FIRST AMENDMENT PROTECTION FROM MANDATORY SUBSIDIZATION OF POLITICAL SPEECH IN PUBLIC COLLEGES AND UNIVERSITIES: THE MARKETPLACE JUST GOT A LOT LESS EXPENSIVE

TABLE OF CONTENTS

I. INTRODUCTION

American universities and colleges have always been a hotbed of political and ideological discourse. It is expected that the collegiate experience should provide a student with a wide exposure to divergent ideas and beliefs. However, it has been argued that the free exchange of ideas has been quieted by recent court decisions involving the use of mandatory student fees to fund political speech.[1]

---

1. *See* William Walsh, Smith v. Regents of the University of California: *The Marketplace Is Closed*, 21 J.C. & U.L. 405, 405-06 (1994); Robert L. Waring, *Talk Is Not Cheap:*

Today, many universities require students to pay an activity fee. These fees are distributed to the elected student council who then disburse the money to various student groups. Often, these groups represent controversial political ideals such as homosexual rights, environmental interests, communism, and abortion rights. Recently, the Court of Appeals for the Seventh Circuit ruled on a case brought by three law students from the University of Wisconsin—Madison.[2] These students objected to the use of their mandatory student activity fees to fund political speech, with which they did not agree.[3]

This decision is but one of many dealing with the use of mandatory fees funding objectionable speech.[4] This Note argues that it is unconstitutional for a university to force a student to fund speech to which he objects. Further, this restriction of funds in no way restricts political groups' First Amendment rights and in fact strengthens them. Part II traces the history and events leading up to the decision in *Southworth v. Grebe*.[5] Part III analyzes the court's reasoning in the case and provides the current state of the law.

II. THE ROAD TO *SOUTHWORTH V. GREBE*

A. Rosenberger v. Rector & Visitors of the University of Virginia[6]

There are numerous important decisions that have led to the ruling in *Southworth v. Grebe*, including *Rosenberger v. Rector & Visitors of University of Virginia*. The *Rosenberger* decision involved a student organization which published a Christian newspaper at the University of Virginia.[7] The university denied funding for the student newspaper because the paper "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[8] The Supreme Court determined the funding mechanism of the university was a public forum and should be treated as such.[9] The Court recognized that content discrimination "may be permissible if it preserves the purposes of that limited

---

Funded Student Speech at Public Universities on Trial, 29 U.S.F. L. REV. 541, 541-43 (1995).

2. Southworth v. Grebe, 151 F.3d 717, 734-35 (7th Cir. 1998), *cert. granted sub nom.* Board of Regents of Univ. of Wis. Sys. v. Southworth, 119 S. Ct. 1332 (1999).

3. *Id.* at 719-20.

4. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995); Smith v. Regents of Univ. of Cal., 844 P.2d 500 (Cal. 1993); Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985) (discussing mandatory student activity fees).

5. Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998), *cert. granted sub nom.* Board of Regents of Univ. of Wis. Sys. v. Southworth, 119 S. Ct. 1332 (1999).

6. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

7. *Id.* at 823-26.

8. *Id.* at 822-23.

9. *Id.* at 830.

forum."[10] The Court also reiterated a standard it had used in a similar case: once a limited forum is opened, speech may not be excluded where its distinction is not "'reasonable in light of the purpose served by the forum.'"[11] However, viewpoint discrimination, which the University of Virginia was engaged in, is always presumed to be impermissible.[12] In general, the Court determined the student activity fees created a limited public forum of money.[13] Once this forum is created the funds must then be distributed on a purely viewpoint-neutral basis.[14] The University of Virginia denied funds to student organizations on the basis of their religious beliefs, and for this reason, the Supreme Court ruled that they had violated the students' First Amendment rights.[15]

The *Rosenberger* decision opened the door for a constitutional challenge to mandatory student activity fees.[16] In her concurrence, Justice O'Connor wrote: "[A]lthough 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."[17] This invitation prompted the *Southworth v. Grebe* decision, which will be discussed in detail later. Further, the *Rosenberger* decision determined the appropriate analysis under which a challenge to student activity fees should be decided.[18] The analysis that *Rosenberger* used is the *Abood v. Detroit Board of Education*[19] and *Keller v. State Bar*[20] analysis.[21] Parts II.B-C will discuss how both cases have become the standard when determining the constitutionality of mandatory student activity fees. Part II.D will explain how the *Abood* and *Keller*

