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Mandatory Student Fees and the First Amendment: Background and Analysis of Issues in *Southworth v. Grebe*

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ABSTRACT

This report discusses *Southworth v. Grebe*, where the Court of Appeals for the Seventh Circuit held that a state university may not use mandatory student activity fees to support student groups that engage in political or ideological advocacy. The Seventh Circuit's decision, predicated on First Amendment principles regarding compelled speech, conflicts with precedent established in other circuit courts. Because of this conflict, the Supreme Court granted certiorari in *Southworth*, with a decision expected this term. This report provides an overview of the Seventh Circuit's decision, with an emphasis on its relation to the dispositions of other courts and established Supreme Court precedent.

Mandatory Student Fees and the First Amendment: Background and Analysis of Issues in *Southworth v. Grebe*

Summary

The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Supreme Court of the United States has established that the First Amendment's free speech guarantee contains, as necessary corollaries, the right not to speak, and the right not to be compelled to support the speech of others. Based on these principles, students of the University of Wisconsin filed suit against the school's Board of Regents, asserting that the use of objecting students' mandatory student activity fees to support political and ideological groups violated their First Amendment rights of free speech, free exercise, and free association. This assertion by the plaintiffs raised a conflict between the general principle that academic institutions may provide a neutral, non-discriminatory forum for the expression of diverse ideas and the maxim that individuals cannot be required to support political or ideological viewpoints to which they are opposed.

In considering this conflict, the Court of Appeals for the Seventh Circuit looked to *Rosenberger v. Rector and Visitors of University of Virginia*, where the Supreme Court ruled that disbursement of student fees must be made on a viewpoint neutral basis. While the Court did not address the issue of whether such fees were violative of the First Amendment in *Rosenberger*, it did state that the analysis of the question would be controlled by standards established in two of its earlier decisions, *Keller v. State Bar of California* and *Abood v. Detroit Board of Education.* In those cases, dealing with bar and teacher's union dues respectively, the Court ruled that members of such organizations could be required to fund activities which are germane to the purpose for which the organization was established, but could not be compelled to fund activities of a political or ideological nature.

Applying this germaneness standard to the academic context, the court of appeals determined that the allocation of student fees to political and ideological groups was unconstitutional. Specifically, the court explained that a university's interest in providing for diverse expression was not sufficiently germane to the educational process to justify such forced funding. A key factor in the court's decision was its conclusion that the disbursements placed too great a burden on the First Amendment rights of objecting students, effectively forcing them to subsidize speech that was anathemic to their personal beliefs.

While the Seventh Circuit employed established precedent in its analysis, its conclusion conflicts with the decisions of other courts. Because of this difference among the circuit courts, the Supreme Court granted certiorari on the question of whether such fee disbursements offend First Amendment principles. A decision in *Board of Regents v. Southworth* is expected this term.

Contents

Mandatory Student Fees and the First Amendment: Background and Analysis of Issues in *Southworth v. Grebe*

Case History

In *Southworth v. Grebe*, a group of students brought suit against the University of Wisconsin, arguing that the University was violating objecting students' First Amendment rights by using their mandatory activity fees to fund private organizations

engaging in political and ideological advocacy, activities, and speech.[1] Specifically, the objecting students argued that such funding violated their free speech and association rights.[2]

The controversy arose from the University of Wisconsin's imposition of a mandatory student fee, assessed at $165.75 for the 1995-96 academic year. As noted by the Seventh Circuit, the fee is mandatory because a student's ability to receive grades or to graduate is contingent upon payment of the fee. Under Wisconsin state law, both the Board of Regents and the students control funds generated by the fee, with the Regents possessing ultimate authority in the approval or disapproval of funding. In particular, the student fees are classified as either allocable or non-allocable, with the Regents having plenary control over the latter.[3] The allocable portion of the student fee, on the other hand, falls under the authority of the Associated Students of Madison (ASM), which serves as the official representative of the student body. These allocable funds support the ASM budget, as well as the General Student Service Fund (GSSF). Both ASM and GSSF distribute the mandatory student fees to private organizations. The GSSF funds are distributed to registered student organizations, University departments and qualified community-based service organizations.[4] The ASM budget funds only Registered Student Organizations, which are formalized, nonprofit groups controlled and directed by students, and comprised primarily of student members.[5] Registered Student Organizations may also obtain funding through student referendums, where the student body at large votes on an assessment for a particular student group.[6] The Wisconsin Student Public Interest Research Group (WISPIRG) received $49,500 in student fees through the referendum process during the 1995-96 academic year.[7]

The Court of Appeals cited several organizations which it determined both received student fees and engaged in "political and ideological activities."[8] In

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[1] *Southworth v. Grebe*, 151 F.3d 717, 718 (7th Cir. 1998).

