

December 13, 2004

Saving Democracy on Campus: Interpretations of *Southworth* that Preserve Student Self-Governance

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Law and Higher Education, Fall 2004
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Introduction

At the University of Virginia and other universities across the United States, the student government distributes money to other student organizations through a pool of money funded by mandatory student activity fees.¹ Every student must pay into this fund and inevitably, some students have resented being forced to support activities contrary to their beliefs. When a few of these students claimed a breach of their First Amendment Rights in *University of Wisconsin v. Southworth*, the Supreme Court resolved a growing conflict among the Circuits on this issue.² The Court upheld the constitutionality of mandatory student fees but, in doing so, imposed a standard of viewpoint neutrality.³ Implying that viewpoint balancing may be required, the Court questioned a referendum mechanism and partly stripped the student body of the political power to decide the distribution of their funds.⁴

This paper argues for a less restrictive interpretation of *Southworth* that does not impinge on student self-governance. By considering the doctrines of public forum and compelled speech then campaign finance cases, I develop a two-step test to govern the

¹ CIO Treasurer's Manual 2 (2004-2005), available at http://www.uvastudentcouncil.com/ciocentral/topic_funding_appropriations.php.

² Board of Regents of the University of Wisconsin v. Southworth, 529 U.S. 217, 120 S.Ct. 1346 (2000).

³ Id. at 233.

⁴ Id. at 235.

access to and distribution of mandatory student fees. Finally, I apply the principles of *Southworth* and my two-step test to the current student activity fund reform at the University of Virginia.

The *Southworth* Decision

In *University of Wisconsin v. Southworth*, a group of university students challenged a mandatory student activity fee under the First Amendment. The Supreme Court held that “[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.”⁵

The University of Wisconsin Student Activity Fund

Since its founding, the University of Wisconsin has required full-time students to pay a nonrefundable activity fee segregated from the general tuition charge. In 1995, when the *Southworth* litigation began, the activity fee was \$331.50.⁶ Approximately 80% of the activity fee is nonallocable, supporting student health services, intramural sports, debt service, and the operations of the student union.⁷ The allocable portion of the fee supports extracurricular endeavors pursued by the University’s registered student organizations (RSO’s). Every RSO must organize as a not-for-profit group, limit membership primarily to students, and agree to undertake activities related to student life on campus. In 1995, there were 623 RSO’s on the Madison campus.⁸

The student government of the University Wisconsin is the Associated Students of Madison (ASM). They distribute the allocable portion of the student activity fee

⁵ *Southworth*, 529 U.S. at 221.

⁶ *Id.* at 222.

⁷ *Id.* at 223.

⁸ *Id.* at 223.

through two different funds. The Student Government Activity Fund (SGAF) supports the operations and events of a large number of RSO's while the General Student Services Fund (GSSF) supports a smaller number of RSO's that administer various campus services. All funding decisions are made in an open session and must ultimately be approved by the chancellor and the board of regents.⁹ A third means of funding is by student referendum that, upon majority vote of the student body, can fund or defund any RSO.

The Majority in Southworth

When *Southworth* reached the Supreme Court, both the District Court and the Seventh Circuit had invalidated the University's mandatory activity fee program. The Court unanimously reversed the lower court decisions, but a six-member majority attached a requirement of viewpoint neutrality and explicitly questioned the referendum mechanism.¹⁰

Both the District Court and the Seventh Circuit struck down the mandatory activity fee on the basis of the compelled speech precedents of *Abood v. Detroit Bd. of Ed.* And *Keller v. State Bar of Cal.*¹¹ These cases held that a teacher's union and a state bar association, respectively, could only assess mandatory fees to support activities "germane" to the purpose of the organization.¹² The Supreme Court dismissed this line of reasoning because "[t]he standard of germane speech as applied to student speech at a university is unworkable."¹³

⁹ Id. at 224-25.

¹⁰ Id. at 221.

¹¹ Id. at 227 *citing* *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977), *Keller v. State Bar of California*, 496 U.S. 1 (1990)

¹² Id. at 230 *citing* *Keller*, 496 U.S. at 13-14.

¹³ *Southworth*, 529 U.S. at 231.

In distinguishing the student activity fee cases from the employment cases, the Court defers to the academic freedom of the university: “It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.”¹⁴ The Court also stops short of requiring a refund option or forcing the University to take responsibility for the speech,¹⁵ upholding a general right to impose mandatory fees:

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.¹⁶

Up to this point, the Supreme Court was unanimous in its decision. However, only six members of the Court joined the majority in imposing an additional requirement of viewpoint neutrality. Analogizing from public forum cases, the majority held that the mandatory fees were lawful as long as the University used “viewpoint neutrality as the operational principle.”¹⁷ Under this standard, the Court criticized the student referendum: “To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires.”¹⁸

Southworth on Remand

After the Supreme Court ruling, *Southworth* was remanded to the Seventh Circuit,¹⁹ back down to the Western District of Wisconsin,²⁰ and was finally resolved by

¹⁴ Id. at 232.

¹⁵ Id.

¹⁶ Id. at 233.

¹⁷ Id. at 233.

¹⁸ Id. at 235.

¹⁹ *Southworth v. Board of Regents of the University of Wisconsin System*, 221 F.3d 1339 (7th Cir. 2000).

²⁰ *Fry v. Board of Regents of University of Wisconsin System*, 132 F.Supp.2d 740 (W.D.Wis. 2000); *Fry v. Board of Regents of University of Wisconsin System*, 132 F.Supp.2d 744, 153 Ed. Law Rep. 83 (W.D.Wis. 2000).

the Seventh Circuit in 2002.²¹ By that time, the University had eliminated the referendum funding mechanism²² and inserted the phrase “viewpoint neutral” into most of its policies.²³ The Circuit Court upheld a majority of the revised procedures but found that several aspects of the program still fell short.