---

10. *Id.*
11. *Id.* at 829-30 (quoting Cornelius v. NAACP, 473 U.S. 788, 804-06 (1985)).
12. *Id.* at 830.
13. *Id.* at 835; *See* Southworth v. Grebe, 151 F.3d 717, 722 (7th Cir. 1998), *cert. granted sub nom.* Board of Regents of Univ. of Wis. Sys. v. Southworth, 119 S. Ct. 1332 (1999).
14. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. at 839.
15. *Id.* at 837.
16. Kari Thoe, Note, *A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled-Speech Rights at American Universities*, 82 MINN. L. REV. 1425, 1426 (1998).
17. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. at 851 (O'Connor, J., concurring); *see also* Keller v. State Bar, 496 U.S. 1, 15-16 (1990) (stating compulsory dues must be used for activities connected with the purpose of the organization); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (stating that funds spent on ideological causes must be financed by fees from employees who do not oppose the advancement of those ideas).
18. Southworth v. Grebe, 151 F.3d at 722. "Not only does *Rosenberger* direct us to *Abood* and *Keller*, but every other circuit to have considered the constitutional uses of mandatory student activity fees has applied the *Abood* and *Keller* analysis." *Id.* at 723.
19. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
20. Keller v. State Bar, 496 U.S. 1 (1990).
21. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. at 840-41.

analysis has subsequently been refined by the *Lehnert v. Ferris Faculty Ass'n*[22] decision.

B. Abood v. Detroit Board of Education

In *Abood v. Detroit Board of Education*, teachers who worked for the Detroit Board of Education challenged an agreement that forced teachers who did not join the union to pay a service fee to the union.[23] The teachers argued this mandatory service fee infringed on their First Amendment rights to free speech and free association.[24] The Supreme Court held that the Board of Education could compel the teachers to pay the service fee.[25] The Court explained: "'The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.'"[26]

It is important to note that the *Abood* decision is not a complete bar to the union's expenditure of funds for political reasons.[27] "Rather, the Constitution requires only that such expenditures 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 . . . ."[28] The test created by the *Abood* decision is called the "germaneness" test.[29] This means that any expenditures for political or ideological activities must be "'germane to the purpose for which compelled association was justified.'"[30]

C. Keller v. State Bar

Thirteen years after the *Abood* decision, the Supreme Court reconsidered the issue of mandatory funding in *Keller v. State Bar*. In *Keller*, a group of attorneys objected to the use of mandatory state bar fees for the use of lobbying

---

22. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991).
23. Abood v. Detroit Bd. of Educ., 431 U.S. at 212-13.
24. *Id.*
25. *Id.* at 222-23.
26. *Id.* (quoting International Ass'n Machinists v. Street, 367 U.S. 740, 778 (1961) (Douglas, J., concurring)).
27. *See* Southworth v. Grebe, 151 F.3d 717, 723 (7th Cir. 1998), *cert. granted sub nom.* Board of Regents of Univ. of Wis. Sys. v. Southworth, 119 S. Ct. 1332 (1999).
28. Abood v. Detroit Bd. of Educ., 431 U.S. at 235-36.
29. *See id.*
30. *Id.* (quoting Keller v. State Bar, 496 U.S. 1, 13 (1990) (explaining what *Abood* stands for)).

efforts on certain political and ideological issues.[31] The State Bar of California (Bar) is an association of attorneys in which dues and membership are required in order to practice law in the state.[32] The purpose of this association is to regulate the state's legal profession.[33] In the furtherance of this goal, the Bar used dues to lobby legislatures and other governmental agencies.[34]

The plaintiffs in *Keller* objected to the expenditures of the Bar for what they considered "political and ideological causes to which [the plaintiffs] do not subscribe."[35] They claimed that the Bar's use of the mandatory dues was a violation of their First Amendment rights of speech and association.[36] The Supreme Court stated in *Keller* that "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.'"[37] The Court recognized the difficulty in discerning between those activities by the Bar that had political and ideological coloration and those that were reasonably related to the advancement of regulatory goals.[38] The lower court in *Keller* declined to apply the *Abood* analysis, stating that to do so would create "an extraordinary burden [on the Bar]."[39] The Supreme Court disagreed stating no such burden would be created because the Bar need only follow the requirements set forth in *Chicago Teachers Union v. Hudson*.[40]

In *Hudson*, the Supreme Court outlined a minimum set of procedures which would allow an agency-shop relationship to meet its requirements under *Abood*.[41] "'[T]he constitutional requirements for the [association's] collection of . . . fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial

---

31. Keller v. State Bar, 496 U.S. 1, 4 (1990).
32. *Id.* at 4-5.
33. *Id.* at 4.
34. *Id.* at 6.
35. *Id.* at 5.
36. *Id.* at 5-6.
37. *Id.* at 14 (quoting Lathrop v. Donohue, 367 U.S. 820, 843 (1961) (plurality opinion)).
38. *Id.* at 15.
39. *Id.* at 16.
40. *Id.* at 16-17; *see* Chicago Teachers Union v. Hudson, 475 U.S. 292, 310 (1986).
41. Chicago Teachers Union v. Hudson, 475 U.S. at 310 (1986); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (requiring an association's use of mandatory fees to be germane to the purpose for which the group existed). The Supreme Court has addressed the issue of germaneness in several other cases, including *Ellis v. Brotherhood of Railway Clerks* and *International Ass'n of Machinists v. Street*. Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 448 (1984); International Ass'n of Machinists v. Street, 367 U.S. 740, 774 (1961).

decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.'"[42] Clearly, this standard creates an additional administrative burden on the group extracting the fees. However, this "additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate."[43]

D. Lehnert v. Ferris Faculty Ass'n

The most significant development in the germaneness analysis came in *Lehnert v. Ferris Faculty Ass'n.* The Supreme Court in *Lehnert* was again faced with the constitutionality of various union expenditures under the germaneness analysis originating in *Abood* and *Keller.*[44] However, the Supreme Court refined its previous decisions by requiring a three-prong analysis for determining whether mandatory fees violated the First Amendment rights of the objecting union members.[45] In order for the expenditures to be constitutional, they 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."[46] The three-prong analysis created by *Lehnert* is still considered the test today.[47]

III. *SOUTHWORTH V. GREBE* AND MANDATORY STUDENT ACTIVITY FEES

A. *Procedural and Factual Background*

In 1995, three University of Wisconsin law students sued the Board of Regents (Regents) "claiming that the Regents' use of objecting students' mandatory student activity fees to fund private organizations that engage in political and ideological advocacy, activities, and speech violates their rights of free speech and association . . . ."[48] The district court granted the plaintiffs'

---

42. Keller v. State Bar, 496 U.S. at 16 (quoting Chicago Teachers Union v. Hudson, 475 U.S. at 310).

43. *Id.* at 16-17.

44. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 511-13 (1991); Keller v. State Bar, 496 U.S. at 16; Abood v. Detroit Bd. of Educ., 431 U.S. at 235-36.

45. Lehnert v. Ferris Faculty Ass'n, 500 U.S. at 519.

46. *Id.*

47. *See* Southworth v. Grebe, 151 F.3d 717, 724 (7th Cir. 1998), *cert. granted sub nom.* Board of Regents of Univ. of Wis. Sys. v. Southworth, 119 S. Ct. 1332 (1999). The Supreme Court reaffirmed the *Lehnert* test in *Air Line Pilots Ass'n v. Miller.* Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998).

48. Southworth v. Grebe, 151 F.3d at 718.

motion for summary judgment on their free speech and free association claims, and the Regents appealed.[49] The Seventh Circuit affirmed the district court's determination "that forcing objecting students to fund private organizations which engage in political and ideological activities violates the First Amendment," but reversed and vacated portions of the declaratory judgment and injunction.[50]

B. *Mandatory Student Fee Policy*

All students enrolled at the University of Wisconsin must pay a mandatory activity fee.[51] This fee is taken directly from each student's tuition every semester, and as such, students who do not pay cannot receive their grades or graduate.[52] In the 1995-96 academic year—the year that the plaintiffs filed suit—"the Regents assessed a mandatory student fee of $165.75 each semester."[53] The mandatory student fee was placed into two groups: allocable funds and non-allocable funds.[54] The Regents had complete authority over the non-allocable funds because those funds were used for student health services and other necessary university functions.[55] Money that was designated as allocable was governed by the Associated Students of Madison (ASM), the official representative of the student body.[56] The plaintiffs in *Southworth* only objected to the allocable funds distributed by the ASM.[57] There are three ways that student groups can receive funds from the mandatory student activity fees assessed by the Regents: (1) they may apply to the General Student Service Fund (GSSF); (2) they may apply directly to the ASM; or (3) they may seek funding through a student referendum.[58]

The GSSF is funded by the ASM and is composed of a committee of ASM representatives called the Student Services Finance Committee (SSFC).[59] "Registered student organizations, University departments, and community-

---

49. *Id.* at 719.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* The ASM is an elected student body. University of Wisconsin, *Associated Students of Madison Student Council File* (visited Nov. 4, 1999) <http://asm.wisc.edu/council/reps.htm>. There are currently 28 representatives of which 25 are elected according to their year or college affiliation. *Id.*
57. Southworth v. Grebe, 151 F.3d at 719.
58. *Id.* at 719-20.
59. *Id.* at 719.

based service organizations qualify for funding from the GSSF."[60] The SSFC reviews the application made for funding to the GSSF and determines whether or not to grant funds.[61] The SSFC distributed approximately $974,200 in student fees to private organizations during the 1995-96 academic year.[62]

