. Southworth v. Bd. of Regents, 529 U.S. 217, 219 (2000). Justice Souter filed a concurring opinion which Justices Stevens and Breyer joined. *Id.*

extracurricular student speech.[217] This was the first time, however, that the Court was faced with the fundamental question of whether a university possesses a constitutional right to take part in such facilitation in the first instance.[218] The Court held that the First Amendment does afford a university the right to mandate the payment of a student activity fee, which is used to facilitate extracurricular student speech.[219] However, the facilitation processes must be limited in order to afford objecting students some protection of their First Amendment rights.[220] The University of Wisconsin, through the Board of Regents, had the right to mandate students to fund extracurricular student speech but was limited to disbursing student funds in a viewpoint neutral manner.[221] The Court found that Wisconsin's RSO program was a viewpoint neutral facilitation of disbursing student funds and thus held the program constitutional.[222] However, the Court was unable to find the referendum aspect of funding constitutional because of its majoritarian facilitation process.[223]

1. *Student Speech may be Governmentally Funded*

The Court held that the First Amendment affords a university the right to mandate the payment of student activity fees used to facilitate extracurricular student speech when the disbursement of funding is done in a viewpoint neutral manner.[224] The university argued that its mandatory activity fee, used to fund a wide range of speech, including political or ideological speech, was for the purpose of fostering its educational mission.[225] The university's mission, defined broadly by state law, was to develop and discover knowledge and extend knowledge beyond the boundaries of its campus, thus stimulating society by heightening its students' intellectual and cultural awareness.[226]

The university described the activity fee as furthering the university's mission and enhancing the educational experience of students by furthering extracurricular activities, fostering advocacy and debate, increasing participation in political activity and campus administrative activity, as well as providing opportunities to develop

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217. *Id.* at 220; *see also Rosenberger,* 515 U.S. at 822 (denying funding of certain student activities according to university guidelines).
218. *Id.* at 220.
219. *Id.* at 221.
220. *Id.*
221. *Id.* at 222-23.
222. *Id.* at 234.
223. *Id.* at 235.
224. *Id.* at 221.
225. *Id.*
226. *Id.*; *see also* WIS. STAT. ANN. § 36.01(2) (West 1994).

social skills.[227] The Court agreed with this argument and stated that the university's mission could withstand the students' First Amendment argument because the mission was developed and furthered for "the sole purpose of facilitating the free and open exchange of ideas by, and among, its students."[228]

The Court noted that the general rule, on a broader level, was that the government could further such programs by the use of taxes, which would be binding upon the students.[229] If the university used tax dollars to foster such programs to advocate its own political or ideological views, it could make content-based distinctions on speech.[230] The Court noted that when a university determines the content of the education it provides, it may make content-based decisions when it or its agents are the speakers.[231] However, when a university denies that the speech is its own, the general rule on government speech does not apply.[232] The Court here directly pointed out that this was not a question of whether the government could use student funds to further its own beliefs, but rather whether the government can use student funds to foster the educational mission of student speech.[233] The students, speaking for themselves and through themselves, were what gave the speech its "purpose and content, not the government."[234]

On the issue of government redistribution of individual funding, the Court found that a university is distinguishable from unions and bar associations.[235] Even though *Abood* and *Keller*, along with their precedents, provided the starting point for this analysis, the Court found that they were not controlling in the context of extracurricular student speech

227. Bd. of Regents v. Southworth, 529 U.S. 217, 222-23 (2000).

228. *Id.* at 229.

229. *Id.*

230. *Id.*

231. *See id.* at 235 (stating that when the government speaks to further its own policies or beliefs it is accountable to its electorate and the political process for its expression); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (discussing the broad discretion of speech and association a university possesses when it alone is the speaker). The rule on government speech through its agents or employees is altogether different from when the government is compelling the speech of others. *Id.* The government has limitations when it comes to encouraging private speech, but it has broad constitutional powers when it is the speaker. *Id.*

232. *See Southworth*, 529 U.S. at 229 (discussing that since government speech is not at issue the traditional rule on government speech should not apply). The Court noted that if the objectionable activities and speech were funded by tuition dollars and facilitated through university officials, the government itself would be the speaker, and the university's program would be constitutionally permissible. *Id.* (discussing how the holding would be different if it were the government speaking and not the students).

233. *Id.*

234. *See id.* (doing this through the students' extracurricular action).

235. *See id.* at 230 (distinguishing "demand for access [from] a claim to be exempt from supporting speech").

at a university.[236] The Court described this case law precedent as "neither applicable nor workable" in the student speech arena.[237] The Court ruled that the rights defined in *Abood* and *Keller* apply when a university conditions an individual's ability to receive an education on the funding of speech which may be contrary to his or her own views.[238]

However, a university is different from a union or a bar association because its fundamental goal is a robust and wide range of speech rather than to further a specific area of speech.[239] In *Abood,* the union's fundamental goal was to further collective bargaining and its benefits.[240] In *Keller,* the bar association's fundamental goal was to regulate the legal profession and its members.[241] Both *Abood* and *Keller* consisted of limited associations and thus had very narrow and easily defined purposes.[242] A university, on the other hand, is an association with the broad fundamental purpose of fostering all types of ideas.[243] Unlike unions and bar associations that further only a narrowly defined area of speech, a university seeks to encourage a very broad range of speakers and speech.[244]

In *Abood* and *Keller* the constitutional protection for objecting individuals was that the government was only allowed to compel speech that was germane to the purpose of the organization.[245] The Court noted, however, that the germaneness standard does not work as applied to student speech within a university because it could not afford protection to both the objecting student and the university.[246]

The Court noted the difficulty that it had encountered in prior cases in defining germaneness and stated that it was even more difficult when

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236. *See id.* at 230-32 (recognizing that the objecting students were being compelled to fund speech they found objectionable). *Abood* held that any teacher who objected to the mandatory fee to a union in which he or she was not a member could prevent the union from spending its monies on views in which he or she was opposed if the views were unrelated to the union's purpose of "collective bargaining." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 240 (1977). *Keller* held that lawyers could be mandated to join a bar association and fund only those activities germane to the association's mission of regulating the legal profession. Keller v. State Bar of Cal. 496 U.S. 1, 16 (1990).

