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## **Southworth v. Grebe: The Conservative Utilization of "Negative" First Amendment Rights to Attack Diversity of Thought at Public Universities**

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# COMMENT

## *SOUTHWORTH V. GREBE*: THE CONSERVATIVE UTILIZATION OF “NEGATIVE” FIRST AMENDMENT RIGHTS TO ATTACK DIVERSITY OF THOUGHT AT PUBLIC UNIVERSITIES

“It were not best that we should all think alike; it is difference of opinion that makes horse-races.”<sup>1</sup>

### INTRODUCTION

The First Amendment to the United States Constitution is popularly celebrated for its protection of free speech, the cornerstone of academic thought. Unfortunately, a right-wing legal attack on the University of Wisconsin-Madison’s (“UWM”) mandatory student fee program has utilized the same First Amendment to squelch the extracurricular debate that makes the university a “marketplace of ideas.”<sup>2</sup> In *Southworth v. Grebe*,<sup>3</sup> the Alliance Defense Fund (“ADF”)<sup>4</sup>, a conservative

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<sup>1</sup> MARK TWAIN, PUDDN’HEAD WILSON 115 (Bantam Books 1984) (1894) (from Puddn’head Wilson’s Calendar).

<sup>2</sup> See *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (Brennan, J.) (“The classroom is peculiarly the ‘marketplace of ideas.’”).

<sup>3</sup> 151 F.3d 717 (7th Cir. 1998), *reh’g denied*, 157 F.3d 1124, *cert. granted*, 119 S. Ct. 1332 (Mar. 29, 1999).

<sup>4</sup> See Eric Brakken, *Right-Wing Unleashes Campaign Against Student Activities*, INFUSION: THE NATIONAL MAGAZINE FOR PROGRESSIVE STUDENT ACTIVISTS, Oct. 1998, at 13. *Southworth* is one lawsuit in a larger effort to “de-fund the left.” *Id.* ADF currently has a nearly identical lawsuit pending against the University of Minnesota. See *id.*

ADF’s activity is expected to increase in the next year. In an interview with the Minnesota Daily, Fund President Alan Sears pledged that ADF will file suit against six colleges in the next year and spend half a million dollars on the issue. They hope that their investment will result in a ruling by the Supreme Court.

*Id.* In fact, the Regents appealed the *Southworth* ruling to the United States Su-

legal organization, mounted a clever attack on UWM's mandatory fee program by relying on a body of First Amendment case law that ensures individuals' "negative," or "corollary," speech and association rights.<sup>5</sup> These "negative" rights of the First Amendment are the inverse of the affirmative speech and association guarantees most often equated with the Constitution. "Negative" First Amendment rights have evolved, mostly in the area of labor law,<sup>6</sup> to protect individuals from government-compelled speech and association, essentially guaranteeing corollary rights *not* to speak or to associate. Couched in language heralding individual freedoms, the ADF mounted an attack on diverse student debate by employing this body of "negative" First Amendment case law to a paradoxical conclusion.

In *Southworth*, the ADF represented three UWM students, "self described members of the extreme Christian Right,"<sup>7</sup> in a lawsuit challenging the Wisconsin Board of Regents' ("Board of Regents" or "Regents") funding of eighteen left-leaning student organizations with mandatory activity fees. The conservative, or "objecting,"<sup>8</sup> students claimed that the Regents had violated their "negative" First Amendment rights not to speak and associate by allocating a portion of their mandatory activity fees to student-run "political and ideological" organizations to

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preme Court, which granted certiorari, 119 S. Ct. 1332 (Mar. 29, 1999), proving ADF's investment on this issue a worthwhile one. For more information about the activities of the ADF, including a list sampling the cases that have come before the United States Supreme Court with the ADF's Assistance, visit their website at <[www.alliancedefensefund.org](http://www.alliancedefensefund.org)>.

<sup>5</sup> See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Chicago Teacher's Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Brotherhood of Ry., Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, 466 U.S. 435 (1984); *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); see also Victor Brudney, *Association, Advocacy and The First Amendment*, 4 WM. & MARY BILL RTS. J. 1, 11 (1995) ("Individuals may be said to have a negative speech interest—i.e., an interest in remaining silent and not being forced or 'improperly' pressured to speak.").

<sup>6</sup> See *supra* note 5.

<sup>7</sup> Brakken, *supra* note 4, at 13.

<sup>8</sup> The court refers to the conservative students in *Southworth* as "objecting students" because they disagree with the political and ideological views of the liberal organizations funded by their mandatory student activity fees. *Southworth*, 151 F.3d at 720. This Comment also refers to the conservative students as "objecting students."

which they were morally and ideologically opposed.<sup>9</sup> Convinced of a traditional First Amendment triumph, a three judge panel of the Seventh Circuit ruled in favor of the objecting students, holding that the Regents had violated the objecting students' speech rights by allocating a portion of the mandatory fees to the so-called "liberal" student groups.<sup>10</sup> As a result, the *Southworth* holding yields grave political, legal and educational results.

A "robust exchange of ideas"<sup>11</sup> is fundamental to all educational institutions and the democracy that they protect. Universities play a vital role in encouraging the "robust exchange of ideas" and developing the discourse that informs democratic choice.<sup>12</sup> "[T]he nation's fundamental civic values are forged in the intellectual fires of its college campuses . . . ."<sup>13</sup> Accordingly, the UWM broadly aims, "to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities . . . ."<sup>14</sup> Regrettably, the UWM's mission was significantly frustrated by the Seventh Circuit decision in *Southworth*. The ruling complicates and renders impractical the continuance of the UWM's support and encouragement of extracurricular political and ideological debate among student groups of various political and religious affiliations. Without sufficient funding, the student organizations which foster the "diverse debate" that is critical to the university's educational mission will largely cease to exist, leaving only a more uniform and colorless educational institution.

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<sup>9</sup> *Southworth*, 151 F.3d at 718.