The ASM also directly funds private organizations, however, the group must be a Registered Student Organization to qualify for ASM funding.[63] A Registered Student Organization must be a formalized, non-profit group, composed mainly of students, "and controlled and directed by students."[64] The ASM distributed approximately $109,277 in student fees to private organizations during the 1995-96 academic year.[65]

The final way for a student group to receive funding from the mandatory student activities fees is a student referendum.[66] This method is more difficult for the group but can provide a substantial payoff in the end.[67] "The Wisconsin Student Public Interest Research Group ("WISPIRG") obtained $49,500 in student fees during the 1995-96 academic year as a result of a student referendum."[68]

C. *First Amendment Protection*

The GSSF, the ASM, and student referendums have funded a variety of different organizations and activities.[69] The plaintiffs in *Southworth* objected only to the groups which "engage in political and ideological activities" and receive money from mandatory student fees.[70] The Court of Appeals for the

---

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 719-20.
64. *Id.* at 720.
65. *Id.*
66. *Id.*
67. *See id.*
68. *Id.*
69. *Id.*
70. *Id.* Plaintiffs presented evidence of eighteen organizations which both receive student fees and engage in political and ideological activities: WISPIRG; the Lesbian, Gay, Bisexual Campus Center; the Campus Women's Center; the UW Greens (an environmental social justice group); the Madison AIDS Support Network; the International Socialist Organization; the Ten Percent Society (a gay, lesbian, bisexual, and transgender organization); 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; Madison-Israel Public Affairs Committee (MADPAC); and Madison Treaty Rights Support Group. *Id.*

Seventh Circuit in *Southworth* stated: "[T]he Supreme Court has long recognized two necessary corollaries to the First Amendment's guarantee of free speech: the right not to speak, and the right not to be compelled to subsidize others' speech."[71]

The *Southworth* court recognized that the Supreme Court has not decided the issue of mandatory student fees.[72] However, the Supreme Court has provided the necessary guidance in *Abood* and *Keller*.[73] The court in *Southworth* utilized *Lehnert*'s three-prong analysis to determine whether the Regents had violated the plaintiff's First Amendment rights.[74]

1. *Germaneness*

The first prong under *Lehnert* asks the court to consider whether the mandatory student fee is germane to some otherwise legitimate government scheme.[75] In *Southworth*, the Regents asserted that the legitimate governmental interest was the education of the students.[76] The Regents argued that the students exposure to a wide variety of political and ideological activities "allows for more diverse expression and this in turn is educational."[77] The *Southworth* court disagreed with the Regents, stating "'germaneness' cannot be read so broadly as to justify the compelled funding of private organizations which engage in political and ideological advocacy, activities and speech."[78]

The groups on campus are open to both students and non-students and often times mirror larger organizations which exist outside the university

---

71. *Id.* (citations omitted).

> James Madison, the First Amendment's author, wrote in defense of religious liberty: Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 n.31 (1977) (internal citation and quotation omitted). Thomas Jefferson agreed that "'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.'" *Id.* (quoting I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948)).

72. Southworth v. Grebe, 151 F.3d at 722.

73. *Id.*; *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 840-41 (1995) (applying the *Abood* and *Keller* analysis in determining whether the University of Virginia was providing student funds on a viewpoint-neutral basis).

74. Southworth v. Grebe, 151 F.3d at 724; *see also supra* Part II.D (explaining *Lehnert*'s three-prong analysis).

75. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991).

76. Southworth v. Grebe, 151 F.3d at 724.

77. *Id.*

78. *Id.*

setting.[79] "[M]ost of the private student groups (over 70%) do not even apply for funding, showing that the funding is not even germane to the private organizations' existence, much less germane to education."[80] In truth, the primary goal of most of the groups who do receive funding is to promote their own ideological beliefs.[81] "The fact that some educational benefit may come from it is secondary, and therefore not sufficiently germane to overcome the objecting students' constitutional rights."[82]

The Regents relied heavily on *Carroll v. Blinken*,[83] where the Second Circuit applied the *Abood* and *Keller* germaneness analysis.[84] In *Carroll*, the court held "a state university could constitutionally fund the New York Public Interest Research Group with students' activity fees even though some students disagreed with that speech."[85] The *Carroll* court simply required that the student organization spend the equivalent of the students' contributions on campus so as to serve the interests of the university in collecting the fee.[86]

The plaintiffs in *Southworth* relied upon a contrary precedent established in *Galda v. Rutgers*.[87] In *Galda*, the Third Circuit concluded that the New Jersey Public Interest Research Group did provide some educational benefit to the student-body, however, the benefit was only incidental to the group's primary political purpose.[88] This incidental education was not sufficient to infringe upon the objecting students' First Amendment rights.[89]