Using another prong of public forum doctrine, the Circuit Court applied the unbridled discretion standard to the University of Wisconsin’s student activity fund.²⁴ They introduce this standard even though “the Supreme Court has never expressly held that the prohibition on unbridled discretion is an element of viewpoint neutrality,” claiming that the “conclusion inevitably flows from the Court’s unbridled discretion cases.”²⁵

The unbridled discretion standard is a procedural safeguard that grew out of cases regarding media censorship and permits for public demonstrations and displays.²⁶ In those cases, the Supreme Court struck down statutes and ordinances that gave public officials “unbridled discretion” over decisions to allow or disallow speech in public forums. The Supreme Court explained the doctrine in *Lakewood v. Plain Dealer Publishing Co.*, where the concern was that “without standards governing the exercise of discretion, a government official may decide who may speak and who may not based on the ... *viewpoint* of the speaker.”²⁷ (emphasis added). Despite the fact that each of the unbridled discretion cases involved specific acts of exclusion not present in *Southworth*,

²¹ *Southworth v. Board of Regents of University of Wisconsin System*, 307 F.3d 566, (7th Cir. 2002).

²² *Id.* at 570.

²³ *Id.* at 582-587.

²⁴ *Id.* at 575.

²⁵ *Id.* at 579.

²⁶ See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935 (1969); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 108 S.Ct. 2138 (1988); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395 (1992); *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775 (2002).

²⁷ *Lakewood*, 486 U.S. at 763-64.

the Seventh Circuit seized upon the word viewpoint in *Lakewood* and concluded that “the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement.”²⁸

Armed with this unbridled discretion standard, the Circuit Court analyzed each aspect of the University of Wisconsin’s activity fund. The university’s Financial and Administrative Policies had been amended to “conform with constitutional requirements, including the decision of the United States Supreme Court in *Board of Regents v. Southworth*.”²⁹ The student government bylaws were also amended to mandate viewpoint neutrality, including an oath for student government officers: “I do solemnly swear to support the Constitution and Bylaws of the ASM, to make decisions concerning the funding of Student Organizations in a view-point-neutral fashion as required by law.”³⁰ Procedural safeguards required copious recordkeeping and specified a lengthy appeals process.³¹ The criteria for the SSFC and GSSF included explicit references to viewpoint neutrality.³² The Seventh Circuit was apparently satisfied with these repeated assertions of viewpoint neutrality and held that “[t]ogether, these Funding Standards greatly limit the student government’s discretion.”³³

That was not the end of the Circuit Court’s analysis. The court noted that balancing viewpoints is easy when all the funding decisions are made at once, but “[t]his may be a bit more problematic for some of the grants funded by the ASM Finance Committee and distributed throughout the year.”³⁴ However, this did not invalidate the

²⁸ *Southworth*, 307 F.3d at 579.

²⁹ *Id.* at 581.

³⁰ *Id.* at 583.

³¹ *Id.* at 581.

³² *Id.* at 585-56.

³³ *Id.* at 588.

³⁴ *Id.* at 591.

system because “any disparate treatment can again be rectified in the appeals process, or if not, in an as-applied legal challenge.”³⁵ There were few guidelines for travel grants, so the court held that “the ASM Finance Committee [has] unbridled discretion for awarding travel grants,” invalidating the use of activity fee funds for that purpose.³⁶ The court also eliminated two criteria used to determine funding for all student organizations: the length of time an organization has been in existence and the amount of funding an organization has received in the past. Since these criteria would cause “current decisions [to] depend in part on viewpoint-based decisions of the past,” they violated the viewpoint neutrality requirement.³⁷ So although the student activity fund was approved in large part, the unbridled discretion standard invalidated several aspects of the program and the prospect of future litigation remains.

Summary of the Law after Southworth

At the close of the *Southworth* litigation, the law is clear on several points. The Supreme Court’s holding can be summarized in one sentence: Universities may collect mandatory student activity fees, but they must distribute those fees to student organizations in a viewpoint neutral manner, and referendum voting mechanisms are suspect.

In the Seventh Circuit, the law has an additional component: University student governments may not have unbridled discretion to make funding decisions. The Seventh Circuit also established several additional criteria: (1) Explicit guidelines that assert viewpoint neutrality limit the discretion of the student government and thus demonstrate compliance; (2) Procedural safeguards such as an appeals process also limit discretion; (3)

³⁵ Id.

³⁶ Id. at 592.

³⁷ Id. at 594.

Contemporaneous funding decisions are more likely to be viewpoint neutral; and (4) Consideration of any factors related to prior funding decisions is prohibited if previous procedures were not viewpoint neutral.

Public Forum Doctrine

In deciding *Southworth*, the majority focused its analysis on the body of law known as public forum doctrine.³⁸ With no apparent public forum at issue in the case, the use of this particular doctrine is unexpected. The Court itself admitted they were using the doctrine “by close analogy ... even though the student activities fund is not a public forum in the traditional sense of the term and despite the circumstance that those cases most often involve a demand for access, not a claim to be exempt for supporting speech.”³⁹

The reason the Court introduces public forum doctrine is clear from the opening line of Justice Kennedy’s majority opinion: “For the second time in recent years we consider constitutional questions arising from a program designed to facilitate extracurricular student speech at a public university.”⁴⁰ The other case was *Rosenberger v. University of Virginia*, decided just five years earlier where the Supreme Court applied the public forum doctrine to student activity fees for the first time.⁴¹ It was *Rosenberger* that sealed *Southworth*’s fate, which is apparent from the Court’s self-satisfying conclusion: “There is symmetry then in our holding here and in *Rosenberger*: Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program’s operation once the funds have been

³⁸ *Southworth*, 529 U.S. at 230.

³⁹ *Id.* at 229-30.