<sup>10</sup> *Id.* at 733.

<sup>11</sup> See *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues . . . .'").

<sup>12</sup> See *Sweezy v. New Hampshire*, 684 U.S. 234, 250 (1957) (holding that a professor's contempt conviction for his refusal to respond to inquiries concerning his political affiliations and the content of his lectures was an invasion of the professor's academic freedom and political expression.) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.").

<sup>13</sup> *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 527 (Cal. 1993) (Arabian, J., dissenting).

<sup>14</sup> WIS. STAT. ANN. § 36.01(2) (West 1998).

Politically, the *Southworth* decision encourages well-funded<sup>15</sup> conservative organizations like the ADF to initiate law suits aiming to silence the viewpoints of left-leaning organizations. The decision demonstrates how a conservative legal organization can utilize the federal courts, and the discourse of individual rights, to effect an anti-democratic purpose: the defunding of political and social groups which foster ideologies inimical to its own.

Moreover, the Seventh Circuit's analysis failed to offer a cogent standard for reviewing the constitutionality of mandatory fee expenditures at public universities. The court did not clearly articulate whether the Regents' allocation of mandatory student fees to political and ideological groups could be justified by a "vital", "legitimate" or "important" interest in education. Likewise, in a patently legalistic manner, the court focused only on the impact of the fee program on the objecting students and never considered the devastating practical effects its ruling would have on the student organizations relying on the funding.<sup>16</sup> Furthermore, the court relied on the "negative" First Amendment doctrine, which evolved mostly in the context of labor law, rendering it inapplicable and largely inapposite to the university setting.

*Southworth* presents the problem of dueling First Amendment interests: the proscription of compelled funding of speech and association and the protection of uninhibited expression. The "negative" First Amendment absolutes,<sup>17</sup> forged largely in the labor context unfold significant contradictions when imported into the educational setting. The result is an Amendment that steps on its own toes, as demonstrated in *Southworth* by the clever but troublesome use of the First

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<sup>15</sup> Brakken, *supra* note 4, at 13. ADF is listed as maintaining an annual budget of \$5 million, with half a million dollars to spend on this issue. *See id.*

<sup>16</sup> Moreover, notably, traditional, positive First Amendment guarantees apply to public universities and protect the speech rights of the left-leaning ("political and ideological") student organizations. *See Healy v. James*, 408 U.S. 169 (1972) (holding that student groups were protected by the First Amendment); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (holding that students' First Amendment right to protest the Vietnam War was only forbidden once the protest "substantially and materially" interfered with discipline).

<sup>17</sup> *See Smith*, 844 P.2d at 533 (Arabian, J., dissenting) ("I acknowledge that the resolution of conflicting interests that I have set forth may not satisfy those who prefer First Amendment absolutes.").

Amendment to effectively silence the exchange of diverse viewpoints that the amendment aims to protect.

Part I of this Comment details the cases that form the “negative” speech and association rights doctrine, setting the backdrop for the Seventh Circuit’s analysis in *Southworth*. Part II discusses the *Southworth* decision. Part III examines the fundamental problems with the Seventh Circuit’s analysis in *Southworth*. Lastly, Part IV considers, in light of *Southworth*, the plausible arguments left to defend the constitutionality of the allocation of mandatory student fees to political and ideological campus groups.

## I. THE FIRST AMENDMENT AND MANDATORY FEE CASES

While the greater part of First Amendment case law respecting the guarantees of speech and association considers the limits on government abridgment of these guarantees, there is a corollary body of case law that recognizes the “negative” rights of an individual *not* to speak or associate.<sup>18</sup> These “negative” rights insure “individual freedom of mind,”<sup>19</sup> which is in turn justified by three canonical First Amendment principles: guarding “‘truth’ in the ‘marketplace of ideas,’ facilitating representative democracy and self-government, and promoting individual autonomy, self-expression and self-fulfillment.”<sup>20</sup> While the rights *not* to speak and *not* to associate are not expressly guaranteed by the First Amendment,<sup>21</sup> they have evolved as ancillary speech rights.<sup>22</sup>

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<sup>18</sup> See *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); see also *Brudney supra* note 5, at 11.

<sup>19</sup> See *Wooley*, 430 U.S. at 714 (“The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”); *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>20</sup> GERALD GUNTHER, KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 1025 (13th ed. 1997); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-1, at 576 (1978).

<sup>21</sup> The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

<sup>22</sup> See GUNTHER, *supra* note 20, at 1361; see also *Southworth v. Grebe*, 151

### A. *The Right Not To Speak*

A study of the "negative" rights guaranteed by the First Amendment necessarily begins in 1943 with *West Virginia Board of Education v. Barnette*,<sup>23</sup> where the United States Supreme Court declared that a school board resolution compelling all students to salute and pledge their allegiance to the American flag was unconstitutional.<sup>24</sup> Walter Barnette, a Jehovah's Witness, challenged the constitutionality of the forced salute and pledge, claiming that it infringed on his religious belief that the flag is a "graven image" within the command of the Book of Exodus.<sup>25</sup> The Court found that Barnette's right to dissent outweighed the nationalism the school board sought to imbue.<sup>26</sup> Thus, the Court held that the compelled salute "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>27</sup> Justice Jackson, in an oft-quoted sentence, poetically began the construction of "negative" speech rights under the First Amendment:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>28</sup>

Later constitutional challenges looked to this "fixed star" to enjoin government compulsion of speech and association. In *Wooley v. Maynard*,<sup>29</sup> plaintiffs Mr. and Mrs. Maynard sought injunctive and declaratory relief against the enforcement of a

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F.3d 717, 722 (7th Cir. 1998), *reh'g denied*, 157 F.3d 1124, *cert. granted*, 119 S. Ct. 1332 (Mar. 29, 1999) ("The 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.") (citations omitted).