The *Southworth* court found *Carroll* unpersuasive and accepted the *Galda* approach.[90] The principles that can be derived from *Carroll*, *Galda*, *Abood*, and *Keller* are these:

> A university may, in general, support student groups through mandatory contributions because that use of funds can be germane to the university's educational mission. At some point, however, the educational benefits that

---

79. *Id.* at 725. Some examples of groups that exist both on campus and outside the University are "WISPIRG, the UW Greens, the International Socialist Organization, and Amnesty International." *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992).
84. *Id.* at 996-97.
85. Southworth v. Grebe, 151 F.3d at 726 (citing Carroll v. Blinken, 957 F.2d at 992).
86. Carroll v. Blinken, 957 F.2d at 992.
87. Southworth v. Grebe, 151 F.3d at 726; Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985).
88. Galda v. Rutgers, 772 F.2d at 1065.
89. *Id.* at 1068.
90. Southworth v. Grebe, 151 F.3d at 726.

> a group offers become incidental to the group's primary function of advancing its own political and ideological interests. To fund such a group may still provide some educational benefits, but the incidental benefit to education will not usually justify the burden on the dissenting students' constitutional rights.[91]

The *Southworth* court noted that even if its own interpretation of germaneness was wrong, the Regents still would not have satisfied their burden.[92] *Lehnert* made clear germaneness is not the deciding question in the constitutional analysis, but it is in fact,

> only the first prong: Under *Lehnert*, not only must the mandatory fee be germane to some otherwise legitimate economic or regulatory scheme, the compelled funding must also be justified by vital interests of the government, and not add significantly to the burdening of free speech inherent in achieving those interests.[93]

The Ninth Circuit, in *Rounds v. Oregon State Board of Higher Education*,[94] found that mandatory fees are constitutional if they fund groups which serve an academic purpose and the activities of those groups serve the university's purpose.[95] *Rounds* was similar to *Southworth* in that the plaintiffs were complaining about the university's funding of private political groups with mandatory student activity fees.[96] However, the *Rounds* case is dramatically different from *Southworth* because the group complained about in *Rounds* served a specific non-partisan educational purpose.[97] The University of Oregon, like the University of Wisconsin, has a Public Interest Research Group (PIRG) called OSPIRG.[98] The major difference between OSPIRG and other PIRGs is that OSPIRG has a subgroup called OSPIRG Education Fund (EF).[99] Unlike the OSPIRG, which "engage[s] in legislative lobbying and more overtly political action," the OSPIRG EF is a completely non-partisan organization.[100] As a

---

91. *See* Smith v. Regents of Univ. of Cal., 844 P.2d 500, 511 (Cal. 1993) (internal citations and quotations omitted).
92. *Id.* at 727.
93. *Id.*
94. Rounds v. Oregon State Bd. of Higher Educ., 166 F.3d 1032 (9th Cir. 1999).
95. *Id.* at 1039.
96. *Id.* at 1033.
97. *Id.* at 1039.
98. *Id.* at 1038.
99. *Id.*
100. *Id.* at 1034, 1038. "No Fees are allocated to OSPIRG; only OSPIRG EF receives funding. Thus, the Oregon system bisects political and educational functions and limits university funding to educational activities." *Id.* at 1038.

result, OSPIRG EF is able to serve a purely educational function which makes it germane to the university's overall goal of education.[101] The Ninth Circuit's view is that the "issues prompting the Seventh Circuit's concern in *Southworth* are not present in this case. Indeed, OSPIRG EF would seem to have carefully tailored its organization and program to satisfy objections raised in other challenges."[102]

It is clear that *Rounds* and *Southworth* are materially different. However, it is unclear whether the Ninth Circuit truly recognized the difference. The language of the decision leads one to believe that they might disagree with the Seventh Circuit's *Southworth* decision if presented the same fact pattern.[103] Also, the holding in *Rounds* is less about a solution and more about arbitrary line drawing. While this situation may present itself as a clear division between political and non-partisan activities, later situations might not be so clear. Education is a nebulous term and cannot be easily defined. This is one of the points of the Seventh Circuit's opinion.[104] The real issue is who decides what is germane to education. If it is not the person funding the speech, then the tyranny of the majority will continue.