[2] *Id.* at 718-719.

[3] *Id.*at 719. Although student government representatives review and make recommendations regarding the use of nonallocable fees, the Regents ultimately control their disposition. These fees "cover expenses such as debt service, fixed operating costs of auxiliary operations, student health services, and the first and second year of the Recreational Sports budget."

[4] *Id*. at 719. Approximately $974,200 was distributed in this manner during the 1995-96 academic year.

[5] *Id*. at 720. Registered Student Organizations may obtain funding to support operations, related travel, or to sponsor events. Approximately $109,277 was distributed in this manner during the 1995-96 academic year.

[6] *Id.* at 720.

[7] *Id.* at 720.

[8] *Id.* at 720. In particular, the court identified the following groups: "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

(continued...)

identifying these groups, the court gave several examples of their political advocacy. WISPIRG, for instance, distributed $2,500 of the $49,500 it had received via student referendum directly to U.S. PIRG "for use in lobbying Congress and developing candidate-voter guides." Additionally, WISPIRG published a voters' guide ranking congressional candidates according to their positions on certain issues.[9] The UW Greens and the Progressive Student Network "lobbied the Wisconsin state legislature, and encouraged legislators to introduce three bills which would limit mining in the state."[10] The Progressive Student Network also focused on issues such as welfare reform and "right-wing backlash on campus."[11] The International Socialist Organization encouraged revolt and the overthrow of capitalism, and also demonstrated outside a local church "to oppose the ideological views of a church speaker."[12] The Campus Women's Center published a series of newsletters advocating its political positions, such as an article "opposing the Informed Consent Bill, which proposed certain regulations on abortions."[13] The Ten Percent Society advocated "legislation authorizing same-sex marriages, while condemning attempts by the Wisconsin Legislature to ban them."[14] Finally, a student chapter of Amnesty International publicly advocated "for the abolition of the death penalty."[15]

Applying established Supreme Court precedent, discussed herein, the court ruled that a university may not apply mandatory student activity fees to fund private organizations that engage in "political and ideological activities, speech, and advocacy."[16]

Appellate Decision

In analyzing the issue of whether state universities may compel objecting students to fund private organizations that engage in political and ideological

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[8](...continued)
Society; the Progressive Student Network; Amnesty International; United States Student Association; Community Action on Latin America; La Colectiva Cultural de Aztlan; the Militant Student Union of the University of Wisconsin; the Student Labor Action Coalition; Student Solidarity; Students of National Organization of Women; MADPAC; and Madison Treaty Rights Support Group." *Id*.

[9] *Id.* at 720.

[10] *Id.* at 720. Both the Progressive Student Network and the UW Greens were funded by student fees, with the latter receiving $6,905 during the 1995-96 academic year. *Id*. The UW Greens also distributed political literature for the Green Party USA, and helped to organize a march on the state capital in opposition to the "governor and the governor's budget." *Id*.

[11] *Id*. at 721.

[12] *Id*. at 720.

[13] *Id*. at 721. The Campus Women's Center received $34,200 in student fees during the 1995-95 academic year. *Id*.

[14] *Id*. at 721.

[15] *Id*. at 721.

[16] *Id.* at 717.

advocacy, the court of appeals observed that "two necessary corollaries to the First Amendment's guarantee of free speech" are the right not to speak, and the right not to be compelled to subsidize the speech of others.[17] The Seventh Circuit noted that the Supreme Court had not ruled whether these corollaries "protect objecting students from being forced by state universities to subsidize private political and ideological organizations."[18] However, the court did determine that the Supreme Court had "provided guidance on the appropriate analysis for such a challenge" in *Rosenberger v. Rector and Visitors of the University of Virginia*.[19]

In *Rosenberger*, a group of students who published a Christian newspaper were denied funding by the University of Virginia. The students challenged the denial of funding on the basis that the university had allocated student fees to nonreligious student newspapers, thereby engaging in viewpoint discrimination. Upon review, the Supreme Court determined that the disbursement of student activity fees to various groups had created a forum of money that, once established, had to be made available on a viewpoint neutral basis. Having made this determination, the Supreme Court held that the university had violated the First Amendment by discriminating on the basis of the religious viewpoint of the newspaper.[20]