<sup>23</sup> 319 U.S. 624 (1943). Three years before *Barnette*, the Supreme Court sustained a compulsory flag salute by denying a free exercise exemption in *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940). However, *Gobitis* was overruled in *Barnette*, thus, commencing the strand of case law granting a First Amendment right not to speak.

<sup>24</sup> See *Barnette*, 319 U.S. at 626.

<sup>25</sup> *Id.* at 629.

<sup>26</sup> See *id.* at 641.

<sup>27</sup> *Id.* at 642.

<sup>28</sup> *Id.*

<sup>29</sup> 430 U.S. 705 (1977).

New Hampshire law criminalizing the act of obscuring the "Live Free or Die" motto on the state license plate.<sup>30</sup> The Maynards, both Jehovah's Witnesses, had covered the motto on their car's license plate because it conflicted with their religious belief that "life is more precious than freedom."<sup>31</sup> The Maynards challenged the constitutionality of the law as it effectively forced them to display a slogan that they found "morally, ethically, religiously and politically abhorrent."<sup>32</sup> Relying heavily on *Barnette*, the Supreme Court found, "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"<sup>33</sup> Here, like the school board's interest in promoting nationalism in *Barnette*, the Court held that New Hampshire's interest in compelling the display of the state motto did not overcome the plaintiff's First Amendment protections.<sup>34</sup>

### B. *Compulsory Fee Cases*

While the "right of association" is not itself a right expressly granted by the First Amendment,<sup>35</sup> the phrase has developed into a guarantee formed by the aggregate meaning of those rights that are expressly granted.<sup>36</sup> Given the right to associate, the ancillary right *not* to associate has likewise evolved.<sup>37</sup> The bulk of challenges claiming a right *not* to associate has been brought by individuals subject to a compulsory

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<sup>30</sup> *Id.* at 709.

<sup>31</sup> *Id.* at 708 n.2.

<sup>32</sup> *Id.* at 713.

<sup>33</sup> *Id.* at 714.

<sup>34</sup> See *Wooley*, 430 U.S. at 717. The State claimed that the compulsory display of the motto was justified by its interest in (1) facilitating the identification of vehicles and (2) promoting the appreciation of history, individualism and state pride. See *id.* at 716. The Court found that these interests were legitimate, but that the State had not chosen a constitutional means of promoting them. See *id.* at 717.

<sup>35</sup> See *supra* note 21.

<sup>36</sup> See *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that it was unconstitutional for Alabama to compel the NAACP to furnish a membership list).

<sup>37</sup> See *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Chicago Teacher's Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Brotherhood of Ry., Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).



fee. Compulsory fee cases often arise in the labor context, when non-union employees challenge the expenditure of fees from an "agency shop" provision,<sup>38</sup> or in the context of the integrated bar, when lawyers challenge the use of bar dues.<sup>39</sup> In all of the compulsory fee cases, the Supreme Court recognizes the impact such fees may have on the First Amendment rights of non-union employees or integrated bar members, yet, in its analysis, the Court rarely takes into consideration the speech and association rights separately or specifically.<sup>40</sup> As a result, the body of compulsory fee cases creates an indistinct hybridization of the negative speech and association rights of the First Amendment.

An agency shop provision requires that, as a condition of employment, all non-union employees in a bargaining unit pay the union a service fee for the benefits of representation.<sup>41</sup> In *Railway Employees' Department v. Hanson*,<sup>42</sup> the United States Supreme Court reviewed a decision of the Nebraska Supreme Court upholding an injunction of a union shop provision on First Amendment grounds of freedom of association.<sup>43</sup> The

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<sup>38</sup> *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Chicago Teacher's Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Brotherhood of Ry., Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, 466 U.S. 435 (1984); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977).

<sup>39</sup> *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); *Lathrop v. Donahue*, 367 U.S. 820 (1961).

<sup>40</sup> *See, e.g., Abood*, 431 U.S. at 222.

<sup>41</sup> This Comment uses the terms "agency shop" and "union shop" interchangeably, so a brief explanation of their differences is necessary for accuracy. Under a union shop provision, an employee must become a member of the bargaining unit's union within a certain time after being hired. In contrast, an agency shop provision requires that an employee who chooses not to join the union pay a service fee to the union, usually equal in amount to union dues. Under federal case law, the courts have viewed the union shop agreement as the "practical equivalent" to an agency shop provision. For an explanation, see Martin H. Malin, *The Legal Status of Union Security Fee Arbitration after Chicago Teachers Union v. Hudson*, 29 B.C. L. REV. 857, 857 n.2 (1988); *see also* *NLRB v. General Motors Corp.*, 373 U.S. 734, 744 (1963) ("Such a difference between the union and agency shop may be of great importance in some contexts, but for present purposes it is more formal than real."); *Abood*, 431 U.S. at 217 n.10. However, a significant difference between the two provisions seems worthy of mention. Unlike an employee forced to join the union under a union shop provision, a non-union employee under an agency provision only pays a fee to the union and, thus, has no voice in the union's internal democratic process.

<sup>42</sup> 351 U.S. 225 (1956).

<sup>43</sup> *See id.* at 230.

Supreme Court agreed that there were “justiciable questions under the First Amendment”<sup>44</sup> but, nevertheless, reversed the lower court and held that the union shop provision was protected by the Railway Labor Act.<sup>45</sup> The Court recognized that a union shop agreement may infringe on a non-union employee’s First Amendment rights; however, since Congress had protected such agreements under the Railway Labor Act, the Court declined to second guess Congress’ contentious policy decisions.<sup>46</sup> The Court opined that, in protecting union shop provisions, Congress had the legitimate objective of peacefully settling labor disputes.<sup>47</sup>

In *Hanson*, the non-union employees did not challenge the union’s expenditure of fees generated by the union shop provision, but challenged the enforcement and application of the provision itself.<sup>48</sup> The Court noted, however, that “[i]f ‘assessments’ are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented.”<sup>49</sup> Thus, subsequently, in *International Association of Machinists v. Street*,<sup>50</sup> the Supreme Court heard a constitutional challenge to the expenditure of non-union fees generated by a union shop provision.<sup>51</sup> In *Street*, the non-union employees challenged the union’s expenditure of their fees to fund political campaigns for candidates whom they did not support.<sup>52</sup>

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<sup>44</sup> *Id.* at 231.