2. *Vital Policy Interests of the Government*

The second prong under the *Lehnert* analysis determines whether the mandatory fee can be justified by vital policy interests of the government.[105] One example of a vital policy interest of the government was addressed in *Keller*.[106] The *Keller* Court held, "the State's interest in regulating the legal profession and improving the quality of legal services" justified compelled association in the bar.[107]

In *Southworth*, the Regents never really addressed the second prong of *Lehnert*.[108] Rather, the Regents continually pointed to the vital interest in education.[109] Clearly, education is a vital policy interest of the university. However, the real question is whether the interest in education is vital enough to

---

101. *Id.* at 1038-39.
102. *Id.* at 1040.
103. *Id.* at 1040 n.5.
104. *See* Southworth v. Grebe, 151 F.3d 717, 725 (7th Cir. 1998), *cert. granted sub nom.* Board of Regents of Univ. of Wis. Sys. v. Southworth, 119 S. Ct. 1332 (1999).
105. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 520 (1991).
106. Keller v. State Bar, 496 U.S. 1, 13-14 (1990).
107. *Id.*
108. *See* Southworth v. Grebe, 151 F.3d at 727.
109. *Id.*

justify compelled funding of the private activity.[110]

Again, *Lehnert* is important in the analysis because it "illustrates the importance of a common cause for justifying the compelled funding."[111] The *Southworth* court found no vital policy interest for supporting compelled funding of private organizations.[112] They even went as far as saying that the compelled funding might undermine the school's interest in education.[113] "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."[114]

The Regents also raised the "free rider" problem.[115] This problem is potentially created because all student organizations must be open to the entire student body.[116] This could then allow any objecting students to withhold funds while still partaking in the benefits of such organizations.[117] The *Southworth* court did not agree with the Regents, and stated that even if the students were labeled as free riders, the basic free rider concern created in *Abood* is missing in this situation.[118] The *Abood* Court agreed that the collective bargaining relationship:

> might well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made . . . 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.[119]

The key difference between *Abood* and *Southworth* is that Congress has imposed upon unions a duty to bargain in good faith on behalf of all employees, even non-union members.[120] Conversely, the private organizations objected to having

---

110. *See id.*

111. *Id.*; *see also* Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 521 (1991) (holding labor peace is not particularly served by "charging objecting employees for lobbying, electoral and other political activities that do not relate to their collective-bargaining agreement").

112. Southworth v. Grebe, 151 F.3d at 728.

113. *Id.*

114. *Id.*

115. *Id.*; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 221 (1977) (discussing the problem of "free riders" in the context of collective bargaining).

116. Southworth v. Grebe, 151 F.3d at 728.

117. *Id.*

118. *Id.* at 728-29.

119. Abood v. Detroit Bd. of Educ., 431 U.S. at 222.

120. *See* Steele v. Louisville & Nashville R.R., 323 U.S. 192, 199-202 (1944).

absolutely no duty to represent all students fairly.[121] "Rather, the private organizations' advocacy and speech further positions espoused by the organizations and their members."[122] In the university setting the free rider concern is inapplicable.[123] It is clear that there is no vital governmental interest in requiring objecting students to fund private organizations with which they do not agree.

3. *Burdening of Free Speech*

The final prong in the *Lehnert* test is whether the forced funding "significantly add[s] to the burdening of free speech . . . inherent in" achieving those interests.[124] "This prong recognizes that any time the government forces individuals to fund private organizations, a burden on free speech and association may incidentally result, but that burden may be justified by an important governmental interest."[125] Provided an important governmental policy interest exists, the next step is to determine whether the mandated funding significantly adds to the burden on free speech rights.[126]

The *Southworth* court again relied upon *Lehnert* to make the determination.[127] In *Lehnert*, the Court held that using objecting employees' money to fund political lobbying not related to collective bargaining presents "'additional interference with the First Amendment interests of objecting employees.'"[128] The Court explained:

> The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing petitioners' funds

---

121. Southworth v. Grebe, 151 F.3d at 728.

122. *Id.*

123. *Id.* at 728-29. "[W]hile we have endorsed the notion that nonunion workers ought not be allowed to benefit from the terms of employment secured by union efforts without paying for those services, the so-called 'free rider' concern is inapplicable where lobbying extends beyond the effectuation of a collective-bargaining agreement." Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 521 (1991).

124. *Id.* at 519.

125. Southworth v. Grebe, 151 F.3d at 729.

126. *See id.*

127. *Id.*

128. Lehnert v. Ferris Faculty Ass'n, 500 U.S. at 521 (quoting Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 456 (1984)). "Although First Amendment protection is in no way limited to controversial topics or emotionally charged issues, . . . the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will affect." *Id.* at 521-22 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977); Buckley v. Valeo, 424 U.S. 1, 14 (1976); Winters v. New York, 333 U.S. 507, 510 (1948)).