While the Supreme Court did not rule directly on the issue of whether objecting students could be forced to fund private organizations in *Rosenberger*, the Seventh Circuit found that the Court had identified the proper analysis for such a challenge.[21] In *Rosenberger*, citing *Keller v. State Bar of California* and *Abood v. Detroit Board of Education*, the Supreme Court observed that "the fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe."[22] Justice O'Connor, in concurrence, also stated that "although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees," again citing *Keller* and *Abood*.[23] In addition to the Supreme Court's declaration, the Seventh Circuit also noted that "every other circuit to have considered the constitutional uses of mandatory student fees has applied the *Abood* and *Keller* analysis."[24] Accordingly,

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[17] *Id*. at 722 (citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990)).

[18] *Southworth*, 151 F.3d at 722.

[19] *Southworth*, 151 F.3d at 722 (citing *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995)).

[20] *Rosenberger*, 515 U.S. at 845-56.

[21] *Southworth*, 151 F.3d at 722.

[22] *Rosenberger*, 515 U.S. at 840 (citing *Keller v. State Bar of Cal.*, 496 U.S. at 15-16; *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 235-36); *see also, Southworth*, 151 F.3d at 722.

[23] *Rosenberger*, 515 U.S. at 840; *see also, Southworth*, 151 F.3d at 722.

[24] *Southworth*, 151 F.3d at 723.

the court of appeals determined that the issue before them should be reviewed under such authority.

Abood, Keller and Lehnert: **The Germaneness Analysis.** In *Abood*, the Supreme Court considered whether non-union employees of the Detroit Board of Education could be required to pay a service fee to the union as a result of an agency-shop agreement regarding collective bargaining. The teachers argued that the imposition of such a service fee violated their First Amendment rights of free speech and free association. The Supreme Court determined that the service fee was constitutional, as it was justified by "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."[25] The Court further explained that an individual could not withhold financial support on the basis that he or she did not agree with the group's strategy, so long as the union was serving "to promote the cause which justified bringing the group together."[26] In essence, the Court determined that both union and non-union teachers benefitted from collective bargaining practices, making it inequitable for non-union teachers receiving such a benefit to refuse to pay the associated service fee. The Court did stress, however, that union expenditures of a political or ideological nature must "be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will."[27]

In *Keller*, the Supreme Court considered a challenge by lawyers who objected to the use of mandatory state bar dues to fund lobbying on social issues. In its analysis of the issue, the Court clarified its holding in *Abood*, stating that a dissenting individual's dues could not be used for "ideological activities not 'germane' to the purpose which compelled association was justified."[28] Applying this maxim to *Keller*, the Court determined that the compelled association and integrated bar were "justified by the state's interest in regulating the legal profession and improving the quality of legal services."[29] Given this legitimate interest, the Court determined that the State Bar may "constitutionally fund activities germane to those goals out of the mandatory dues of all members."[30] However, the Court again stressed that the State Bar could not "fund activities of an ideological nature which fall outside those areas of activity."[31]

As the Seventh Circuit noted, the decisions in *Abood* and *Keller* have been interpreted as establishing a "germaneness" analysis for the review of compelled

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[25] *Abood v. Detroit Bd. of Educ.*, 431 U.S. at 222.

[26] *Id.* at 223.

[27] *Id.* at 235-36.

[28] *Keller v. State Bar of Cal.*, 496 U.S. at 13-14.

[29] *Id.*

[30] *Id.*

[31] *Id.*

funding issues.[32] As clarified in *Keller*, the "guiding standard must be 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.'"[33] In addition to *Abood* and *Keller*, the Supreme Court has employed the germaneness analysis in several cases, culminating in the approach developed in *Lehnert v. Ferris Faculty Association*.[34]

In *Lehnert*, the Supreme Court again considered the constitutionality of union expenditures, employing the germaneness analysis developed in *Abood* and *Keller*. Conducting this analysis, the Court determined that a three-pronged test was the proper avenue by which to determine whether union expenditures violated the First Amendment rights of objecting employees. Specifically, the Court stated that such expenditures must be "germane to collective bargaining; justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."[35] Having determined the appropriate analysis, the Seventh Circuit proceeded to apply the test delineated in *Lehnert*.