<sup>45</sup> *See id.* at 233. The Railway Labor Act, enacted by labor and management consensus in 1926, aimed to avoid the disruptions in commerce caused by railway labor disputes. *See* Harry A. Rissetto, *Overview of the Railway Labor Act*, SA31 ALI-ABA 1, 3, 9 (1996). At issue in *Hanson* was section 2, Eleventh, an amendment of 1951 that annulled the Act’s prohibition of union shop agreements. *See Hanson*, 351 U.S. at 230. Section 2, Eleventh, specifically provided for union shop agreements. *See id.* at 229.

<sup>46</sup> *See Hanson*, 351 U.S. at 233. Justice Douglas wrote, “Congress, acting within its constitutional powers, has the final say on policy issues.” *Id.* at 234. Two policies frequently advanced to justify agency shop provisions are the avoidance of a “free-rider” problem and the peaceful settlement of labor disputes. The “free-rider” issue addresses the benefits non-union employees get from union representation. Agency provisions seek to make sure that the union is compensated for its services, as it must consider the interests of all employees in the bargaining unit. *See Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 520-21 (1991).

<sup>47</sup> *See Hanson*, 351 U.S. at 233.

<sup>48</sup> *See id.* at 227.

<sup>49</sup> *Id.* at 235.

<sup>50</sup> 367 U.S. 740 (1961).

<sup>51</sup> *See id.* at 744.

<sup>52</sup> *See id.*

Since *Street* presented constitutional expenditure issues not presented in *Hanson*, the Court reexamined the propriety of the Railway Labor Act.<sup>53</sup> The majority maintained the *Hanson* rule that the Railway Labor Act constitutionally protected union shop provisions, but added that a union's use of fees for political or other causes not germane to collective bargaining is not within the Act's protections.<sup>54</sup> In *Street*, as in *Hanson*, the Court did not rule on the constitutionality of union shop agreements or certain expenditures thereunder. Instead, the Court addressed only whether the relevant portion of the Railway Labor Act was constitutional in its protection of agency shop provisions.<sup>55</sup>

The *Hanson* and *Street* trend of eluding the central First Amendment issues of compelled funding continued in the subsequent cases of *Lathrop v. Donahue*<sup>56</sup> and *Brotherhood of Railway Clerks v. Allen*.<sup>57</sup> In *Lathrop*, a lawyer challenged the constitutionality of both the compulsory dues imposed by the Wisconsin Bar and the Bar's expenditure of such dues to fund political causes which he opposed.<sup>58</sup> The Court was bound by the Supreme Court of Wisconsin's factual determination that the bar dues were not used to influence political and ideological agendas and, thus, only considered the plaintiff's challenge to the imposition of the fee itself.<sup>59</sup> Relying heavily on *Hanson*, the Supreme Court found the Bar had a legitimate end in its policy of "elevating the educational and ethical standards of the Bar to the end of improving the quality of legal

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<sup>53</sup> See *id.* at 747-49.

<sup>54</sup> See *id.* at 768. An activity is considered to be germane to collective bargaining when it speaks to the benefits non-union employees receive from the exclusivity of union representation. See *Street*, 367 U.S. at 761; see also *supra* note 46. Moreover, while the Court found a violation of the Railway Labor Act in *Street*, it did not enjoin the union from funding political causes with objecting employees' fees. See *Street*, 367 U.S. at 775. Instead, the United States Supreme Court remanded to the Georgia Supreme Court for further actions in accordance with the holding of *Hanson*. See *id.*

<sup>55</sup> See *Street*, 367 U.S. at 749-50.

<sup>56</sup> 367 U.S. 820 (1961).

<sup>57</sup> 373 U.S. 113 (1963).

<sup>58</sup> See *Lathrop*, 367 U.S. at 827. The lawyer's "kitchen sink" challenge was based on his rights of "freedom of association, assembly, speech, press, conscience and thought," as well as the due process and equal protection clauses of the Fourteenth Amendment. *Id.* at 828 n.4.

<sup>59</sup> See *id.* at 828.

services.”<sup>60</sup> The Court found no occasion to consider the First Amendment issues raised by the attorney and quoted the dicta of *Hanson*, “[o]n the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.”<sup>61</sup> Thus, the state’s actions were only subject to Supreme Court review concerning the due process clause, of which the Court did not find a violation, and the question of undue burden.<sup>62</sup> The Court found that the public interest promoted outweighed the “slight inconvenience” to the objecting lawyer.<sup>63</sup>

Similarly, in *Allen*, non-union railway employees bound by an agency shop provision challenged the union’s expenditure of fees to fund political activities with which they disagreed and successfully attained an injunction of the expenditures from the North Carolina Superior Court.<sup>64</sup> On appeal, again, the United States Supreme Court did not rule on the First Amendment issues presented by compulsory funding. The Court did, however, reverse the lower court’s injunction because it was inconsistent with *Street*’s requirements that non-union employees make their dissent affirmatively known and that there be a showing of which union expenditures were political in order to effectuate a refund or future remedy.<sup>65</sup>

The Supreme Court addressed a First Amendment challenge to an agency shop provision for the first time, in 1977, in *Abood v. Detroit Board of Education*.<sup>66</sup> The provision required all non-union teachers to pay a service fee to the union in the same amount as union dues.<sup>67</sup> The Supreme Court began its analysis by reviewing *Hanson* and *Street*, and determined that those cases were controlling.<sup>68</sup> Although federal labor law was inapplicable to the state employees in *Abood*, several of the state’s labor provisions mirrored those of the Railway Labor

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<sup>60</sup> *Id.* at 843.