⁴⁰ *Id.* at 220-21.

⁴¹ *Rosenberger*, 515 U.S. 819.

collected.”⁴² The viewpoint neutrality requirement would not be part of *Southworth* but for *Rosenberger*.

Overview of the Public Forum Doctrine

The term “public forum” was first used by the Supreme Court in *Police Department of Chicago v. Mosley*.⁴³ In *Mosley*, a Chicago ordinance prohibited picketing within 150 feet of a school unless related to labor disputes, and the Court held that “[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.”⁴⁴ The reasoning of the case turned on the distinction between a public forum and other government property, and thus the public forum doctrine was born.⁴⁵

The Court created the “limited public forum” in *Perry Education Association v. Perry Local Educators’ Association* to govern cases that were not traditional public forums.⁴⁶ In *Perry*, the Court upheld the school district’s decision to allow one teacher’s union to use an interschool mail system while another could not.⁴⁷ The Court ruled that the mail system was a “limited public forum,” which is created when the “State has opened [property] for use by the public as a place for expressive activity.”⁴⁸ The rules regarding limited public forums were laid out most clearly in *Cornelius v. NAACP Legal Defense and Educational Fund*, allowing regulations that are “reasonable in light of the purpose served by the forum and are viewpoint neutral ... [T]he government violates the

⁴² *Southworth*, 529 U.S. at 233.

⁴³ Robert C. Post, “Between Governance and Management: The History and Theory of the Public Forum” 34 *UCLA L.Rev.* 1713, 1731 (1987) *citing* *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96, 99 (1972).

⁴⁴ *Mosley*, 408 U.S. at 96.

⁴⁵ Post, 34 *UCLA L.Rev.* at 1732.

⁴⁶ Post, 34 *UCLA L.Rev.* at 1750 *citing* *Perry Education Association v. Perry Local Educators’ Association*, 460 U.S. 37 (1983).

⁴⁷ *Perry*, 460 U.S. at 47.

⁴⁸ *Id.* at 45.

First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”⁴⁹

Rosenberger v. University of Virginia

The facts of *Rosenberger* closely resemble those of a limited public forum case. The plaintiff, Ronald Rosenberger, was the founder of a student-run magazine entitled “Wide Awake: A Christian Perspective at the University of Virginia.”⁵⁰ Wide Awake applied for funding from the University Student Activities Fund (SAF) but was denied under a policy excluding religious activities.⁵¹

The Supreme Court begins its analysis in *Rosenberger* with the presumption that “[d]iscrimination against speech because of its message is presumed to be unconstitutional.”⁵² When invoking the public forum doctrine, the Court admits that “[t]he SAF is a forum more in a metaphysical sense than in a spatial or geographic sense, but the same principles are applicable.”⁵³ The Court then cites a few analogous public forum cases,⁵⁴ most notably a decision just two years earlier where a school district had enacted a formal policy barring religious groups from school facilities.⁵⁵ In *Lamb’s Chapel*, the Court was unanimous in holding that such action “discriminates on the basis of viewpoint.”⁵⁶ A decade earlier, the Court had forced a university to open its doors to

⁴⁹ *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 806 (1985).

⁵⁰ *Rosenberger*, 515 U.S. at 826.

⁵¹ *Id.* at 827.

⁵² *Id.* at 828 *citing* *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643, 114 S.Ct. 2445, 2458-2460 (1994).

⁵³ *Id.* at 830.

⁵⁴ *Id.* at 830 *citing* *Perry Ed. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 46-47, 103 S.Ct. 948, 46-47 (forum analysis of a school mail system); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 801, 105 S.Ct. 3439, 3448 (1985) (forum analysis of charitable contribution solicitations).

⁵⁵ *Lamb’s Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 113 S.Ct. 2141 (1993).

⁵⁶ *Id.* at 393.

religious groups in *Widmar v. Vincent*.⁵⁷ The University of Virginia tried to distinguish the funding context from *Widmar* and *Lamb's Chapel* by emphasizing the difference between the scarce resource of money and the plentiful resource of space, but the Court dismissed this argument: "Had the meeting rooms in *Lamb's Chapel* been scarce ... our decision would have been no different."⁵⁸

The prior holdings flow nicely into the facts of *Rosenberger*: A religious group was being denied access in a school setting. Exclusion of religious content is not generally permissible in a limited public forum. This led to the clear conclusion that "the regulation invoked to deny SAF support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment."⁵⁹

The Court went on to hold that funding religious organizations would not violate the Establishment Clause⁶⁰ and after the decision, the University's funding requirements were amended to include the following language:

Notwithstanding any other provision of these Student Activities Fee funding guidelines, no student news, information, opinion, entertainment or academic communications media group shall be deemed ineligible for funding on the grounds that the ideas or viewpoints expressed or advocated by such group are religious in nature or because such group primarily promotes or manifests a particular belief(s) in or about a deity or an ultimate reality.⁶¹

Rosenberger to Southworth

The outcome of *Rosenberger* was a logical extension of *Lamb's Chapel* and *Widmar* – just as religious groups should not be denied access to generally available school facilities, religious student publications should not be denied access to generally

⁵⁷ *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269 (1981).

⁵⁸ *Id.* at 835.

⁵⁹ *Rosenberger*, 515 U.S. at 837.

⁶⁰ *Id.* at 846.

⁶¹ See University of Virginia CIO Treasurer's Manual 2004-2005, Appendix 3, p17.

available activity funds. However, the leap to *Southworth* is more significant in terms of public forum doctrine.