A. Germaneness. In its consideration of the first prong, the court of appeals stated that the University had to possess a legitimate governmental interest justifying the compelled funding, and further demonstrate that such funding was germane to the asserted interest. As the objecting students did not contend that the University lacked a legitimate interest in compelled funding, the court limited its consideration to whether the challenged activity was in fact germane to that interest.[36]

The University claimed that its interest in education supported the funding of private organizations. Specifically, the Regents asserted that funding such groups engaged in political and ideological speech was germane to the University's educational interest, in that it would allow for "diverse expression."[37] The court of appeals rejected this argument, stating that "germaneness cannot be read so broadly as to include forced funding of private political and ideological groups."[38] In reaching this determination, the court of appeals compared the imposition of mandatory student fees to the facts of earlier compelled funding cases. The court pointed to *Keller* in particular, where the State Bar had asserted that its funding of lobbying on nuclear weapons, abortion and prayer in public schools was justified by its purported authority "to fund activities "in all matters pertaining to the advancement of the

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[32] *Southworth*, 151 F.3d at 723-24.

[33] *Keller*, 496 U.S. at 14 (quoting *Lathrop v. Donahue*, 367 U.S. 820, 843 (1961) (plurality opinion)).

[34] 500 U.S. 507 (1991); *see also*, *Southworth* 151 F.3d at 724.

[35] *Lehnert*, 500 U.S. at 519.

[36] *Southworth*, 151 F.3d at 724.

[37] *Id*.

[38] *Id*. at 725.

science of jurisprudence or to the improvement of the administration of justice."[39] Noting that the Supreme Court rejected such a rationale as overly broad in *Keller*, the court of appeals in *Southworth* likewise rejected the University's position.

B. Vital Policy Interests. Turning its attention to *Lehnert's* second prong, the court considered the University's argument that it possessed a "vital interest in education" and "in allowing students to share the governance of the University system."[40] The court stated that "neither of these interests presents a vital interest in compelling students to fund private organizations which engage in political and ideological speech."[41] Specifically, the court determined that there was not a "common cause" justifying compelled funding in the educational context. In *Lehnert*, for instance, the Supreme Court stated that while there was no common cause between union and non-union employees in supporting the union's political activities, all employees had an equal interest in the negotiation and administration of collective bargaining agreements.[42] In *Southworth*, however, the court determined that, in the compelled funding context, while there may be a common educational cause in shared governance, there is no such link between private organizations that pursue political and ideological agendas and objecting students. Accordingly, the court ruled that there was "no vital policy interest supporting compelled funding of the private associations."[43]

The University next argued that since private organizations were required to permit open access to all students, "permitting objecting students to withhold funding would result in a free-rider problem."[44] The court found this argument unconvincing on several levels. First the court observed that the University's own policy allowed non-students to participate in registered student organizations, thereby negating its ability to decry the impact of free-riders. Relatedly, the court pointed out that the vast majority of student groups subject to the open access policy received no funds whatsoever.[45] On a more substantive level, the court explained that whereas unions are required to represent all employees equally, the private organizations under consideration did not act in a representative capacity for the students and were not under an obligation to represent the students fairly. Furthermore, the court found it significant that "many of the ideological and political activities and speech" to which the students objected occurred off-campus, limiting the benefit of these aspects to the

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[39] *Id*. at 724 (quoting *Keller*, 496 U.S. at 15).

[40] *Id*. at 727.

[41] *Id*. at 727.

[42] *Lehnert*, 500 U.S. at 521.

[43] *Southworth*, 151 F.3d at 728. Also, the court of appeals opined that the school's avowed interest in furthering educational principles could actually be harmed by forcing students to fund groups they find objectionable: "in some courses students are likely taught the values of individualism and dissent. Yet despite the objecting students' dissent they must fund organizations promoting opposing views or they don't graduate." *Id.*

[44] *Id*. at 728.

[45] *Id*. at 728.

objecting students even further. Given these factors, the court concluded that free-rider concerns were inapplicable to the mandatory student fee dynamic.[46]

C. Burdening Free Speech. Under the third prong of the *Lehnert* analysis, the court was required to take several factors into consideration in determining whether the mandatory student fees significantly added to the burdening of free speech inherent in their imposition. First, the court considered whether the forced funding imposed a significant burden on objecting students' speech. Noting the conviction of the objecting students' philosophical and religious beliefs, the court determined that forcing them to participate in the funding of groups with which they disagreed regarding sensitive issues such as abortion and homosexuality did indeed constitute a significant burden offensive to the First Amendment.[47] In support of this determination, the court quoted Madison's admonition that "to compel a man to furnish contributions and money for the propagation of opinions which he disbelieves is sinful and tyrannical."[48]