<sup>61</sup> *Id.* at 843 (quoting *Railway Employees’ Dep’t v. Hanson*, 351 U.S. 225, 238 (1956)).

<sup>62</sup> See *Lanthrop*, 367 U.S. at 844.

<sup>63</sup> *Id.*

<sup>64</sup> See *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113, 117 (1963).

<sup>65</sup> See *id.* at 119, 121.

<sup>66</sup> 431 U.S. 209 (1977).

<sup>67</sup> See *id.* at 212.

<sup>68</sup> See *id.* at 222.

Act.<sup>69</sup> Accordingly, the Court held constitutional the funding of union activities that were germane to the purpose of promoting collective bargaining.<sup>70</sup> More significantly, however, the Court further held that the funding of political and ideological activities with which non-union teachers disagreed was a violation of the First Amendment because the activities were unrelated to the purpose of collective bargaining.<sup>71</sup> In *Abood*, the non-union teachers' corollary freedom *not* to associate was recognized because, although the non-union teachers were forced into, not prohibited from, funding political causes, there was still an infringement on their constitutional rights.<sup>72</sup> After citing the famous "fixed star" quote of *Barnette*,<sup>73</sup> the Court explained that "the freedom of belief is no incidental or secondary aspect of the First Amendment's protections."<sup>74</sup>

Following *Abood*, later Supreme Court opinions began to clarify which specific union expenditures of compulsory fees were constitutional and how unconstitutional expenditures could be returned. For example, in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*,<sup>75</sup> the Court explained that union conventions, publications, and litigation incidental to collective bargaining negotiations were constitutional expenditures of non-union members' dues.<sup>76</sup> However, the funding of union organizing and social activities was not germane to the purpose of the compulsory fee, and thus presented a violation of the non-employees' freedom not to associate.<sup>77</sup> Furthermore, the *Ellis* Court held that an agency shop agreement could not require an objecting non-union employee to pay a full service fee, then later rebate the portion representing political expenditures with which the non-union employee did not

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<sup>69</sup> See *id.* at 223.

<sup>70</sup> See *id.* at 232.

<sup>71</sup> See *Abood*, 431 U.S. at 234.

<sup>72</sup> See *id.* at 234.

<sup>73</sup> See *supra* note 28 and accompanying text.

<sup>74</sup> *Abood*, 431 U.S. at 235.

<sup>75</sup> 466 U.S. 435 (1984).

<sup>76</sup> See *id.* at 448-53.

<sup>77</sup> See *id.* at 449.

agree.<sup>78</sup> The Court stated that there were other reasonable alternatives to a rebate system and held that even the temporary commitment of an objecting employee's fee was a violation of the right not to associate.<sup>79</sup>

In *Chicago Teacher's Union v. Hudson*,<sup>80</sup> the Court further shaped the remedy stages of compulsory dues cases when it held that the constitutional collection of an agency fee minimally required "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."<sup>81</sup> In *Hudson*, the Court not only required that the government have a strong enough interest to support an agency shop, it further required a procedure utilizing those burdens in a way that is "carefully tailored to minimize" the First Amendment infringement of the objecting employees' rights.<sup>82</sup> Subsequently, compulsory fee cases have relied on this requirement to justify an application of a strict scrutiny standard when the First Amendment is implicated.<sup>83</sup>

In consonance with *Abood* and its progeny, twenty-one attorneys commenced another challenge to the expenditure of integrated bar dues in *Keller v. State Bar of California*.<sup>84</sup> Unlike the result in *Lathrop* nearly thirty years earlier, in *Keller*, a unanimous Supreme Court held that the Bar's expenditure of dues not germane to its purpose of "regulating the legal profession" and "improving the quality of . . . legal service[s]" violated the objecting lawyers' First Amendment right not to associate.<sup>85</sup> The Court cautioned that "those activities having political or ideological coloration" are not always easy to discern, but found that the challenged funding of gun control and weapons freeze initiatives was clearly of the political and ideological ilk that violated objectors' constitutional rights.<sup>86</sup>

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<sup>78</sup> See *id.*

<sup>79</sup> See *id.* at 444.

<sup>80</sup> 475 U.S. 292 (1986).

<sup>81</sup> *Id.* at 310.

<sup>82</sup> *Id.* at 303.

<sup>83</sup> See, e.g., *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 506 (Cal. 1993).

<sup>84</sup> 496 U.S. 1 (1990).

<sup>85</sup> *Id.* at 14 (citation omitted).

<sup>86</sup> *Id.* at 15, 16.

Lastly, in *Lehnert v. Ferris Faculty Ass'n*,<sup>87</sup> the Supreme Court synthesized nearly fifty years of cases to create a more compartmentalized and seemingly sensible three-prong analysis to determine the constitutionality of the expenditure of objectors' shop fees.<sup>88</sup> For an expenditure of agency shop fees to be valid, *Lehnert* held that it must: "1) be 'germane' to collective-bargaining activity; 2) be justified by the government's vital policy interest in labor peace and avoiding free riders; and 3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop."<sup>89</sup> This three-prong *Lehnert* analysis is the current means by which the courts determine the constitutionality of the expenditure of fees generated by agency shop provisions.

The First Amendment review applied in compulsory fee cases retains a distinctive quality because it evolved from a statutory analysis of the Railway Labor Act's allowance for agency shop agreements. The application of an analysis shaped mostly in the field of labor law to challenges to the appropriation of mandatory student fees presents difficulties due to the inherent differences between the union shop, or integrated bar, and the university.

### C. Challenges to Mandatory Student Fees

The United States Supreme Court has not yet ruled on the constitutionality of compelled funding in the area of mandatory student activity fees at public universities.<sup>90</sup> While *Abood*

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<sup>87</sup> 500 U.S. 507 (1991).

<sup>88</sup> See *id.* at 519.