The public forum doctrine was developed to regulate access and the viewpoint neutral standard developed as a limitation on excluding access. The *Southworth* students were not seeking access but wanted to refuse support for a forum. Public forum doctrine has generally been applied only to challenge exclusionary regulations. In *Rosenberger*, the doctrine properly led the Court to strike down a rule that was not viewpoint neutral with respect to religion. In *Southworth*, the Court transformed viewpoint neutrality into a tool for affirmative action. The traditional public forum doctrine would simply force universities to remove any policies that discriminated on the basis of viewpoint. After *Southworth*, universities must now use viewpoint neutrality as the “operational principle” for distributing resources.⁶²

The term “operative principle” does not necessarily impose an affirmative duty on the university to enact certain policies. The Court writes that the university “is free to enact viewpoint neutral rules restricting off-campus travel or other expenditures.”⁶³ This statement conforms to the traditional role of public forum doctrine: As long as the rules in place are viewpoint neutral, the courts do not intervene. Unfortunately, the end of the *Southworth* opinion hints at a more aggressive doctrine. Admitting that the “record is not well developed” on the referendum funding mechanism, the Court expresses a concern for the lack of “protection” for viewpoint neutrality in that part of the process.⁶⁴ The Court goes on to state that “the referendum substitutes majority determinations for viewpoint neutrality” as if “majority determinations” and “viewpoint neutrality” were

⁶² *Southworth*, 529 U.S. at 233.

⁶³ *Id.* at 234.

⁶⁴ *Id.* at 235.

two alternative methods to distribute funds.⁶⁵ However, these are not two competing political theories. Majority voting is the basis of funding decisions at every level of government while viewpoint neutrality is a doctrine limited to regulating access to public forums. The Court gives substance to the principle by writing: “The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views,” implying some form of viewpoint balancing.⁶⁶

Universities are then left with an operational principle that must balance minority views against majority views. It no surprise then, that the Seventh Circuit struggled to apply this principle to a budgeting process and resorted to the “unbridled discretion” standard. The University of Wisconsin also did not know how to develop viewpoint neutral procedures; they simply inserted the words “viewpoint neutral” into their policies. The reality of a budget process is one driven by majority determinations. At the time of *Rosenberg*’s filing, 135 student groups at the University of Virginia applied for funding from an SAF fund of \$224,000.⁶⁷ At the time of *Southworth*’s filing, about 200 student groups at the University of Wisconsin received funding from SGAF and GSAF funds totaling \$1.9 million.⁶⁸ Both universities have chosen to manage these large funds using the principles of self-governing democracy. Viewpoint balancing is unworkable in this context. If the Asian Student Union receives \$1,000 should the Black Student Alliance receive precisely the same amount? Should the White Student Association? What if there is no White Student Association? Majority votes dispense with these issues easily but viewpoint balancing provides few answers.

⁶⁵ Id. at 235.

⁶⁶ Id. at 235.

⁶⁷ *Rosenberger*, 515 U.S. at 823-825.

⁶⁸ *Southworth*, 529 U.S. at 222-23.

The Supreme Court's operational principle is useless in the face of the most simple budget questions and provides little guidance to universities seeking to comply with the law. In their zeal to tie *Southworth* and *Rosenberger* together under a single legal theory, the majority severely overstepped the bounds of the public forum doctrine and set a standard that creates more questions than answers.

Compelled Speech Doctrine

Many Circuit Courts considered the student activity fee issue before *Southworth* reached the Supreme Court, and not a single one invoked the public forum doctrine. In those cases, including the Seventh Circuit case that led to *Southworth*, the issue was one of compelled speech, following the standards of *Aboud* and *Keller* that the Supreme Court in *Southworth* dismissed as “unworkable”.⁶⁹

In *Aboud v. Detroit Board of Education*, nonunion public school teachers were required, as a condition of their employment, to pay a service fee to a teacher's union.⁷⁰ The union used these fees to engage in political speech that the complaining teachers did not support, and the Court held that objecting teachers could not be forced to pay the union to conduct speech “unrelated to its duties as exclusive bargaining representative.”⁷¹ *Aboud* laid the foundation for *Keller v. State Bar of California*, which involved a similar situation with lawyers objecting to funding a state bar association.⁷² The Court applied the same principles and restricted the usage of mandatory fees to funding activities

⁶⁹ *supra* n19

⁷⁰ *Aboud v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977).

⁷¹ *Id.* at 234.

⁷² *Keller v. State Bar of California*, 496 U.S. 1, 110 S.Ct. 2228 (1990).

“germane” to the association’s mission of “regulating the legal profession and improving the quality of legal services.”⁷³

Student Activity Fees

The Circuit Court cases before *Southworth* generally fell into two categories. One category of cases challenged the funding of student newspapers. In *Kania v. Fordham*, a University of North Carolina newspaper was guaranteed a fixed percentage of student activity fees through the student government constitution. The Fourth Circuit upheld the fees because the funding of the paper was germane to the University’s educational mission.⁷⁴ The court distinguished *Abood* because rather than espousing a particular viewpoint, the student newspaper “increases the overall exchange of information, ideas, and opinions on the campus.”⁷⁵ In *Hays County Guardian v. Supple*, an independent newspaper challenged Southwest Texas State University’s support of a student newspaper through mandatory student fees.⁷⁶ The Fifth Circuit noted that “the University provided the students with the funds needed for the students themselves to engage in debate and did not force ideological conformity.”⁷⁷ Following the reasoning in *Kania*, the court held that funding a student newspaper was a “minimally restrictive means of advancing an educational interest.”⁷⁸

The second category of activity fee cases involved Public Interest Research Groups (PIRG’s). In *Galda v. Bloustein*, Rutgers students challenged a mandatory fee that supported the New Jersey PIRG.⁷⁹ The *Galda* court interpreted *Abood* to hold that

⁷³ Id. at 13-14.

⁷⁴ *Kania v. Fordham*, 702 F.2d 475, 480 (4th Cir. 1983).

⁷⁵ Id. at 480.

⁷⁶ *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Circuit 1992).

⁷⁷ Id.