237. Bd. of Regents v. Southworth, 529 U.S. 217, 230 (2000).

238. *Id.* at 231. The Court reasoned that students' own personal aspirations and potentials are interfered with when the government has the ability to condition their education upon the funding of the beliefs of others. *Id.* The government has thus placed a burdening condition on an individual's education without any recognition of the government's duty to the objecting individual's beliefs. *Id.*

239. *Id.* It can be inferred from the opinion that the university's goal is much broader than the goals of unions or bar associations. *Id.*

240. *Abood,* 431 U.S. at 211-16.

241. *Keller,* 496 U.S. at 5-9.

242. *Id.*; *see also Abood,* 431 U.S. at 211-16.

243. Bd. of Regents v. Southworth, 529 U.S. 217, 232 (2000).

244. *Id.* at 231-32.

245. *Id.* at 231.

246. *See id.* (stating that the standard gives insufficient protection to not only the objecting students but also the university).

the term was applied to a university whose purpose is broader than that of any other organization analyzed in the past.[247] The difficulty began when the Court was unable to reach a conclusion on what was germane to the purpose of a particular association.[248] This difficulty became even more challenging in a public university setting, which has a broader purpose than the more limited purpose of a union or bar association.[249] The Court stated the impossibility lies when the state endeavors to arouse a whole universe of speech and ideas as it does in a university environment.[250]

Since the university's mission was to foster all types of ideas and to expand student's knowledge with a wide range of subjects, there was no clear line where that mission would end and non-germane speech would begin.[251] In fact, there was no clear intention by the university that the language of its mission would cut off any speech at all.[252] Therefore, if the university never intended a distinction to be drawn between germane and non-germane speech, the Court certainly would not be able to easily define such a distinction.[253] Insisting upon a definition for what speech would be defined as germane to a whole universe of speech would negate the purpose that the university created.[254] The university's mission made this determination more unique and difficult, and thus it was not a question the Court was willing to answer.[255]

Although the Court was not willing to answer the question of germaneness, it found that the unanswered question left open a conceivable avenue for intrusion on the First Amendment rights of objecting

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247. *Id.* at 232 (citing Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 521-22 (1991) (stating that different members of the Court had varying views on how the germane standard was to be applied to the union in the case)).

248. *Id.*; *see also Lehnert,* 500 U.S. at 520 (stating that there may be a "somewhat hazier" line in what is or is not "germane" to a union in the public employment sector where the ideological activities of the union may relate to the collective bargaining agreement). The public employment sector often spends a significant amount of time and money in negotiating employment agreements in the state or local legislative avenues. *Id.* Thus, the activity may be considered political or ideological although it borders on falling within the purpose of such a union. *Id.*

249. Bd. of Regents v. Southworth, 529 U.S. 517, 232 (2000). A bar association's purpose is often limited to specific issues such as employment relation, negotiation, and representation issues. *Lehnert,* 500 U.S. at 525. A university's purpose is not limited to specific issues but instead is a very broadly defined mission of fostering a wide range of educational experiences. *Southworth,* 529 U.S. at 231-32.

250. *Southworth,* 529 U.S. at 232.

251. *See id.* (inferring that the broad scope of the university's mission, to foster a whole universe of ideas, did not explicitly or implicitly limit or restrict any speech from such a purpose).

252. *Id.*

253. *See id.* (stating that if the university would have defined what is or is not included in "a whole universe of ideas" the Court could make a distinction between what is or is not germane to that purpose yet such a definition would defy the ultimate goal of the university).

254. *See id.* (keeping the mission broad develops the robustness that is created by student organizations on campus).

255. *Id.*

students.[256] The Court stated that this intrusion was possible because it was inevitable that a portion of the fees would fund speech that some students might find objectionable.[257] Since the university's mission was so broad, there were many different organizations created on campus with a wide variety of expressive ideas and purposes.[258] Where so many organizations need funding in order to survive, it was likely that some of the students' mandated activities fee would be used to further speech which may be objectionable.[259] The Court noted that if the university found its mission well-served when students "engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects" outside the classroom, then the university could require a mandatory fee to further such speech.[260] However, the objecting students must still be afforded some protection.[261]

The Court concluded that the standard that would protect objecting students when the government allocated their funds was the requirement of viewpoint neutrality.[262] This standard was taken from the precedents of public forum cases, but it was given substance in a university setting in *Rosenberger*.[263] Although *Rosenberger* addressed an issue similar to that in *Southworth,* it failed to answer the primary question of the *Southworth* inquiry: whether a public university could be allowed to require its students to pay a fee to create the facilitation of extracurricular speech in the first instance.[264] The *Southworth* Court stated that when a university is mandating its students to pay fees that subsidize speech of other students, it must not prefer some viewpoints over others.[265] Therefore, in applying the holding of *Rosenberger*, *Southworth* held that a

256. *Id.* By answering the germaneness question, the Court would define what speech is or is not constitutional and offer objecting students a clearer distinction. *Id.* By not answering the germaneness question, the Court leaves open the question of whether the university is violating objecting students' First Amendment rights by compelling them to fund private speech. *Id.*

257. *Id.*

258. *Id.* at 237.

259. *Id.* at 232.

260. *See id.* at 233 (stating that if the speech is furthering the mission of the association, the association is constitutionally allowed to impose a mandatory fee to sustain and support the purpose no matter how broadly it may be defined).

261. *Id.*

262. *Id.*

263. *See id.* (discussing *Rosenberger*'s holding as imposing the viewpoint neutrality standard when a university is administering the student fee program to fund student speech and not the university's own speech). *Rosenberger* centered on the issue of student rights in an extracurricular speech program and offered a viewpoint neutrality protection for objecting students. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 832 (1995) (discussing cases which called for a claim to access and not necessarily a claim against compelled speech).

264. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 228 (2000) (stating that *Rosenberger* answered the question of what type of protection should be afforded to objecting students but ignored whether or not political or ideological speech could be compelled to be funded through the student activities fee).

265. *Id.* at 233.

university must use viewpoint neutrality in mandating and distributing student fees used to further extracurricular student speech.[266] The Court stated that a university may provide any type of program it wishes to foster extracurricular student expression so long as the program's structure is consistent with the First Amendment.[267]

The Court expressly stated that its holding on student speech was not to be inferred as applying to university speech.[268] When the university is the speaker, different standards apply than when a student is the speaker.[269] The Court has stated that when the state, acting through its university, is the speaker, it may form content-based choices.[270] When it is the university that is speaking, the Court has established that it has every right to determine the content of the education it provides.[271] The university may use public funding for the promotion of its own speech on its own policies or beliefs.[272] In *Southworth* the Court made clear that the holding of *Rosenberger* applied in this case because the speech was not from the university but from the students themselves.[273]

A university is not mandated by the Constitution to require any other First Amendment protection other than disbursing student fees in a viewpoint neutral manner.[274] However, the Court noted that a university could in fact set up its own protection if it wished to do so.[275] If a university decided that its students' First Amendment rights would be more adequately safeguarded by having some kind of refund system or optional funding system, it could implement such a device.[276] A universi-

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266. *Id.*; *see also Rosenberger*, 515 U.S. at 845-46. The Court noted that there was symmetry in the viewpoint neutrality holding of *Rosenberger* and the constitutional right to impose a mandatory fee in the first instance in the *Southworth* holding. *Southworth*, 529 U.S. at 233. Therefore, the Court put the two holdings together and held that the university may fund the extracurricular activities of its student organizations with a mandated student activity fee if it uses viewpoint neutrality in its facilitation process. *Id.*

267. *Southworth*, 529 U.S. at 233.

268. *Id.* at 234-35. University speech is defined as speech by the university, the employees, or agents of the university. *Id.*

269. *Id.* When the university is speaking, it is promoting its own policies or ideas and is thus offered more constitutional freedom to make its own decisions than when the university is furthering private student speech. *Id.*

270. *See Rosenberger*, 515 U.S. at 833 (stating that a university is allowed to develop the content of its mission and therefore must be allowed to make content-based decisions in order to develop and further its mission).

271. *See id.* (stating that a university has broad discretion in applying its mission in terms of who may teach, what may be taught, and how it may be taught).

272. *Id.*

273. Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000) (stating that the university was using private funding not to promote its own policies or ideas but instead to promote and further students' ideas).

274. *Id.* at 233.

275. *See id.* (giving an example of such a program as a program where each student would list which activity he or she is or is not willing to fund).

276. *Id.* The Court declined to impose such a system but stated that this type of program would be completely up to the discretion of each individual university. *Id.* The Court noted, however, that

ty could implement a program where a student could be refunded a portion of his or her activity fee upon an individual objection or a "check the box" program in order to identify and eliminate payment to organizations the student opposes.[277] The Court made it a point to note that creating an opt out program may endanger the very program that the university wishes to support.[278] Some students may take advantage of this system in order to save money, which in turn would minimize the funding going to organizations created to further the university's mission.[279] If the funding became too sparse some of the organizations would not survive; thus, the university's mission of creating a robust and broad range of extracurricular expressive activities would not be possible.[280]

2. *The Constitutionality of Wisconsin's Program*

The Court applied the constitutional requirement of viewpoint neutrality to the Associated Students of Madison program to determine whether its structure was consistent with the First Amendment.[281] To be consistent with the First Amendment, the University of Wisconsin's scheme could not prefer some viewpoints over others in any part of its structure or operation.[282] The parties stipulated that the facilitation of the registered student organizations through the Student Government Activities Fund, the General Student Services Funds, and the Associated Students of Madison was consistent with the viewpoint neutrality standard.[283] The Court went into no further analysis, holding that when a disbursement of funds respects the viewpoint neutrality standard it will be upheld as constitutional.[284]

The Court found it unclear whether the referendum portion of the university's distribution scheme was consistent with viewpoint neutrality.[285] If the function of the referendum aspect created a majority determination for what was or was not viewpoint neutral, it would not possess

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such a program may disrupt the very goal a university wishes to obtain, could become very costly, and interfere with the facilitation of extracurricular student speech. *Id.*

277. *Id.*

278. *Id.* at 232.

279. *Id.* If the university created an opt-out program some students may opt out of the program merely to avoid more costs of their education. *Id.* If a majority of the students chose to opt out, current student organization funding would vastly decrease and may deter new organizations from forming. *Id.*

280. *Id.*

281. *Id.* at 233.

282. *Id.* at 234.

283. *Id.* The facilitation process of the Student Government Activities Fund, the General Student Services Fund, and the Associated Students of Madison is a democratic process that distributes student funds fairly without reference to the viewpoint of the funded speech. *Id.* at 222-24.

284. *See id.* at 234 (inferring that the stipulation controlled the Court's decision).

285. *See id.* at 235-36 (stating that the Court found it unclear how much protection, if any, the referendum program would offer for viewpoint neutral decisions).

the constitutional protection that was required.[286] If access to or denial of funding was based on a majority decision, it would be possible that the decision might, in effect, discriminate against some viewpoints.[287] The Court stated that access to or denial of the funding should not need to depend on majoritarian consent.[288] The Court remanded for further proceedings any portion of the referendum aspect that was based on a majority vote.[289]

3. *The Distinction Between On- and Off-Campus Activities*

The Court stated that just as a university can decide to afford students more protection than the First Amendment mandates, it can also decide the geographical or spatial boundaries of where it is going to fund expressive activity.[290] The Court, in addressing the issue of geographical limitations, stated that there was no distinction to be made between on-campus or off-campus expressive activities of student organizations.[291] The Court stated that there was no mandate by the Constitution to institute any geographical or spatial restriction on a university as a condition to funding student organizations.[292] The only mandate that the Constitution required was redistribution of funding in a viewpoint neutral manner.[293] Therefore, universities are free to expand their mission of furthering student encouragement of a vast array of social, civic, and cultural activities to any geographical bounds they see fit.[294] Today is an age of communication, and there have been expansive changes in the information arena, making it nearly impossible for the Court to insist upon or mandate geographical limitations on obtaining information.[295] The Court stated that with a proper application of

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286. *See id.* (stating that the theory behind the viewpoint neutral standard is to be able to regard minority views with the same respect as majority views).