Next, the court addressed the University's assertion that there was no evidence that student activity fees had been used "to fund the actual political or ideological activities the organizations promoted."[49] Noting the Supreme Court's determination in *Abood* that merely limiting the use of the actual dollars collected from objecting individuals was not an adequate remedy, the court of appeals stated that "whether or not the student fees directly fund the political or ideological activities is irrelevant; the First Amendment is offended by the Regents' use of objecting students' fees to subsidize organizations which engage in political and ideological activities."[50] Further, the court declared that the University could neither require objecting students to fund such organizations, nor simply distribute objecting students' funds to non-political organizations and funnel non-objecting students' fees to the political and ideological organizations, resulting in the same overall allocation of funds. To do so, according to the court, would nonetheless result in objecting students subsidizing the political and ideological organizations. As the court explained: "dollars are fungible and splitting the same amount in two does not cure the obvious subsidy."[51]

The court then looked to the University's argument that free speech concerns were not implicated where the organizations did not purport to speak for the entire student body. Rejecting this argument, the court explained that the First Amendment's free speech guarantee carries with it "the corresponding right not to be compelled to fund private speech." As such, the court held that the question of whether a third

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[46] *Id*. at 728.

[47] *Id*. at 729.

[48] *Id*. At 730 (quoting *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 234-35 n.31 (quoting Irving Bryant, James Madison: The Nationalist 354 (1948))).

[49] *Southworth*, 151 F.3d at 731.

[50] *Id*. at 732.

[51] *Id*. at 732.

party may or may not attribute "the organization's political and ideological views to the objecting student" was irrelevant.[52]

Regarding the University's argument that students were free to work through the democratic process to proscribe funding for groups to which they objected, the court was similarly unimpressed. Specifically, the court declared that the "First Amendment trumps the democratic process and protects the individual's rights even when a majority of citizens wants to infringe upon them."[53]

Lastly, the court addressed the University's assertion that it was authorized to impose student fees for the funding of political and ideological organizations in the same manner that Congress and the States are able to use public money to support political parties and other ideological organizations. The court explained that the student fee was not classifiable as such, since a mandatory activity fee is not a general tax implemented to raise funds for a university. Quoting *Rosenberger*, the court stressed that student activity funds do not represent government resources "derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students."[54]

Based on all of these factors, the Court of Appeals for the Seventh Circuit held that the University had failed to meet its burden under the *Lehnert* standard. Specifically, the court explained that even if the funding of private political and ideological organizations was germane to the educational mission of a university, the forced funding by objecting students nonetheless constituted a significant burden to free speech rights. As such, the court ruled that the University could not use "the allocable portion of objecting students' mandatory activity fees to fund organizations which engage in political or ideological activities, advocacy, or speech."[55]

Supreme Court Review

The Supreme Court granted certiorari in *Southworth*, limited to the question of "whether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech."[56] Given the practical and constitutional impact of the Seventh Circuit's decision, it is evident that the Supreme Court's ultimate disposition of the issue will have significant implications in the First Amendment and mandatory fee context.

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[52] *Id*. at 732.

[53] *Id*. at 732. The court further noted that even if the objecting students participated fully in the democratic process, they would not be able to de-fund organizations to which they were opposed. *Id*. at 732, n.14.

[54] *Id*. at 732.

[55] *Id*. at 732-33.

[56] *Board of Regents v. Southworth*, 119 S.Ct. 1332 (1999).

A. Forum Creation and Compelled Speech Considerations. Of the several issues which will figure into the Supreme Court's consideration of *Southworth*, the most basic will be the degree to which the *Rosenberger* decision applies to the collection and distribution of mandatory student fees. As noted above, *Rosenberger* established that a public university may not distribute student fees or other financial resources to student organizations based upon the substantive content of the group's speech. Rather, the Court declared, once such a forum of money has been established, funds must be distributed on a viewpoint neutral basis.[57] In addressing the Supreme Court's decision, the Seventh Circuit determined that *Rosenberger* pertained only to the disbursement of funds, and had no bearing on the constitutionality "of forcing students to fund private political and ideological organizations."[58]

On petition for rehearing, the dissent in *Southworth* argued that *Rosenberger* was controlling, maintaining that student fees constitute a "compelled subsidy of a neutral forum for speech."[59] In making this argument, the dissent analogized the student fee to the compelled funding of neutral fora such as the Mall in Washington, D.C., "which is used by countless speakers with a virtually infinite range of viewpoints."[60] Essentially, this argument characterizes the student fee dynamic as identical to the forum access in *Pruneyard Shopping Center v. Robins*.[61] There, the Supreme Court ruled that the owner of a private shopping center could not deny individuals the opportunity to advocate a message there, since the mall was open to the public, and the speech of the activists could not be attributed to the mall owners.[62] Under this rationale, the allocation of student fees could be said to create a forum open to all student organizations, with little likelihood that the views of such groups will be attributed to objecting students.