⁷⁸ Id. at 123-24.

⁷⁹ *Galda v. Bloustein*, 686 F.2d 159, 161 (3rd Cir. 1982).

compelled association “cannot be sustained unless it is justified by a compelling government interest.”⁸⁰ In the final disposition of the case, the Third Circuit outlawed the fee because the educational benefits of PIRG were “incidental to, and inherent in, the ideological activities.”⁸¹ However, the court was careful to limit their holding because the PIRG was funded through a segregated fee rather than the general student activity fund at Rutgers: “we do not enter the controversy on whether a given campus organization may participate in the general activities fee despite the objections of some who are required to contribute to that fund.”⁸² In *Carroll v. Blinken*, the Student Association at the State University of New York at Albany had contracted a portion of student funds to New York PIRG.⁸³ NYPIRG pooled its funds statewide and counted every student at SUNY Albany among its members.⁸⁴ The court weighed the First Amendment interests of the students against three interests of the university: “1) the general promotion of extracurricular activities, 2) the facilitation of ... participatory civics training, and 3) the stimulation of robust campus debate.”⁸⁵ The Second Circuit found that those interests “are substantial enough to justify the infringement of appellants’ First Amendment right against compelled speech.”⁸⁶ However, the court required that money be spent on campus in an equal amount to student activity funds received and enjoined NYPIRG from listing the entire student body as members in its organization.⁸⁷

⁸⁰ Id. at 164.

⁸¹ *Galda v. Rutgers*, 772 F.2d 1060, 1068 (3rd Cir. 1985).

⁸² Id. at 1064.

⁸³ *Carroll v. Blinken*, 957 F.2d 991, 993 (2nd Cir. 1992).

⁸⁴ Id. at 993.

⁸⁵ Id. at 999.

⁸⁶ Id. at 1001.

⁸⁷ Id. at 1002-03.

The Ninth Circuit was the last court to consider the student activity fee issue before *Southworth* was decided. In *Rounds v. Oregon State Board of Higher Education*, student fees were paid into a general fund that was distributed by the student government at the University of Oregon, part of which went to the Oregon State PIRG Educational Fund (OSPIRG EF).⁸⁸ *Rounds* makes reference to the precedent set in *Rosenberger* that a student activity fund is a “limited public forum.”⁸⁹ However, *Rounds* does not make the leap to viewpoint balancing, dispensing with the issue by holding that “the distribution of funds to OSPIRG EF serves a legitimate governmental interest that does not violate the First Amendment.”⁹⁰

Compelled Speech Doctrinal Structure

The *Rounds* case is a more thorough treatment of compelled speech law than the Supreme Court opinion in *Southworth*. First, the court notes two arrangements that would invite strict scrutiny: (1) “compelled membership” as was the case in *Carroll*,⁹¹ and (2) “compelled personal speech” that would make the students couriers of political or ideological messages.⁹² Second, the court highlights the “nature of the communication” as a factor, supporting *Kania*’s distinction between “one-sided” viewpoints and increasing the “overall exchange of information.”⁹³ The newspaper cases that were upheld supported a wide range of viewpoints while the PIRG cases were struck down when a segregated fee supported only one organization.⁹⁴

⁸⁸ *Rounds v. Oregon State Board of Higher Education*, 166 F.3d 1032, 1034 (9th Circuit 1999).

⁸⁹ *Id.* at 1039 *citing* *Rosenberger*, 515 U.S. at 830.

⁹⁰ *Id.* at 1039-40.

⁹¹ *Id.* at 1037 *citing* *Carroll*, 957 F.2d at 1003 (Students were automatically members of NYPIRG).

⁹² *Id.* at 1038 *citing* *Kania*, 702 F.2d at 478 n.6 (The student newspaper was not perceived to be the official voice of all the students).

⁹³ *Id.* at 1038 *citing* *Kania*, 702 F.2d at 480.

⁹⁴ *Id.* at 1040 *citing* *Galda*, 772 F.2d at 1064.

Rounds specified the central rule of the compelled speech doctrine: “ideological activities must be ‘germane’ to the purposes for which the compelled association was justified to pass constitutional muster.”⁹⁵ Conveniently, Oregon had a statute delineating the purpose of the student activity fee “to be advantageous to the cultural or physical development of students” and NYPIRF met that standard⁹⁶ When supporting a diversity of viewpoints, “a university’s determination that an organization contributes to the university community is presumptively valid.”⁹⁷

Thus, the compelled speech doctrine invokes strict scrutiny only in cases of compelled membership, compelled personal speech, and one-sided viewpoints. Outside those categories, the supported activities must pursue a legitimate governmental purpose germane to the establishment of the fee. If this doctrine were applied by the Supreme Court, as it had been applied by every Circuit Court to consider the issue, the University of Wisconsin student activity fund system would have been upheld without a viewpoint balancing requirement and without elimination of the referendum funding mechanism. In fact, *Rounds* involved a similar referendum mechanism and the Ninth Circuit praised it as part of “an elaborate system to ensure compliance.”⁹⁸

Writing for three concurring judges in *Southworth*, Justice Souter followed the framework of the compelled speech doctrine. Looking for compelled membership or compelled personal speech, he concluded that “the clear connection between fee payer and offensive speech ... is simply not evident here.”⁹⁹ Looking for a one-sided viewpoint, he notes that “the challenged fees support a government program that aims to broaden

⁹⁵ Id. at 1038 *citing* Keller, 496 U.S. at 13.

⁹⁶ Id. at 1039 *citing* Or.Rev.Stat. § 351.070(3)(d) (1997).

⁹⁷ Id. at 1039 *citing* Galda, 686 F.2d at 166.

⁹⁸ Id. at 1039.