287. *Id.*

288. *Id.* The Court relied on the principle that access to a public forum does not depend on majoritarian consent. *Id.*

289. *Id.*

290. *See id.* at 233-34 (stating that a university should be able to further its mission in any geographical area it wishes and this includes both on-and off-campus activity funding). The Court refrained from imposing any geographical or spatial boundaries as conditions to funding a student organization since universities have a substantial interest in ensuring that students have the opportunity to participate in a wide variety of social and cultural experiences. *Id.* at 234.

291. *See id.* (stating that the respondents expressed there was no connection to the student opposition to off-campus activities and the university imposing a fee to begin with).

292. *Id.*

293. *Id.* at 235.

294. *Id.* at 233. The objecting students in *Southworth* argued that the off-campus funding often did not relate to the university's goal of fostering student speech and its reason for imposing the segregated fee. *Id.* at 234. The Court noted that if the university had the same concern, the university may restrict off-campus expenditures or travel reimbursements as long as it is done in a viewpoint neutral manner. *Id.*

295. *See id.* The Court stated that a university, like all of society, is expanding in this age of

viewpoint neutrality, a university is allowed broad geographical latitude, without infringing upon students' First Amendment protections.[296]

B. JUSTICE SOUTER'S CONCURRENCE

The Court unanimously held that it was not a violation of students' First Amendment rights to allow a university to mandate funding for student organizations' extracurricular expressive activities.[297] However, Justice Souter wrote a concurring opinion which stated that the majority went too far in insisting upon a "cast iron viewpoint neutrality requirement" in upholding the university's student activity program.[298] He found that the students' objections did not need a "cast iron" First Amendment protection other than the viewpoint neutrality already granted.[299] Justice Souter asserted that the scheme offered by the university granted enough protection and that the Court did not have to insist that this standard be strictly defined.[300] Justice Souter thought that the question to be answered was "not . . . whether viewpoint neutrality is required, but whether Southworth has a claim to relief from this specific viewpoint neutral scheme."[301] In answering this narrowed question, he considered two foundations of law.[302]

The first foundation of law was comprised of case law precedent discussing the "umbrella of academic freedom."[303] Justice Souter stated that this might have been implicated by the university in its discussion of the importance of the activity fee in carrying out its educational mission.[304] Academic freedom was defined as giving learning institutions the discretion of what and how to teach by giving them freedom from any restrictions on thought, expression, and association within the institution.[305] The prior case law dealt with issues of

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information, and it is finding that traditional boundaries are becoming too difficult to insist upon. *Id.*

296. *Id.* at 233-34. If the university's mission is to create and foster student debate and to encourage students to take advantage of social, civic, and religious experiences, then it may further this mission wherever it sees necessary as long as it is furthered in a viewpoint neutral manner. *Id.* at 234.

297. *Id.* at 236 (Souter, J., concurring).

298. *Id.* Justice Souter was joined in his concurrence by Justices Stevens and Breyer. *Id.*

299. *See id.* (stating that they would have not gone any further). Justice Souter stated that he limited his examination of the case to the general distribution scheme of the university and agreed with the Court that the referendum issue should be remanded for further findings. *Id.* at 236 n.1.

300. *Id.* at 236. Justice Souter stated that the question of whether viewpoint neutrality needed to be required did not even need to be reached in order to decide this case. *Id.* He noted that the university program is already facilitated in a viewpoint neutral fashion and the parties have stipulated to that fact. *Id.* at 236 n.2.

301. *Id.* at 236.

302. *Id.*

303. *Id.* at 237.

304. *Id.* (citing a statement of the Associate Dean of the Students which noted the University of Wisconsin's academic importance of the funding program).

305. *Id.* (citing Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985)). The Court has further explained "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision making by the academy itself." *Ewing*, 474 U.S. at 226 n.12 (citations omitted).

restrictions imposed from outside the university on individual teachers and individual organizations.[306] He noted that the constitutional importance of academic freedom has been historically recognized by the Court; however, those cases answered more limited questions and did not compel the conclusion that objecting students would not have a First Amendment claim in this situation.[307] Justice Souter also stated that it may be just enough in the First Amendment analysis to protect a university's liberty to mold its own educational mission.[308] If a university is allowed to mold its own mission, it only needs to follow its own mold in order to stay within First Amendment boundaries.[309]

The second foundation of law implicated in answering whether the activities fee could be abolished involved the comparison of *Southworth* to cases in which mandated governmental speech required relief.[310] Justice Souter first addressed prior case law in which the government imposed upon the objectors by restricting messages or requiring an individual to bear the government's statements.[311] He suggested that those cases in which the government was "imposing far more directly

306. Bd. of Regents v. Southworth, 529 U.S. 217, 239 n.4 (2000) (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 591-92 (1967), Shelton v. Tucker, 364 U.S. 479, 487 (1960), Sweezy v. New Hampshire, 354 U.S. 234, 236 (1957), and Wieman v. Updegraff, 344 U.S. 183, 184-85 (1952)). This case law is distinguished from *Southworth* because *Southworth* deals with the broader issue of the university redistributing individual student funds to a wide variety of outside speech, rather than the specific issue of speech of an individual teacher or organization's speech. *Id.* at 238.