> for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.[129]

In *Southworth* the facts are clear, the mandatory funds extracted from dissenting students were used to fund private organizations,[130] and these private organizations used those funds to "garner the support of the public in its endeavors."[131] This creates a "particularly great"[132] burden on the objecting students' speech rights.[133] Also, the degree of impingement on the dissenting students' rights is particularly severe in this case because of the types of speech engaged in by the student groups receiving fees.[134] The student groups at the University of Wisconsin deal in controversial subjects ranging from abortion and religious beliefs to homosexuality and the destruction of the United States government.[135] The *Southworth* court stated, "[e]ven if the Regents could satisfy [*Lehnert*'s] first and second prongs, they cannot satisfy *Lehnert*'s third and final prong . . . ."[136] The Regents could not prove the forced funding does not "significantly add to the burdening of free speech."[137]

IV. THE IMPACT OF *SOUTHWORTH V. GREBE*

The impact of *Southworth* has not yet been fully realized. Certain legal scholars have predicted the doom of student fee programs at universities around the country.[138] Others have called the "analogy of mandatory student activity fees to contributions to a teachers' union and an integrated state bar association

---

129. Lehnert v. Ferris Faculty Ass'n, 500 U.S. at 522 (citations omitted) (quoting Wooley v. Maynard, 430 U.S. 705, 715 (1977)).

130. Southworth v. Grebe, 151 F.3d at 729.

131. Lehnert v. Ferris Faculty Ass'n, 500 U.S. at 522.

132. *Id.*

133. Southworth v. Grebe, 151 F.3d at 729.

134. *Id.*

135. *See id.*

136. *Id.*

137. Lehnert v. Ferris Faculty Ass'n, 500 U.S. at 519.

138. Jennifer Lynn Davis, *The Serpentine Wall of Separation Between Church and State:* Rosenberger v. Rector and Visitors of the University of Virginia, 74 N.C. L. REV. 1225, 1254 (1996).

. . . inappropriate."[139] Part IV of this Note will attempt to deal with the criticisms leveled against the decisions concerning mandatory student fees. Part V will also suggest possible solutions to this First Amendment problem.

In February of 1998, five students from the University of Minnesota apparently followed the lead of the *Southworth* plaintiffs and sued their school.[140] The students claimed similar constitutional rights violations as a result of the University of Minnesota's mandatory student fee policy.[141] In a related editorial, it was stated, "[t]he student services fee is simply one way of securing . . . tolerance. It is the price of belonging to the university community, and students should be eager to pay it."[142] An important question to ask after hearing such an argument would be, why would people have less First Amendment rights because they attend a university? Universities, of all places, should be the most protective of civil liberties. They should zealously guard those rights and pass on this reverence and respect to all of their students.

Another argument was raised in *Southworth*.[143] The Regents argued there was no infringement upon the students' First Amendment rights because the students could work through the democratic process to make a change.[144] The court responded to this by saying: "[T]here is a more basic flaw in the Regents' reliance on the democratic nature of student representation: The First Amendment trumps the democratic process and protects the individual's rights even when a majority of citizens wants to infringe upon them."[145]

---

139. Maxine G. Schmitz, *Mandatory Student Activity Fees in Public Colleges and Universities: The Impact of* Smith v. University of California, 25 J.L. & EDUC. 601, 602 (1996).

140. *'Freedom of Belief' Beats College Fee Use, Court Rules*, STAR TRIB. (Minneapolis), Aug. 12, 1998, at 7B.

141. *Id.*

142. *Student Fees: Paying the Price of Belonging*, STAR TRIB. (Minneapolis), Apr. 22, 1998, at 1A.

143. *See* Southworth v. Grebe, 151 F.3d 717, 732 (7th Cir. 1998), *cert. granted sub nom.* Board of Regents of Univ. of Wis. Sys. v. Southworth, 119 S. Ct. 1332 (1999).

144. *Id.*

145. *Id.*

> Let us suppose, therefore, that the government is entirely at one with the people, and never thinks of exerting any power of coercion unless in agreement with what it conceives to be their voice. But I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate. The best government has no more title to it than the worst. It is as noxious, or more noxious, when exerted in accordance with public opinion, than when in opposition to it. If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.

JOHN STUART MILL, ON LIBERTY 23 (Prometheus Books 1986) (1859).

It is important to note again that over seventy percent of the student groups at the University of Wisconsin do not receive funding from the mandatory fees.[146] This is conclusive proof that groups can and do exist without the university's help. An editorial in the Chicago Tribune stated: "Without university funding, many unpopular and controversial groups will surely wither away. And if they manage to survive, their members will spend more time raising funds than carrying out their intended activities."[147] There is no question that it would be more difficult for certain groups to thrive and survive, however, this is a small price to pay to prevent infringement on students' First Amendment rights. Further, the Constitution does not mandate that everyone be able to exercise their First Amendments rights in the same way.[148] In response to a statement made by the Wisconsin Assistant Attorney General—"hateful speech has a place in our society too"—the *Southworth* court responded: "That may well be true, but the Constitution does not mandate that citizens pay for it."[149] Maybe a better system is one where the marketplace of ideas is left alone. The whole idea behind the marketplace of ideas is that the best ideas thrive and grow and the lesser do not. Universities across the country are, in effect, subsidizing speech which might not survive in a free market.