⁹⁹ *Southworth*, 529 U.S. at 240 (dissenting opinion).

public discourse.”¹⁰⁰ Considering the germane purpose of the fund, Justice Souter finds that “[n]o one disputes the University’s assertion that some educational value is derived from the activities supported by the fee.”¹⁰¹ Souter states that he “does not believe the Court should take occasion to impose a cast-iron viewpoint neutrality requirement.”¹⁰² The compelled speech analysis stops where viewpoint discrimination is not evident.

Campaign Finance

Justice Souter’s concurrence in *Southworth* also cited the Supreme Court’s landmark decision in *Buckley v. Valeo*, noting a similar situation where the Court upheld “a congressional program providing viewpoint neutral subsidies to all President candidates.”¹⁰³ The public financing of political campaigns shares many characteristics with the student activity fund cases. Both are programs where the government collects funds from the general population to support ideological speech.

An Arizona campaign case quoted *Southworth* favorably in 2002. In *May v. McNally*, an Arizona citizen challenged a law imposing a surcharge on parking fines that went into a general fund for political campaigns.¹⁰⁴ The lower court had rejected *Southworth* as irrelevant, but the Arizona Supreme Court held that “[e]ncouraging public debate in the political arena is at least as compelling a public purpose as encouraging speech on a university campus.”¹⁰⁵ The court then rejected the contention that viewpoint neutrality was violated where not all candidates ask for and receive funds by noting that “*Southworth's* insistence on viewpoint neutrality focused on the government's method of

¹⁰⁰ Id. at 240-41.

¹⁰¹ Id. at 242.

¹⁰² Id. at 236.

¹⁰³ *Southworth*, 529 U.S. at 241 (dissenting opinion) *citing* *Buckley v. Valeo*, 424 U.S. 1, 93-94, 96 S.Ct. 612, 670 (1976).

¹⁰⁴ *May v. McNally*, 203 Ariz. 425, 55 P.3d 768 (Ariz. 2002), *cert. denied*, 538 U.S. 923, 123 S.Ct. 1583 (2003).

¹⁰⁵ Id. at 429.

allocating funds, not the resulting viewpoints being supported.”¹⁰⁶ Unlike the Supreme Court’s criticism of the referendum vote and the Seventh Circuit’s scrutiny of the entirety of the University of Wisconsin’s funding procedures, the Arizona supreme court was satisfied that “[t]he method of allocating funds under the Clean Elections Act is clearly neutral with regard to the ideology or message of any candidate.”¹⁰⁷ This interpretation of *Southworth* shows appropriate judicial restraint within the proper bounds of the compelled speech doctrine. Where a regulation is viewpoint neutral on its face and plaintiffs do not cite a particular act of discrimination, the courts need not conduct an invasive review.

Buckley v. Valeo

While the Arizona court traced the compelled speech doctrine from *Buckley* to *Aboud* to *Keller* then to *Southworth*, the majority in *Southworth* made no mention of *Buckley*. A careful reading of that landmark campaign finance decision could have aided the Supreme Court in its resolution of the student activity fee cases. The third major section of *Buckley v. Valeo* considered the constitutionality of public financing for Presidential elections.¹⁰⁸ The Presidential Election Campaign Act of 1966 created the dollar check-off on tax returns that designates a portion of tax liability to a fund for Presidential elections.¹⁰⁹ This voluntary contribution may appear to distinguish campaign finance from the mandatory student activity fees, but the Court ruled that the “check-off is simply the means by which Congress determines the amount of its appropriation.”¹¹⁰

¹⁰⁶ Id. at 430.

¹⁰⁷ Id.

¹⁰⁸ *Buckley*, 424 U.S. at 84.

¹⁰⁹ Id. n114.

¹¹⁰ Id. n124.

The *Buckley* plaintiffs raised compelled speech objections but the Court ruled that the fund was a “congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge discussion and participation in the electoral process, goals vital to a self-governing people.”¹¹¹ The Court also states that “public financing is generally less restrictive of access to the electoral process than the ballot-access regulations”,¹¹² making the careful distinction between access and distribution that should properly separate the public forum and compelled speech doctrines. The campaign finance laws distribute money based upon the popular vote received by a political party in the previous election. When rejecting the contention that this discriminated against minor parties, the Supreme Court distinguished between the needs of parties with “historically established broad support, on the one hand, and a new or small political organization on the other.”¹¹³ The Court concludes that “popular vote totals in the last election are a proper measure of public support.”¹¹⁴ Although the plaintiffs made many additional claims, the Court dismissed them because “[a]ny risk of harm to minority interests is speculative due to our present lack of knowledge of the practical effects of public financing.”¹¹⁵ Despite the fact that that *Buckley* declared other aspects of the campaign finance bill unconstitutional, public financing scheme of Presidential elections was upheld in full.¹¹⁶ When campaign finance came before the Supreme Court again in *McConnell v. Federal Election Commission* (2004), the Presidential Election Campaign Fund was not even an issue.¹¹⁷

¹¹¹ Id. at 92-93.

¹¹² Id. at 95.

¹¹³ Id. at 98 *quoting* *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971).

¹¹⁴ Id. at 100 *quoting* *Jenness*, 403 U.S. at 439-40.

¹¹⁵ Id. at 101.

¹¹⁶ Id. at 108-109.

¹¹⁷ *McConnell v. Federal Election Commission*, 540 U.S. 93, 124 S.Ct. 619 (2004).

Application to Student Activity Fees

Although *Southworth* and *Buckley* both upheld their respective funding schemes, the student activity fee invited far greater scrutiny than the Presidential Election Campaign Fund. This is somewhat counter-intuitive, given that one fund governs the activities of literary magazines and chess teams while the other governs Presidential candidates. Although *Buckley* was decided before the development of the viewpoint neutrality standard, the Court respected the difference between access and distribution and realized that a single standard was not compelled in both cases. Where *Southworth* questioned majority determinations, *Buckley* embraced them as a rational method to distribute funds. Where the Seventh Circuit delved into the funding procedures searching for potential harms, *Buckley* refused to speculate where there were no concrete claims. The Seventh Circuit rejected the previous funding and the length of time an organization existed as discriminatory factors but *Buckley* recognized that the established history of a political party was very relevant to its funding level.