307. *See Southworth*, 529 U.S. at 238-39 (stating that the Court has stated that there is a broad protection for academic freedom that stretches to barring the legislature from imposing conditions on the array of viewpoints expressed in a higher learning institution). Even if academic freedom would control, the Court has never held that universities are beyond the reach of the First Amendment. *Id.* at 239. The Court noted, however, that it would not render an opinion on an academic freedom aspect in this case since the university did not argue it as an issue. *Id.*

308. *Id.* Justice Souter explained the significance of a university's ability to define its own mission. *Id.* (citing *Sweezy*, 354 U.S. at 262-64 (Frankfurter, J., concurring)). Justice Frankfurter, in *Sweezy*, described the open universities in South Africa:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy, 354 U.S. at 263.

309. *Southworth*, 529 U.S. at 239.

310. *Id.* at 239-40.

311. *See id.* (citing Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 572-74 (1995) and Wooley v. Maynard, 430 U.S. 705, 707 (1977)). The government was also not mandating an individual student to personally bear an offensive statement. *Id.* (citing *Wooley*, 430 U.S. at 707). *Southworth* addressed a more indirect issue of the government compelling student speech by its registered student organizations furthering the message of others. *Id.* at 239. Prior case law restricted the government from restricting or modifying an individual's message or mandating an individual to personally accept and bear the government's offensive statements. *Id.*; *see also Hurley*, 515 U.S. at 572-74 (holding that the government may not restrict an individual's message); *Wooley*, 430 U.S. at 707 (holding that the government may not mandate an individual to personally bear an offensive message).

and offensively on an objecting individual," as opposed to indirectly funding messages of other speakers, were not controlling.[312] In *Southworth*, the government was merely taking a small portion of student funds and redistributing it to organizations that expressed objectionable views.[313] The student activity fees were a fairly small portion of the total money students pay for an education, and the amount of the funding going to speech the student may have found to be objectionable was an even smaller portion.[314] The government was merely compelling a small portion of the students' funds to go to expressive organizations; this was not as large of a limitation on the freedom of speech as it would have been had the government restricted a student's expressive activity.[315]

Justice Souter next agreed with the Court that the *Abood* and *Keller* cases did not control the remedy in this case and explained why it did not in a four-part analysis.[316] First, he stated that in *Southworth* there was not enough of a connection between the fee payer and the ultimate objectionable message.[317] In unions and bar associations, there was a direct connection between the fee payer and message because the fee payer was forced to contribute funds to the very organization advancing the objectionable message.[318] In *Southworth*, the student was forced to contribute funds to a distributing agency which was not itself promoting or advancing any personal views.[319]

Second, because the government's mission was to "broaden public discourse" Justice Souter found that the students' argument did not hold as much force as it might otherwise have held with a more limited mission.[320] A university's mission is not to restrict or censor speech but instead to foster and enhance the students' knowledge by providing a

312. *Southworth*, 529 U.S. at 239-40.

313. *Id.* at 239.

314. *Id.*

315. *Id.* at 239-40 (discussing that mandating a student activities fee to support other student speech was at best indirectly imposing government speech upon individuals); *see also Hurley*, 515 U.S. at 572-74; *Wooley*, 430 U.S. at 707.

316. *Southworth*, 529 U.S. at 240.

317. *Id.* Justice Souter stated that the connection is more attenuated in *Southworth* since the individual student's fee was not given directly to the ultimate message but rather was distributed through an agency to fund a multitude of messages, some objectionable and some not. *Id.*

318. *Id.* The ultimate message of the union and bar association was given its force through the mandated fees of its members. *Id.*

319. *See id.* (stating that the agency was not the speaker since it did not possess any social, political, or ideological character and was not itself engaging in the expression of the distinct message).

320. *See id.* at 240-41 (stating the reason is because the fees in this situation support a governmental scheme that strives to broaden public discourse and those goals that are vital to self-governing people).

wide range of expressive activity on and off campus.[321] A university uses public funding to facilitate and encourage its students to engage in public debate and participate in the electoral process.[322] Such goals are important and vital to a self-governing democratic society.[323] "Thus [the program] further[ed], not abridg[ed], pertinent First Amendment values."[324] This is a standard that the Court has recognized outside the realm of government spending, and the same consideration in those cases went against the contributors' objection to the system in this area because a university's mission is the basis for the student funding and the students' education.[325]

Third, the compelled speech and funding cases were distinguishable based on the legitimacy of the government's interest.[326] The government's interest in *Southworth* lent itself to supporting activities, which provided an educational value that was distinguishable from a union's interest in supporting views beyond the purpose of "collective bargaining," and a bar association's interest in supporting speech beyond the purpose of regulating the legal profession.[327] The government's interest in a university is to provide and encourage a wide range of expressive activity, which is a much broader interest than that of a union or a bar association.[328]

Last, the university setting itself, where students fund a wide variety of speech, some objectionable and some not, merely by paying tuition, underscored the argument that funding speech was somehow different through the activity fee.[329] Justice Souter asserted that by paying tuition,

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321. *Id.* at 241. The program used the funds to promote and enhance public discussion. *Id.*

322. *Id.* Justice Souter noted that the university fee in this situation was a tax, which was paid into a state account and disbursed through a state program. *Id.*; *see also* WIS. STAT. ANN. § 36.09(5) (West 1992 & Supp. 2000). He then followed by stating that prior case law suggests the government may constitutionally use its tax revenue to further public discourse. Bd. of Regents v. Southworth, 529 U.S. 217, 241 (2000).

323. *Id.*

324. *Id.*

325. *See id.* at 242 (discussing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (rejecting a shopping mall owner's claim of the government not being able to use his private property as a public forum for other people's expressions)). The Court upheld a First Amendment right for individuals to express their potentially objectionable views on a shopping mall owner's property, stating that there was no danger that such a requirement would "dampen the vigor and limit the variety of public debate." *PruneYard*, 447 U.S. at 87-88 (quoting Miami Herald Pbl'g Co. v. Tornillo, 418 U.S. 241, 257 (1974)).