<sup>89</sup> *Id.*

<sup>90</sup> In *Rosenberger v. Rector*, 515 U.S. 819 (1995) (holding that funding of a religious student newspaper must be considered on a viewpoint neutral basis once a fee-funded forum has been created) (a case on which the ADF was also of counsel), the Court, citing to *Abood* and *Keller*, specifically did not address "the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe." *Id.* at 840. In concurrence, however, Justice O'Connor did recognize "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." *Id.* at 851 (O'Connor, J., concurring). Thus, while not at issue in *Rosenberger*, Justice O'Connor did foreshadow *Southworth* by mentioning the possibility of a First Amendment challenge to certain expenditures of mandatory student fees.

technically occurred in an educational setting, the expenditures at issue were teachers' agency shop fees and, thus, ultimately spoke not to academic issues but rather to labor and employment issues. Conversely, in the student fee cases that follow, students have challenged the expenditure of their mandatory activity fee, which does speak to the definitions and concepts of education.

While the Supreme Court has not yet considered whether the use of mandatory student fees to fund political and ideological student groups violates objecting students' First Amendment rights against compelled speech and association, some circuit and state courts have considered the issue. Perhaps because of case-by-case factual differences as to the challenged group activity, or the varying broadness of the interests offered by the defendant universities, the courts have not decided such issues uniformly.

In 1983, in *Kania v. Fordham*,<sup>91</sup> the Fourth Circuit heard a University of North Carolina student's challenge to the school's use of a portion of his mandatory activity fee to fund a newspaper that expressed viewpoints with which he disagreed.<sup>92</sup> The Fourth Circuit distinguished the student's constitutional challenge from *Abood* by recognizing that the educational setting is inherently different from that of labor relations in a union shop.<sup>93</sup> Applying a modified *Abood* "germaneness" analysis, the court found that a university newspaper is "a vital part of the University's educational mission, and that financing it is germane to the University's duties as an educational institution."<sup>94</sup> The court further distinguished the labor context from the funding of the school newspaper because the nature of the "union viewpoint" was one-sided; whereas, the paper opened a forum for "uninhibited, robust, and wide-open" expression.<sup>95</sup>

The Fifth Circuit rejected an analogous newspaper funding challenge by students of Southwest Texas State University in *Hays v. Supple*.<sup>96</sup> Using the Supreme Court's three prong

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<sup>91</sup> 702 F.2d 475 (4th Cir. 1983).

<sup>92</sup> See *id.* at 477.

<sup>93</sup> See *id.* at 479.

<sup>94</sup> *Id.* at 480.

<sup>95</sup> *Id.* (citation omitted).

<sup>96</sup> 969 F.2d 111 (5th Cir. 1992).



*Lehnert* analysis,<sup>97</sup> the Fifth Circuit held that the University-sponsored newspaper narrowly advanced important government interests because it created a forum for discussion and allowed students to attain journalism experience.<sup>98</sup> In adopting the *Lehnert* analysis, the Fifth Circuit did not specifically distinguish the labor and university contexts as the Fourth Circuit had done in *Kania*. Nevertheless, the Fifth Circuit did focus on the newspaper as the creation of a "forum for public discussion," not the one-sided promotion of a particular viewpoint associated with a political student organization.<sup>99</sup>

In *Galda v. Rutgers*,<sup>100</sup> two years after the first newspaper challenge in *Kania*, students contested the constitutionality of Rutgers' funding of a politically active campus organization. The Third Circuit heard the students' challenge to the university's policy of compelling them to fund NJPIRG<sup>101</sup> with a portion of a mandatory, refundable fee. The circuit court held that the mandatory, refundable fee imposed on objecting students violated their First Amendment rights.<sup>102</sup> Instead of permitting the University to collect the funds—even though these funds were refundable to the students—the court suggested that the university adopt a system of voluntary student contributions to NJPIRG.<sup>103</sup> In weighing the university's interests against the objecting students' interests, the court found

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<sup>97</sup> See *supra* notes 87-89 and accompanying text.

<sup>98</sup> *Hays*, 969 F.2d at 123.

<sup>99</sup> *Id.* at 123-24. The Fifth Circuit distinguished *Hays* from *Galda* because a newspaper, unlike a political organization, does not espouse a particular viewpoint, but instead provides a forum for the expression of a wider array of ideas. See *id.* at 124.

<sup>100</sup> 772 F.2d 1060 (3d Cir. 1985).

<sup>101</sup> The New Jersey Public Interest Research Group ("NJPIRG") is a non-partisan, independent, non-profit corporation that "actively engages in research, lobbying and advocacy for social change." *Id.* at 1061. In *Galda*, although NJPIRG was initially ineligible for student activity fees funding because of its independent nature, it was later funded as a result of a student referendum. See *id.* at 1061-62. The referendum required over 25% of the student body and a majority of the votes cast to approve funding NJPIRG. See *id.*

<sup>102</sup> See *id.* at 1067.

<sup>103</sup> See *Galda*, 772 F.2d at 1068 n.5.

that the educational benefits of NJPIRG were only incidental to its political motives and, further, that such educational benefits could be achieved through a less drastic, alternative means.<sup>104</sup>

The Second Circuit case of *Carroll v. Blinken*<sup>105</sup> presents a challenge similar to that presented in *Galda* by the Rutgers students. In *Carroll*, several SUNY Albany students claimed that the compulsory funding of NYPIRG<sup>106</sup> violated their right against compelled association.<sup>107</sup> Relying on the speech interests protected in *Barnette*, and the analysis of *Abood* and its progeny, the Second Circuit reduced the tension of interests by limiting the university's funding of NYPIRG to on-campus activities.<sup>108</sup> The court found that the interests the state offered<sup>109</sup> to defend funding NYPIRG with student fees were "substantial enough to justify the infringement" on the students' "right against compelled speech."<sup>110</sup> By limiting the activities that the university could fund based on their location, not their content, the court was able to diminish the infringement on the objecting students' rights.<sup>111</sup>

Moreover, adding to the disjunction between the circuits, in *Rounds v. Oregon State Board of Higher Education*<sup>112</sup>—a case decided after *Southworth*—the Ninth Circuit, unlike the Seventh Circuit, rejected a challenge to the constitutionality of the University of Oregon's funding of OSPIRG EF<sup>113</sup> with

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<sup>104</sup> See *id.* at 1065-66.