The deference afforded in *Buckley* may be attributable to the fact that Congress enacts the campaign finance laws whereas universities enact the regulations concerning student activity fees. *Southworth* distinguishes government speech because “[i]f the citizenry objects, newly elected officials later could espouse some different or contrary position.”¹¹⁸ However, the distinction between government and non-government speech does not separate *Southworth* from *Buckley*. In both cases, the government authorizes the collection and appropriation of money but does not claim ownership of the speech. Presidential candidates do not speak for Congress any more than student clubs speak for a university. The only real difference is the appropriations process, which is created by

¹¹⁸ *Southworth*, 529 U.S. at 235.

Congress in the campaign finance case and the university administration in the activity fund case. However, this distinction ignores the role of student government.

At most universities, student activity appropriations are handled by students themselves. Although the collection of fees is authorized by the university, representatives elected from the general student body set the rules and make the decisions as to how student activity money will be spent each year. These representatives are just as accountable as members of Congress. In fact, with one-year terms, no political parties, and an electorate that turns over every four years, it is hard to imagine a more robust and responsive democracy. While there may be a bias in Congress towards the two major political parties, there is much less concern when there are more clubs than student representatives. If the standard is responsiveness and accountability, student government has a lot more in common with Congress than the city and school officials that were suspect in the public forum cases.

A Two-Step Test

The Court did not consider these details in *Southworth* because they sought a single doctrine to govern the entire system. In reality, there are two separate areas of inquiry regarding a scheme like the university student activity funds. The first is the regulation of access to the fund. The constitutionality of any exclusion must be scrutinized under public forum doctrine. The viewpoint neutrality standard should be applied to questions of access, where it was meant to be used. The second consideration is the appropriation of funds to different student groups, which should be analyzed using the compelled speech doctrine.

The first step is simply the holding in *Rosenberger*. Exclusions from a student activity fund must be viewpoint neutral. Conversely, a dedicated fee can only go to an organization open to all viewpoints, such as a student newspaper. The second step follows the reasoning of *Buckley*, *Abood*, *Keller*, and the Circuit Court student activity fund cases. A university may not compel speech by collecting a fee dedicated to an organization advocating a particular viewpoint. No organization can compel association by listing the entire student body as members, and organizations can not claim to speak for the student body. Absent severe abuse of the system, a student should have no cause of action to challenge funding of a particular organization through an open, democratic process. Traditional political controls protect the interests of individuals through the student government. Challenges to denial of funding should only be allowed in cases of viewpoint discrimination. Challenges to the imposition of the fee should fail because supporting extracurricular activity is germane to the educational mission of the university.

Under such a two-step test, the University of Wisconsin's student activity fund would have been upheld in full. There were no exclusionary policies that violated viewpoint neutrality. There was no compelled speech or compelled association, and the fund supported a wide array of viewpoints. A proper separation of the issues would have foreclosed a viewpoint balancing requirement.

Appropriations Reform at the University of Virginia

The Student Council at the University of Virginia is currently considering a proposal to reform their Student Activity Fund (SAF) appropriations. As reported by the *Cavalier Daily*, it is "the most important initiative that Council will undertake this

year.”¹¹⁹ Council Vice President for Organizations Rebecca Keyworth identified the key motivations for the reform as a recognition that the process was originally designed for a much smaller number of student groups and the growing disparity between the amount of money requested, the amount of money allocated, and the amount of money spent.¹²⁰

Current System

The SAF appropriations process has not changed significantly since the *Rosenberger* decision. Funded by mandatory student fees, the SAF consists of approximately \$600,000, which is distributed to about 300 student groups each year.¹²¹ To be eligible for SAF funding, a student group must become a Contracted Independent Organization (CIO). CIO status is available to any group with a majority-student membership and officers that are full-time, fee-paying students.¹²² There are over 500 registered CIO’s and most, but not all, are eligible for SAF funding. Fundable organizations must fall into one of thirteen categories defined by the Board of Visitors.¹²³

Once a year each spring, CIO’s seeking funding for the next year must submit proposed budgets to the Appropriations Committee. This committee is composed of students nominated by the Vice-President for Organizations and approved by the Student Council Representative Body.¹²⁴ Eight types of activities are excluded from SAF funding: religious activities, social expenses, philanthropic contributions, political activities, activities that would jeopardize the University’s tax-exempt status, fundraising expenses,

¹¹⁹ “CIO’s Give Feedback on Reform,” *The Cavalier Daily* (Nov. 11, 2004).

¹²⁰ Interview with Rebecca Keyworth, University of Virginia Student Council Vice President for Organizations (Nov. 29, 2004).

¹²¹ *Id.*

¹²² CIO Treasurer’s Manual at 3. *See also* *Rosenberger*, 515 U.S. at 823.

¹²³ *Id.* at 3-4.