While this argument is facially appealing, it ignores the unique aspects of a compelled student fee. Specifically, it would seem that the money compelled from the students, as opposed to the subsequently created funding forum, is analogous to the issues at play in *Pruneyard.* There, the Supreme Court found it significant that the shopping mall owner had voluntarily granted public access. In the student fee context, however, it cannot be said that objecting students have made their money available to the groups which they oppose willingly. This factor seems to bring the student fee dynamic in line with subsequent determinations by the Court that *Pruneyard* is

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[57] *Rosenberger,* 515 U.S. at 835. Furthermore, the Court determined that even if funds were limited, they must nonetheless be allocated according to "an acceptable neutral principle,"as "the government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Id.*

[58] *Southworth*, 151 F.3d at 722. The Court of Appeals for the Eighth Circuit has reached the same conclusion that *Rosenberger* applies only to the distribution of student fees. *See Curry v. Regents of the University of Minnesota*, 167 F.3d 420, 422 n.4 (8th Cir. 1999).

[59] *Southworth v. Grebe*, 157 F.3d 1124, 1128 (Wood, J., dissenting).

[60] *Id.* at 1129.

[61] 447 U.S. 74 (1980).

[62] *Id.* at 87.

inapplicable in instances where the property owner objects to the speech at issue.[63] Furthermore, the argument that the student fee creates a metaphorical forum for the expression of diverse viewpoints ignores the fact that the money, in essence, goes directly to support private organizations. This fact further undermines the notion that the allocation of student fees merely supports a neutral forum as argued by the dissent.[64]

In light of these factors, it seems that the Seventh Circuit correctly determined that the *Abood/Keller* analysis was controlling, irrespective of the forum creation arguments forwarded by the dissent. Indeed, it must be remembered that the Supreme Court directed just such an analysis in the *Rosenberger* decision itself.[65]

B. Application of the Germaneness Standard. Given the inapplicability of the *Rosenberger* decision, it seems that the primary factor in the mandatory fee analysis will not be whether the Seventh Circuit erred in following the *Abood* and *Keller* line of cases. Rather, the Court's focus will likely center on the more substantive question of whether the *Abood* and *Keller* germaneness analysis was correctly applied in the academic context. In particular, it has been argued that the Seventh Circuit's decision "misapprehend[s] Supreme Court precedent" by analogizing the union fees of *Abood* and the integrated bar fees at issue in *Keller* with the imposition of mandatory student fees.[66]

The most significant aspect of this argument centers on the assertion that unlike unions or integrated bars, university students pay "fees not to the challenged groups, but to the student government which then uses the money to fund its own operations and over 100 student groups, regardless of viewpoint."[67] As such, it is argued that the speech of such groups is not attributable to objecting students, thereby nullifying any First Amendment concerns regarding compelled speech.[68] Indeed, it does seem that a valid argument may be made that whereas *Abood* and *Keller* involved mandatory contributions to an organization which unilaterally determined the speech at issue, mandatory student fees are available to multiple groups, minimizing the burden on free speech.[69]

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[63] *See Pacific Gas & Electric Co. v. Public Utilities Comm.*, 475 U.S. 1 (1986). There, the Court stated: "notably absent from *Pruneyard* was any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content based. *Pruneyard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible." *Id.* at 12.

[64] *See* n.69 and accompanying text, *infra*.

[65] *Rosenberger*, 515 U.S. at 840.

[66] *Southworth v. Grebe*, 157 F.3d at 1125 (Rovner, J., dissenting).

[67] *Id*.

[68] *Id*.

[69] *Id*. at 1127.