<sup>105</sup> 957 F.2d 991 (2d Cir. 1992).

<sup>106</sup> New York Public Interest Research Group ("NYPIRG"), like its New Jersey counterpart in *Galda*, is a "non-partisan research and advocacy organization." *Id.* at 994. In a referendum held every two years, the students at SUNY Albany decide whether to fund NYPIRG through their activity fee, and the students have always approved the funding. See *id.*

<sup>107</sup> See *id.* at 995-96.

<sup>108</sup> See *id.* at 1001.

<sup>109</sup> SUNY Albany offered three interests to support the expenditure of activity fees to fund NYPIRG: "1) the general promotion of extracurricular activities, 2) the facilitation of what the district court called 'participatory civics training', and 3) the stimulation of robust campus debate on a variety of public issues." *Carroll*, 957 F.2d at 999.

<sup>110</sup> *Id.* at 1001.

<sup>111</sup> See *id.*

<sup>112</sup> 166 F.3d 1032 (9th Cir. 1999).

<sup>113</sup> Oregon Student Public Interest Research Group Education Fund ("OSPIRG EF"), a non-partisan group like the PIRGs challenged in *Galda* and *Carroll*, aimed to "develop students' potential to become educated and responsible citizens who are

mandatory student activity fees. In this challenge, nearly identical to those in *Galda* and *Carroll*, the Ninth Circuit held that the allocation of mandatory student activities fees to OSPIRG EF did not violate the objecting students' First Amendment right to be free from compelled association.<sup>114</sup> First, the court applied the germaneness doctrine of *Abood*.<sup>115</sup> Finding that OSPIRG EF's programs met the educational objectives of the University and recognizing that the goals of a university are much broader than a labor union or state bar, the court held that the compelled funding of OSPIRG EF's activities was germane to the purpose of education.<sup>116</sup>

Next, applying what it dubbed an "intermediate level of scrutiny," borrowed from *Lehnert*, the Ninth Circuit determined that the funding of OSPIRG EF with mandatory student activity fees was "adequately supported by a governmental interest."<sup>117</sup> Noting that the inquiry is a "fact-sensitive" one, the Ninth Circuit found that the objecting students were not compelled to become members of OSPIRG EF, nor were they compelled to speak any message with which they disagreed.<sup>118</sup> Moreover, the court analogized *Rounds* to *Kania*,<sup>119</sup> a newspaper case, determining that OSPIRG EF was not, and was not perceived to be, speaking for all the students in attendance at the University of Oregon.<sup>120</sup> Accordingly, the Ninth Circuit, unlike the Seventh Circuit in *Southworth*, allowed the University of Oregon to fund OSPIRG EF with mandatory student fees because the organization was part of a "limited public forum"—one that embraces a wide array of groups representing diverse interests.<sup>121</sup>

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informed about the American legislative process and political system." *Id.* at 1034; see *supra* notes 101 and 106.

<sup>114</sup> See *Rounds*, 166 F.3d at 1037.

<sup>115</sup> See *id.* ("The germaneness doctrine of *Abood* does not silence organizational speech; rather, it requires only that ideological activities not germane to an organization's purpose be funded through sources other than compulsory fees.").

<sup>116</sup> See *id.* at 1039.

<sup>117</sup> *Id.* at 1037.

<sup>118</sup> *Id.* at 1037-38.

<sup>119</sup> See *supra* notes 91-95 and accompanying text.

<sup>120</sup> See *Rounds*, 166 F.3d at 1038 (citing *Kania v. Fordham*, 702 F.2d 475, 478 n.6 (4th Cir. 1983)).

<sup>121</sup> *Id.* at 1039. The Ninth Circuit distinguished *Rounds* from *Southworth* based on factual grounds and noted, "[t]o the extent that *Southworth* holds that a public university may not constitutionally establish and fund a limited public forum for

Additionally, on the state level, in *Smith v. Regents of the University of California*,<sup>122</sup> over a strongly worded dissent, the California Supreme Court extracted principles from the *Carroll*, *Galda*, *Keller* and *Abood* line of cases and observed that the use of mandatory student activity fees are generally permissible if "germane to the university's educational mission."<sup>123</sup> However, the court cautioned that "at some point" the educational benefits of the funded group become incidental to its political objectives and no longer justify the burden on objecting students' speech and association rights.<sup>124</sup> The California court held that "the constitutional guarantees of free speech and association do not permit the state to make speech a matter of compulsion and coercion," and found that the objecting students were unduly burdened by the compulsion to fund the political and ideological groups whose purposes were only incidentally educational.<sup>125</sup> The California Supreme Court stressed that the decision was not about the abridgment of the political and ideological organizations' association and speech rights, but was, in fact, about the objecting students' guarantee of freedom from compulsion to exercise those same rights.<sup>126</sup>

The objecting students in *Smith* challenged the funding of a laundry list of 14 student organizations that pursued political and ideological goals.<sup>127</sup> This challenge was unlike *Galda* and *Carroll*—and *Rounds*, which followed *Smith*—because objecting students in those cases exclusively challenged the funding of PIRGs.<sup>128</sup> In *Smith*, the objecting students challenged the funding of environmental, feminist, gay and lesbian, human rights and other progressive student organizations.<sup>129</sup> This distinction is significant because the objecting students who challenged the funding of NYPIRG, NJPIRG or ORSPIRG were objecting to a singular, self-described partisan student

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the expression of diverse viewpoints, we respectfully disagree . . . ." *Id.* at 1040 n.5.

<sup>122</sup> 844 P.2d 500 (Cal. 1993).