¹²⁴ Interview with Rebecca Keyworth.

bank charges, and expenses incurred in the appropriations process.¹²⁵ Each CIO is given a 15-minute hearing and the Appropriations Committee determines an allocation amount based on nine criteria: (1) group size; (2) self-sufficiency; (3) uniqueness; (4) community benefit; (5) history of fiscal responsibility and programs; (6) justifiability of expenses; (7) likelihood that activities will occur as planned; (8) availability of SAF funds; and (9) evaluation of line items. If a CIO is dissatisfied with the amount allocated by the Appropriations Committee, the CIO may appeal to the Student Council. A final appeal can be made to the Student Activities Committee, a University faculty/student committee that oversees the student activity fee fund under authority of the Vice President for Student Affairs.¹²⁶

New SAF System

In January 2004, the Student Activities Committee proposed revisions to the Board of Visitors Guidelines governing the Student Activity Fund.¹²⁷ This proposal was adopted at the Board of Visitors meeting on February 6-7, 2004.¹²⁸ During the summer of 2004, a task force composed of University students and administrators formulated three possible ways to amend the Student Activities Fund appropriations process.¹²⁹ The first proposal divided student organizations into ten categories (club sports, political, religious, etc.) and let the Student Council allocate a budget to each category. Although this kind of categorization is most conducive to viewpoint balancing in each area of

¹²⁵ CIO Treasurer's Manual at 7-8. *See also* Rosenberger, 515 U.S. at 825.

¹²⁶ Minutes of University of Virginia Board of Visitors Meeting of the Student Affairs and Athletics Committee (Jan. 16, 2004) *available at* <http://www.virginia.edu/bov/studentminutes.html> (2004).

¹²⁷ *Id.* at 2.

¹²⁸ Minutes of the February, 2004, Meeting of the Board of Visitors (February 5-7, 2004) *available at* <http://www.virginia.edu/bov/publicminutes.html> (2004).

¹²⁹ "CIO's Give Feedback on Reform."

student activity, it was not well-received by students wary of predetermined quotas.¹³⁰

The second proposal allowed the Student Council to emphasize initiatives each year such as “cultural awareness” or “civic participation” and allowed rolling grant requests throughout the year. This proposal received the harshest criticism from students because, as one student complained, “This plan places the representative body in a position where they get to decide value and worth with organizations.”¹³¹ Like the Supreme Court, the students were concerned with the risk of viewpoint discrimination. The third proposal received the best response from the student body and was approved by the Student Council on December 7, 2004.¹³² It divides SAF funding into two processes. Travel and activity expenses are moved to a rolling process to avoid allocating funds for events that do not occur. Operational expenses are governed by the original yearly SAF funding procedure.¹³³

If *Southworth* is construed narrowly, the University of Virginia SAF procedures would be upheld. There are no policies that discriminate based on viewpoint and there is no referendum funding mechanism. However, if the Fourth Circuit adopts the reasoning of the Seventh Circuit, they would find several problems with the new procedure. The total absence of the word “viewpoint neutrality” or any affirmative assertion that viewpoint will not be a criterion will make the procedure suspect. The move to rolling appropriations may make viewpoint balancing decisions difficult. The consideration of past performance would likely be banned as such a criterion was explicitly banned in the Seventh Circuit.

¹³⁰ Rebecca Keyworth.

¹³¹ “CIO’s Give Feedback on Reform.”

¹³² “Council passes SAF allocation reform bill,” *The Cavalier Daily* (Dec. 8, 2004).

¹³³ FB04-32: Bill to Amend the Bylaws *available at* <http://www.uvstudentcouncil.com/archives/legislation.html> (November 30, 2004).

Under the two-step test proposed in this paper, the new SAF procedure would be upheld in full. The policies governing fundable expenditures are viewpoint neutral, having complied in full with *Rosenberger*. The political process of student government protects the students from compelled speech, and there is no organization receiving a dedicated percentage of the student activity fund. It is interesting to note that the students themselves rejected a viewpoint-based regulation while also rejecting one that accommodated viewpoint balancing. The democratic process created a fair solution without the intrusion of the courts.

Conclusion

The majority in *Southworth* noted two alternative funding schemes that could avoid the viewpoint neutrality scrutiny. First, they suggested “some type of optional or refund system” that they theorize could “allow each student to list those causes which he or she will or will not support.”¹³⁴ The Court also notes that the analysis would be different if “the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content.”¹³⁵ If that were the case, the University would be “accountable to the electorate and the political process for its advocacy” and traditional political controls would presumably provide sufficient protection.¹³⁶

The reasoning behind the second alternative rings hollow in light of the campaign finance cases and the role of student government in the process. The first alternative is curious when compared with the referendum system the Court struck down. If every club were funded according to the number of students that were willing to support it, the

¹³⁴ *Southworth*, 529 U.S. at 232.

¹³⁵ *Id.* at 229.

¹³⁶ *Id.* at 235.

system would certainly be one that “substitutes majority determinations for viewpoint neutrality.”¹³⁷ Representative democracy, especially in an environment with hundreds of competing interests and more clubs than appropriations committee members, is actually one of the best systems for protecting minority interests. With no prompting, the students at the University of Virginia recognized the dangers of viewpoint discrimination and the inequity of viewpoint balancing. The success of this student-driven reform shows that the speculative fears of *Southworth* are unfounded and that student democracy is well-equipped to distribute funds in a fair and balanced manner.

In an effort to reduce the student activity fee problem to a single principle, the *Southworth* opinion missed the important questions. A two-step analysis would have been more appropriate to properly treat the separate access and distribution issues. As it stands now, the *Southworth* opinion leaves the law ambiguous regarding student activity fees. If a liberal reading of *Southworth* leads judges to rewrite student government bylaws across the country, self-governing democracies will be needlessly threatened. The legacy of *Southworth* should not be a progression from viewpoint neutrality to viewpoint balancing,¹³⁸ and *Southworth* should not stand for a presumption against majoritarian processes.¹³⁹ The precedent of *Southworth* should simply be that, when the government creates a fund to promote speech, access should not be limited by viewpoint and the distribution of funds should not compel personal speech or membership.¹⁴⁰

¹³⁷ Id.

¹³⁸ See, e.g. *Southworth*, 307 F.3d 566.

¹³⁹ See *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 291, 120 S.Ct. 2266, 2269 (2000) citing *Southworth*, 529 U.S. at 235.

¹⁴⁰ See, e.g. *McNally*, 203 Ariz. 425.