326. *Southworth*, 529 U.S. at 242. Justice Souter stated that government's interest of furthering public discourse and goals vital to self-governing people was a much more substantial interest than merely supporting collective bargaining or a professional regulatory program. *Id.*

327. *Id.*

328. *Id.* Justice Souter noted that the government's objective in *Southworth* should be distinguished from a case in which the university wishes to mandate a student to fund religious evangelism. *Id.* at 242 n.10 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 868-71 (1995)).

329. *See id.* at 242-43 (stating that it is undisputed that some tuition dollars go to fund course offerings that may be objectionable).

students are paying for all types of university speech and a wide range of expression taught in classrooms.[330] Surely, there are teachers who are teaching subjects that may be objectionable to some students, and if tuition cannot be refunded upon such an objection, it seems unreasonable to allow a different holding for the activity fee.[331] Since tuition is not optional and the government is allowed to use student funds for speech that may be found objectionable, Justice Souter found it troublesome to see how the activity fee could confer a more believable argument for a refund.[332]

IV. IMPACT

The Court did not expressly state whether its holding would apply in other organizations with broad missions based upon expressive conduct.[333] However, the Court did not state that this holding was only applicable to a university setting and could not be applied elsewhere.[334] The language in *Southworth* seems to suggest that its holding could be applied to all higher learning settings or any learning facility with the goal of broadening public discussion.[335] The Court and Justice Souter's concurrence gave substance to the legitimacy of the government's purpose and seemed to imply that the government's interest may also be a factor to consider.[336] Justice Souter also stated in his concurring opinion that the government's interest in encouraging public debate on a wide variety of subjects is more substantial than the government's interest in collective bargaining or a professional regulatory program.[337] Therefore, a government mandated fee may be more likely upheld to fund objectionable speech when the government has a legitimate interest

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330. *Id.* at 243.

331. *Id.* Justice Souter also noted that there is no claim that the university is somehow required to offer a wide variety of courses in order to comply with a viewpoint neutrality standard. *Id.* (citing *Rosenberger*, 515 U.S. at 892-93 nn.11-12 (Souter, J., dissenting)). He followed by stating "The University need not provide junior years abroad in North Korea as well as France, instruct in the theory of plutocracy as well as democracy, or teach Nietzsche as well as St. Thomas." *Id.*

332. *Id.*

333. *Id.* at 221-235.

334. *Id.* The only exception is when the government is the speaker, which is addressed in prior case law. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 92-93 (1976).

335. Bd. of Regents v. Southworth, 529 U.S. 217, 233 (2000). The Court stated that if a university reached the conclusion that its mission is being furthered when its students engage in public discussion and debate in "philosophical, religious, scientific, social, and political subjects" outside the classroom, it is able to impose a mandatory fee to encourage the open dialogue. *Id.* (inferring that when there is a broad mission of encouraging public discussion and debate, open dialogue will be permissible to the point it furthers the mission).

336. *See id.* at 231-32, 242 (stating that the government had a legitimate interest in *Southworth* because the fee went to further educational values versus other cases where the fee only supported a specific area such as collective bargaining).

337. *See id.* at 242 (stating that educational value is derived from a university's interest in creating an arena of speech).

in furthering a broad mission developed to foster and sustain public discussion and debate.[338]

A. STUDENT ACTIVITY FEES IN THE FUTURE

It is now clear that a university which seeks to foster a wide range of political or ideological speech in order to further its educational mission, may do so if it is done in a viewpoint neutral manner.[339] It is also clear that a registered student organization program, like the one at the University of Wisconsin, is a constitutionally permissible way of abiding by the viewpoint neutral standard.[340] It is not clear from this decision, however, if a referendum manner of distributing student funds is constitutional.[341] The Court noted that when minority views are not treated with the same equality as majority views, viewpoint neutrality is undermined.[342] Therefore, the Court inferred that the referendum program should not be held constitutional if minority views are not being treated as equally as the majority views.[343]

B. APPLICATION TO NORTH DAKOTA LAW

North Dakota universities must now comply with the viewpoint neutrality standard specifically mandated to universities through the holding in *Southworth*.[344] It is clear that if a university within North Dakota has an educational mission developed to encourage a wide range of student speech, the university is allowed to impose a mandatory fee upon its students to further such a mission.[345] The university may also create or sustain a student organization program analogous to the one implemented by the University of Wisconsin.[346] However, if the university has a referendum program implemented, it may need to change how funding distributions are made in the future.[347]

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338. *Id.* at 233-43. The Court and Justice Souter in his concurrence agreed that *Abood* and *Keller* did not control in a university setting since the mission of a university is a much broader mission that compels a broader remedy to further the results it seeks. *Id.*

339. *Id.* at 234-35.

340. *Id.* at 236. The grant scheme followed by the student government programs was stipulated to by the parties as viewpoint neutral, and the Court agreed, finding it viewpoint neutral as a matter of law. *Id.*

341. *See id.* at 235-36 (stating that it is different from the student government programs since it requires a majority vote instead of following a democratic process that protects viewpoint neutrality).

342. *Id.* at 235. There is a likely probability that the majority may vote on viewpoints, and thus viewpoint neutrality could not be protected. *Id.*

343. *Id.*

344. *Id.*

345. *Id.* at 236.

346. *Id.*

347. *Id.* at 235.

Effective April 4, 2000, the North Dakota State Board of Higher Education Policy Manual was amended to state the current conditions and procedures under which North Dakota higher learning institutions may collect student activity fees.[348] The policy states that institutions may collect an activities fee to support "student activities, including, but not limited to, student organizations, and clubs, lyceums, drama, music, field trips and student publications."[349] The allocation of the funds is to be administered, pursuant to the institution's procedures set by the student government as a part of its annual budget.[350] The student government process should allow for organizations to request review for funding.[351] This allocation process is to be reviewed and approved by the institution's president.[352]

At the University of North Dakota, student fees are collected, and a portion of the money is given to the Student Government.[353] The Student Government is comprised of many subcommittees, including the Student Activities Committee (SAC) and the University Program Council, which all play a role in sponsoring registered student organizations and activities.[354] SAC then distributes the student fee money to student organizations under the guidelines set out in its constitution.[355]

Each organization must present the Student Organization Center (SOC) with an operating budget by the first Wednesday in November, which is used to request funding for daily operation costs.[356] However,

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348. NORTH DAKOTA HIGHER EDUCATION POLICY MANUAL § 805.2 (2000).