A University of Minnesota student on the Queer Student Cultural Center Board stated that while the suit's success would "'not necessarily threaten our existence, it would threaten our ability to thrive.'"[150] The fact is that no group has the constitutional right to "thrive." While most Americans would like to see a large number of diverse groups operating to advance their ideas, the cost is just too high. It is simply not worth sacrificing our most closely held liberties to subsidize groups that can compete on their own in the marketplace of ideas.

V. SOLUTIONS

The question remains of how to protect objecting students' First Amendment rights while preserving a system that allows private groups to

---

146. Southworth v. Grebe, 151 F.3d at 725.

147. *The Price of Free Speech*, CHI. TRIB., June 21, 1997, at 22.

148. *See* Regan v. Taxation With Representation, 461 U.S. 540, 550 (1997) (stating "[a]lthough TWR [Taxation With Representation of Washington] does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantage of that freedom.'" (quoting Harris v. McRae, 448 U.S. 297, 318 (1980)).

149. Southworth v. Grebe, 151 F.3d at 729.

150. Mary Jane Smetanka, *Suit Over "U" Fees Is About Free Speech, Student Says*, STAR TRIB. (Minneapolis), Apr. 13, 1998, at 1A (quoting Matt Strickler, member of the Queer Student Cultural Center Board).

flourish. The district court instituted an injunction which ordered the Regents of the University of Wisconsin to "cease the funding of private groups that engage in ideological or political advocacy."[151] The district court also ordered the Regents to publish a list of the political groups and the pro rata share of mandatory fees contributed to them.[152]

The Court of Appeals for the Seventh Circuit properly recognized that this injunction was overly broad.[153] "The district court's order enjoining the university from funding private groups that engage in ideological or political advocacy applies to both objecting students and non-objecting students, but the plaintiffs pursued only a challenge to contributions made with objecting students' fees."[154] The plaintiffs in this case did not object to the Regent's use of mandatory student fees in general but only to the use of objecting students' funds.[155]

The Regents suggested a refund mechanism which would allow students to retrieve a portion of the funds they had paid at a later date.[156] However, the court of appeals rejected this idea, again drawing from the union analogy.[157] In *Ellis v. Brotherhood of Railway Clerks*,[158] the Supreme Court held that a refund mechanism inadequately protects the First Amendment rights of dissenting employees:

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employee for activities that are outside the scope of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded . . . . Even then the union obtains an involuntary loan for purposes to which the employee objects.[159]

---

151. Southworth v. Grebe, 151 F.3d at 733.
152. *Id.*
153. *Id.*
154. *Id.* (internal quotations omitted).
155. *Id.* at 734.
156. *Id.* at 733.
157. *Id.*
158. Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435 (1984).
159. *Id.* at 444; *see* Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292, 305 (1986). The court stated:

> [A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that the dissenters' funds may be used temporarily for an improper purpose . . . . For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear.

The *Southworth* court determined that *Ellis* was controlling on the issue of refunds and rejected the Regents argument asserting various administrative problems.[160] The court agreed with the plaintiffs that the student should be the final arbiter of what is or is not a political and ideological group.[161] This would give the student a reasonable amount of control and prevent the university from circumventing the system by calling most groups non-political.

A refund mechanism insufficiently protects the rights of dissenting students and can not be considered as an appropriate solution. Students must have the right to withhold funds from the very beginning of the process, namely when tuition is paid. A check-off system allowing students to decide which groups should receive funds would be a better plan. Although this system would be administratively burdensome for the university, it pales in comparison to the burden upon a dissenting student's First Amendment rights under the old system of mandatory fees.

VI. CONCLUSION

The extraction of mandatory student activity fees from students is not by itself a violation of the First Amendment. As long as the expenditures by a university are germane to education, justified by vital policy interests of the government, and do "not significantly add to the burdening of free speech," they will survive judicial scrutiny.[162] It is wrong to force anyone to fund speech he does not agree with. The right to speak freely includes the right to choose not to speak.[163] These groups play an important role at universities as well as in society at large, however, it is simply not worth the cost of lessening our First Amendment protections.

David E. Frank

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. at 305.

160. Southworth v. Grebe, 151 F.3d at 733 (citing Ellis v. Brotherhood of Ry. Clerks, 466 U.S. at 443-45).

161. *Id.* at 735.

162. *See* Lehnert v. Ferris Faculty Ass'n, 500 U.S. at 519.

163. *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).