However, while the funding of multiple groups by a neutral student government may have the practical effect of preventing direct attribution to individual students, it does not seem that this practice sufficiently alleviates the underlying constitutional impingement. In particular, courts have rejected the notion that such attenuation in the student fee context alleviates any constitutional infringement since the students themselves are not required to directly convey or support a personally repugnant message. In *Carroll v. Blinken*, for instance, the Court of Appeals for the Second Circuit rejected the attenuation argument, noting that while major compelled speech cases generally involved "citizens compelled actually to speak or carry a message, nowhere did those opinions state or imply that compelled speech has only one modus operandi."[70] Accordingly, the Second Circuit determined that the mere fact that the student fee compelled speech through multiple groups "in no way heals the constitutional infirmity" of such a practice. Rather, the court determined that the only effect of the student fee was to require that "students fund more than one unwanted view."[71]

Another assertion by student fee proponents in this context is that the activity fees go to the student government which then makes funding decisions, as opposed to being given directly to the student organizations. On petition for rehearing, the dissent raised this argument, declaring that "the recipient of the funds in this case is not itself engaging in the challenged speech." Based on this premise, the dissent argued that, under *Rosenberger*, such speech is not attributable to the student government, which further means that the speech "necessarily cannot be attributed to the students paying the fees to the student government."[72] While this viewpoint appears to validate the student fee dynamic, such a characterization seems to misrepresent the nature of the transaction, and has been rejected by the courts. Specifically, the courts have determined that the mere fact that a student government serves as an intermediary between the students and the organizations is irrelevant, as such funneling does not alter the substantive fact that a transfer has taken place.[73]

The factors noted above seem to establish both that the *Abood* and *Keller* standard is applicable, and that the fees do indeed constitute compelled speech. As such, it is likely that the Supreme Court's disposition of *Southworth* will hinge on whether the Seventh Circuit correctly concluded that mandatory student fees are not sufficiently germane to a university's educational mission so as to outweigh the burden imposed on the First Amendment rights of objecting students.

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[70] *Carroll v. Blinken*, 957 F.2d 991, 998 (2nd Cir. 1992).

[71] *Id*. at 998. The Court of Appeals for the Third Circuit reached the same conclusion in *Galda v. Rutgers*, 772 F.2d 1060, 1067 (3rd Cir. 1985), stating "if the university compelled a student to make separate contributions to both the Democratic and Republican National Committees, the evil is not undone; it is compounded."

[72] *Southworth v. Grebe*, 157 F.3d at 1125 (Rovner, J., dissenting).

[73] *See Carroll v. Blinken*, 957 F.2d 991, 997 (2nd Cir. 1992). In *Carroll*, the court stated that simply because a portion of the "student activity fee is briefly in the hands of the student association while being funneled from students to NYPIRG does not diminish the fact that a transfer has taken place." *See also, Galda*, 772 F.2d at 1067-68.

The Second Circuit reached a different conclusion regarding the germaneness of mandatory student fees in *Carroll*. Specifically, the court considered a challenge by students of the State University of New York ("SUNY") contesting the distribution of student fees to campus chapters of NYPIRG. The court identified several state interests, including "the stimulation of robust campus debate on a variety of functions"[74] that it determined outweighed any impingement on First Amendment principles. In reaching this conclusion, the court acknowledged both that compelled speech concerns were at issue, and that the allocation of the student fees did indeed encroach upon the constitutional rights of the objecting students.[75] However, the court held that SUNY's goal to "stimulate uninhibited and vigorous discussion on matters of campus and public concern," among others, alleviated the constitutional burden.[76]

While the *Carroll* court determined that student fees could be germane to a university's educational goals, it stressed that the off-campus activities of student groups could not be funded. Specifically, the court noted that the use of student fees to pay "non-student lobbyists, cover statewide administrative costs" and to finance other university chapters stretched the "nexus between the extracted fee" and the university's educational interests "beyond what is constitutionally permissible."[77] Clarifying this standard, the court explained that students could be required to tolerate "some compromise of their First Amendment" rights when the benefits of a varied extracurricular life, hands-on civics training, and robust campus debate are all around them to approvingly take part in, actively oppose, or merely witness dispassionately firsthand."[78] The court further explained that "these benefits vanish" when student funds are spent outside the scope of campus related activities, noting that a university's educational interests, "however substantial, are, still, after all, those of the university and its community, not that of an independent statewide organization."[79] Accordingly, the court ruled that students could not be compelled to fund such of campus activity.

The Court of Appeals for the Ninth Circuit has also ruled that a university's educational mission may support the collection of mandatory student fees. In *Rounds v. Oregon*, the court determined that the funding of an educational arm of Oregon Student PIRG ("OSPIRG") was germane to the educational mission of Oregon State University, based upon the organization's involvement in activities which the court deemed were directly linked to the intellectual enrichment of the campus environment.[80] The court also went to great lengths to stress that it was not faced

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[74] *Carroll*, 957 F.2d at 1001.