349. *Id.* The policy also states in subsection 2 that institutions may collect a college fee that supports the student body, "including, but not limited to, debt retirement, student union operations, athletics, and [career] services." *Id.* This fee amount is established by the institution's president with input from the student government body. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* The policy manual also states in subsection 3 that the chancellor should establish waiver policies for those students who audit course work, senior citizens, and students enrolled in the institution for distance education courses. *Id.*

353. *Student Fees; Supreme Court Decision was Correct Ruling for Students' Interests*, UNIV. OF N.D. DAKOTA STUDENT, April 4, 2000, at 4.

354. *Id.*; *see also* UNIVERSITY OF NORTH DAKOTA STUDENT ACTIVITIES COMMITTEE CONST. art. I. "The Student Activities Committee [SAC] was established on May 24, 1956 as a presidential committee to coordinate and supervise student activities." *Id.* In 1966, SAC was given University Senate Committee status, and in 1976, by action of the University Senate, SAC became a standing committee of the Student Senate and provided its members with a constitution. *Id.*

355. STUDENT ACTIVITIES COMM. CONST., *supra* note 354, at art. V. The SAC Constitution provides guidelines that various groups must meet before becoming eligible for funding. *Id.* These guidelines provide an explanation of what may be funded from student activity fees. *Id.* The guidelines show four main areas of funding, including: operating costs, programming costs, transportation costs, and equipment funding. *Id.*

356. *See id.* (stating that costs include printing, telephone, and office supplies). The operating budget is intended to defray the costs of daily operations of student organizations including the cost of postage, office supplies, long distance telephone expense, advertising, printing, and other expenses. *Id.* Each student organization may receive only one allocation for operating expense per fiscal year. *Id.*

if an organization wishes to request funding for programs, equipment, or transportation it may request this from SOC at any time.[357] The organization must then speak before SAC, and SAC will then vote on the funding.[358] There are separate guidelines regarding when SAC is able to fund organization's programs, equipment, or transportation.[359] Program funding is provided to student organizations for programs that are perceived as a benefit to the students of the University of North Dakota.[360] Transportation and equipment funding is distributed only if it is essential to the student organization's existence.[361]

When a student organization requests funding, the organization makes its request in writing to SOC and then appears before SAC.[362] This commission is composed of eleven voting members and includes the tie breaking vote of the chairperson of the committee.[363] The commission hears the request in an open session, asks any questions it may have, and then proceeds to vote on the request.[364] If the request is granted, the funds become available to the student organization through a university account system.[365]

If an organization is not satisfied with SAC's decision, it may follow the appeals process set out in the SAC Constitution.[366] The structure of the University of North Dakota's student activity disbursement is a viewpoint neutral facilitation process.[367] The State of Affairs Coordinator for the University of North Dakota's Student Senate stated that the university's distribution of student fees furthers the established educational mission, thus leaving the University of North Dakota's program constitutionally permissible.[368]

North Dakota State University has an allocation process similar to the process at the University of North Dakota.[369] North Dakota State

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357. *Id.*

358. *Id.*

359. *Id.* These guidelines are set out in the SAC Constitution. *Id.* Student organizations are limited to two allocations of program funding during any fiscal year. *Id.*

360. *Id.* Program funding helps defray the costs of conferences, speakers, films, dances, or other similar events. *Id.*

361. *Id.* The guidelines also provide that transportation expenses are partially covered by the individual students who are traveling. *Id.*

362. *Id.*

363. *Id.* at art. IV. Eight of the members are students who are appointed by the Student Senate. *Id.* Each student attending the University of North Dakota who is of "good standing" may be eligible to become a SAC member. *Id.* "Good standing" means that a student must not be on any type of university probation. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. Sherri Richards, *Student Fees Upheld to be Constitutional*, UNIV. OF N.D. DAKOTA STUDENT, April 4, 2000, at 3.

369. NDSU STUDENT GOVERNMENT CONST.; *see also* STUDENT ACTIVITIES COMM. CONST., *supra*

University distributes its student activity fee through its Student Senate and Finance Commission.[370] The Student Finance Commission is a commission composed of the executive branch of student government and nine voting members.[371] The Student Finance Commission at North Dakota State University also allocates funding according to a predetermined set of guidelines.[372] The areas of funding at North Dakota State University are similar to those previously listed for the University of North Dakota.[373] The Student Finance Commission allocates funding according to the predetermined guidelines after a written request has been made by the organization.[374] A member of the student organization will then appear before the commission to make the request and answer any questions.[375] The commission then votes on whether the student organization should be allocated the funding.[376] All funding decisions are presented to the Student Senate for approval and to the president of the university for ratification.[377]

Both the University of North Dakota's and North Dakota State University's funding schemes are similar to the viewpoint neutral grant scheme in *Southworth*.[378] Neither of the North Dakota universities distributes its mandated activities fees based upon a majority vote.[379] They both have a process that protects viewpoint neutrality and as a result are both constitutionally permissible under the Court's holding in *Southworth*.[380]

The other public institutions of higher learning across the state have similar but less detailed plans for distributing student fees.[381] These

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note 354.

370. STUDENT GOVERNMENT CONST., *supra* note 369, at art. III, § 5.

371. *Id.* Eight of the voting commission members are students; two of the students are appointed by Student Senate and the remaining six are appointed by the Finance Commissioner, subject to the Senate's approval. *Id.* Any North Dakota State University student is eligible to be a member of the Finance Commission. *Id.*

372. *Id.*

373. *Id.*; *see also* STUDENT ACTIVITIES COMM. CONST., *supra* note 354. The main difference between the two universities is that North Dakota State requires each student organization to submit its operating budget in the spring for the following year. STUDENT GOVERNMENT CONST., *supra* note 369, at art. III, § 5.

374. STUDENT GOVERNMENT CONST., *supra* note 369, at art. III, § 5. If a student organization later requests additional funding, the organization must make a contingency request. *Id.* The contingency request is similar to the University of North Dakota's requests for program or transportation funding. *Id.*; *see also* STUDENT ACTIVITIES COMM. CONST., *supra* note 354.

375. STUDENT GOVERNMENT CONST., *supra* note 369, at art III, § 5.

376. *Id.*

377. *Id.*

378. *Id; see also* STUDENT ACTIVITIES COMM. CONST., *supra* note 354; Bd. of Regents v. Southworth, 529 U.S. 217, 217-31 (2000).

379. STUDENT GOVERNMENT CONST., *supra* note 369, at art. III § 5; *see also* STUDENT ACTIVITIES COMM. CONST., *supra* note 354.

380. STUDENT GOVERNMENT CONST., *supra* note 369, at art. III, § 5; *see also* STUDENT ACTIVITIES COMM. CONST., *supra* note 354; *Southworth*, 529 U.S. at 234-35.

381. Telephone interview with David Clark, Vice President of Operations and Corporate and Continuing Education, Bismarck State College (Mar. 2001); telephone interview with Mark Lowe,

plans closely resemble the distribution process of North Dakota State University and the University of North Dakota in that a fee is collected through the business office and then subsequently distributed to student organizations through a student senate.[382] Smaller universities generally have fewer student organizations due to the fact that the student population is less.[383] Thus, there are fewer organizations that are engaged in speech activities.[384] Generally these universities distribute to organizations such as a campus center, athletics, campus improvements, students' dances and theater arts.[385] When smaller North Dakota universities distribute their fees through a student senate, the universities are distributing student activity fees in a fashion similar to the University of North Dakota and North Dakota State University.[386] Since such distribution schemes distribute fees in like fashion and not by referendum, they would also be constitutionally valid schemes under the *Southworth* decision.[387]

The holding in *Southworth* would not extend to the higher learning institutions in North Dakota that do not mandate a student activity fee for the funding of extracurricular student organizations.[388] Therefore, North Dakota universities which distribute fees to university programs such as student health, athletics, and campus improvements, but not to any student-run extracurricular organizations will not be affected by the *Southworth* decision.

V. CONCLUSION

In *Southworth,* the Court expanded the holding of *Rosenberger.*[389] The Court determined that it was constitutionally permissible for a

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controller, Dickinson State University (Aug. 2001); telephone interview with Randall Fixen, Chairman of Campus Activities, Lake Region State College (Oct. 2001); telephone interview with Janice Jorgensen, accountant, Mayville State University, (Aug. 2001); telephone interview with Sharon Berning, controller, Minot State University (Aug. 2001); telephone interview with Ann Bergeron, accountant, Minot State University-Bottineau Campus (Oct. 2001); telephone interview with Claire Byron, business office personnel, North Dakota State College of Science (Aug. 2001); telephone interview with William Ament, business office personnel, Valley City State University (Aug. 2001); telephone interview with Hugh Long, Student Activity Director, Williston State College (Aug. 2001).

382. *See* telephone interviews, *supra* note 381; *see also* STUDENT GOVERNMENT CONST., *supra* note 369, at art. III § 5; STUDENT ACTIVITIES COMM. CONST., *supra* note 354.

383. *See* telephone interviews, *supra* note 381.

384. *Id.*

385. *Id.*

386. *Id.; see also* STUDENT GOVERNMENT CONST., *supra* note 369, at art. III, § 5; STUDENT ACTIVITIES COMM. CONST., *supra* note 354.

387. *See* telephone interviews, *supra* note 381; *see also* STUDENT GOVERNMENT CONST., *supra* note 369, at art. III, § 5; STUDENT ACTIVITIES COMM. CONST., *supra* note 354; Bd. of Regents v. Southworth, 529 U.S. 217, 234-35 (2000).

388. *See, e.g.,* Bismarck State College 2001-2002 Disbursement Plan for Service/Facility Fee (on file with author) (demonstrating that Bismarck State College does not fund extracurricular student organizations through a student activities fee); *see also Southworth,* 529 U.S. at 234-35.

389. *Southworth,* 529 U.S. at 234-35; *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 845 (1995).

university to mandate student fees for the furtherance of extracurricular student speech.[390] The Court also more clearly defined the limitation on mandated funding in order to have some First Amendment protection for objecting students, holding that any funding scheme must be administered in a viewpoint neutral fashion.[391] The Court did not overrule *Abood* and *Keller*; therefore, they are still good law in the context of public organizations seeking to further a more narrow goal.[392]

The Court expressly stated in *Southworth* that the germaneness standard used in previous case law was inapplicable in the university setting because of the purpose the university's mission seeks to achieve.[393] Since a wide range of diverse speech is the very goal the university wishes to achieve, the Court stated that it would be too difficult, and almost contradictory, to define what is germane in that context.[394] The Court did not abolish the germaneness inquiry entirely, but it did reaffirm that it had previously found it difficult to define what was germane to an association's mission.[395] The unmanageability, however, came only at the point when an organization, such as a university, seeks to stimulate an entire universe of ideas.[396]

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390. *Southworth*, 529 U.S. at 234-35.

391. *Id.*

392. *See id.* at 231-32 (stating that the standards used in the prior case law were unworkable in a university context). When the goal is a more narrow one, such as collective bargaining or regulating the legal profession, rather than a broader goal of furthering a wide range of expressive activity, the government may further expression if it is germane to the purpose of the association. *Id.* The germaneness standard is workable in an association with a more narrowly drawn purpose because it is easier to draw distinctions between what is and what is not germane to the purpose of the association. *Id.*

393. *Id.*

394. *Id.*

395. *Id.* (citing Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 521-22 (1991)).

396. *Id.*

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