[75] *Id*. at 1001.

[76] *Id*. at 1001.

[77] *Id*. at 1002.

[78] *Id*. at 1002.

[79] *Id*. at 1002.

[80] 166 F.3d 1032, 1039-40. Specifically, the court pointed to the fact that the educational branch of OSPIRG in question was a non-partisan organization that provided students with

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with the issues presented in *Southworth,* since the organization in question engaged only in educational activities tailored to the university's educational mission. Nonetheless, the court did state that it disagreed with the *Southworth* decision, to the extent that the Seventh Circuit's holding established that "a public university may not constitutionally establish and fund a limited public forum for the expression of diverse viewpoints."[81] At the same time however, the Ninth Circuit stated that "it is of the utmost significance that the organizational speech at issue occurs in an academic setting," indicating agreement with the approach of the Second Circuit in *Carroll.*[82]

From the factors noted above, it seems that the decisions in *Carroll* and *Rounds* provide a reasonable basis for disagreement with the Seventh Circuit's decision in *Southworth,* to the extent that they establish that a university may use student fees to fund groups which engage in educational activities that directly augment the campus intellectual environment. However, it should be noted that the Seventh Circuit's broad rejection of mandatory student fee allocation is not without precedent. In *Smith v. University of California*, the Supreme Court of California considered an objection to the disbursement of funds to political or ideological organizations.[83] Striking down the allocations, the court declared that "a group's dedication to achieving its political or ideological goals, at some point, begins to outweigh any legitimate claim it may have to be educating students on the university's behalf."[84] The court went on to declare that regulations permitting the funding of such groups are not narrowly drawn to avoid impinging on the rights of objecting students, especially since a university may achieve similar goals through course work and other less onerous methods.[85]

Even if the Supreme Court determines that the *Carroll* approach is sufficient to protect the First Amendment rights of objecting students, it is likely that the Seventh Circuit's decision will be upheld as it applies to student fees allocated through the referendum process.[86] Specifically, the Seventh Circuit's decision finds support in *Galda v. Rutgers,* where the Court of Appeals for the Third Circuit addressed a challenge by students at Rutgers University who objected to a referendum allocation supporting NJPIRG.[87] The court struck down the allocation, noting that while organizations funded from a general fee "can be 'perceived broadly as providing a

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[80](...continued)
"hands-on experience in recognizing, researching, and solving the problems of society," by "sponsoring internships, conferences, workshops, research reports, and leadership training." *Id.* at 1039.

[81] *Id*. at 1040, n.5.

[82] *Id*. at 1038.

[83] 844 P.2d 500 (Cal. 1993).

[84] *Id*. at 508.

[85] *Id*. at 508, 512.

[86] Apart from the allocable funds distributed amongst various groups, the University of Wisconsin also distributed $49,500 to WISPIRG through a student referendum. *See Southworth*, 151 F.3d at 720.

[87] *Galda*, 772 F.2d at 1061.

'forum' for a diverse range of opinion,'" those that are funded from a dedicated fee do "'not provide a forum for the expression of differing views.'"[88]

This analysis applies to referendum allocations in *Southworth*, as well, as the scenarios are essentially identical, and share a close nexus with the union and bar dues rejected in *Abood* and *Keller*. Specifically, while the Supreme Court may determine that the *Carroll* approach is proper given the university's traditional role in fostering a variety of viewpoints, such a justification fails "when an outside organization independent of a university and dedicated to advancing one position, is entitled to compelled contributions from those who are opposed."[89] As such, the Seventh Circuit's decision seems well entrenched as it regards the student referendum process.

Conclusion

In light of the factors noted above, it appears that the court of appeals correctly assessed the constitutional burden imposed by the disbursement of mandatory student activity fees. As such, arguments asserting that the court employed an improper analytical framework in striking down the allocation of student fees to political and ideological groups appear to be misplaced. Indeed, it seems evident that the Seventh Circuit properly interpreted the Supreme Court's decision in *Rosenberger* by applying the *Abood/Keller* analysis as modified under *Lehnert*. At the same time, the Seventh Circuit's decision departs from precedent established in other student fee cases, leaving open the possibility that the Supreme Court will reverse.

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[88] *Id*. at 1064.

[89] *Id*. at 1067.