<sup>123</sup> *Id.* at 511.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 503.

<sup>126</sup> *See id.*

<sup>127</sup> *See Smith*, 844 P.2d at 504-05.

<sup>128</sup> *See supra* notes 101, 106 and 113 and accompanying text.

<sup>129</sup> *See Smith*, 844 P.2d at 504-05.

group. Conversely, in *Smith*—and *Southworth* as well—the objecting students cited a vast array of student organizations that are only related because they can be construed as representing liberal or progressive politics.

In dissent, Justice Arabian termed the majority's decision a "jurisprudential debacle" and argued that all on-campus speech is germane to the educational mission, and, thus, justified by compelling state interests.<sup>130</sup> Justice Arabian further argued that the court should have deferred to the University's "considered academic judgment" instead of creating the "ill-conceived dichotomy" between the political and the educational.<sup>131</sup> The dissenting Justice's opinion stressed the "altogether different" scope of a University campus and a union shop, remarking that a university's "interests are not narrowly vocational, but broadly educational."<sup>132</sup> Unlike the majority in *Smith*, the dissent recognized the possible devastating effects of the holding on the positive speech rights of the political and ideological organizations.<sup>133</sup> Appreciating the gravity and fragility of free speech on a university campus, Justice Arabian warned, "[w]e must approach our task, therefore, 'with special caution,' understanding that the institution's continued vitality and independence [sic] are contingent upon its freedom from disruptive judicial interference."<sup>134</sup>

## II. *SOUTHWORTH V. GREBE*

### A. *Facts*

In 1996, Scott Southworth, Amy Schoepke and Keith Bannach, three law students<sup>135</sup> enrolled in the University of Wisconsin-Madison ("UWM"), commenced an action in the District Court for the Western District of Wisconsin challenging

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<sup>130</sup> *Id.* at 518.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 519.

<sup>133</sup> *See id.* at 521.

<sup>134</sup> *Smith*, 844 P.2d at 521 (citation omitted).

<sup>135</sup> At the time the action was commenced, Southworth and Bannach were in their third year of law school and Schoepke was in her second year. *See Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. Dist. LEXIS 20980, at \*1, \*2 (W.D. Wis. Nov. 29, 1996).

aspects of the Board of Regents' mandatory student activity fee policy.<sup>136</sup> The three students sought injunctive and declaratory relief, alleging that the mandatory fee policy violated their rights to freedom of speech, freedom of association, free exercise of religion, and their rights under the Religious Freedom Restoration Act, because a portion of the funds generated by the fee were allocated to organizations that engaged in political and ideological activities to which the students objected.<sup>137</sup>

At UWM, student activity fees are allocated to a wide variety of student organizations.<sup>138</sup> The plaintiffs in *Southworth* challenged only the funding of politically and ideologically active organizations to which they objected.<sup>139</sup> The students specifically cited and objected to eighteen different progressive campus organizations that received funding from mandatory student fees and engaged in political and ideological activities, speech and advocacy.<sup>140</sup> The eighteen politically and ideologically active organizations offered as evidence by the objecting students were: WISPIRG; the Lesbian, Gay, Bisexual Campus Center; the Campus Women's Center; the UW Greens; the Madison AIDS Support Network; the International Socialist Organization; The Ten Percent Society; the Progressive Student Network; Amnesty International; United States Student Association; Community Action Latin America; La Colectiva Cultural de Aztlan; The Militant Student Union of the University of Wisconsin; the Student Labor Action Coalition; Student Solidarity; Students of National Organization of Women; MADPAC; and Madison Treaty Rights Support

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<sup>136</sup> See *id.* at \*1-\*2. The activity fee policy of the Regents is mandatory because students cannot graduate or receive their grade reports if they have not paid the semester's fee. See *id.* at \*2-\*3.

<sup>137</sup> See *id.* at \*1. The district court held that there was a violation of the objecting students' rights to free speech and association and, thus, did not find the need to further address the other alleged violations. See *id.* at \*36. The Supreme Court declared the Religious Freedom Restoration Act unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Therefore, on appeal, the circuit court only heard arguments on the objecting students' free speech and association claims. See *Southworth v. Grebe*, 151 F.3d 717, 719 (7th Cir. 1998). After its analysis of the free speech claim, the court did not find it necessary to consider what the alleged violation of the association clause "would add to the students' claim." *Id.* at 733 n.15. This Comment, thus, focuses on the objecting students' free speech claim.

<sup>138</sup> See *Southworth*, 151 F.3d at 720.

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

Group.<sup>141</sup> These eighteen challenged groups were involved in lobbying, demonstrating, rallying, marching, distributing newsletters and hosting web-pages that promoted political causes.<sup>142</sup> The objecting students claimed to have deeply held religious beliefs that conflicted with the views of the organizations cited and argued that their First Amendment rights were violated because the Regents' fee policy compelled them to fund these organizations.<sup>143</sup>

Under section 36.09 of the Wisconsin Code, the Board of Regents has ultimate control over the allocation of the funds generated by student activity fees.<sup>144</sup> The sum of the funds generated by the activity fees is classified by the Regents as either allocable or non-allocable.<sup>145</sup> The Regents automatically budget the non-allocable funds for operating costs of campus programs such as recreational sports and health services.<sup>146</sup> In contrast, the allocable funds are distributed by grants from the student representative body, the Associated Students of Madison ("ASM").<sup>147</sup> These allocable funds are budgeted to a wide array of student organizations, including those political and ideological groups cited by the objecting students.<sup>148</sup> Thus, the allocable portion of the funds generated by the student activity fees is the only expenditure at issue in *Southworth*.<sup>149</sup>

These allocable fees are the source of funding for the ASM budget and General Student Services Fund ("GSSF").<sup>150</sup> In

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<sup>141</sup> See *id.*

<sup>142</sup> See *id.* at 720-21 (the court specifically describes the political activities of WISPIRG, UW Greens, Progressive Student Network, International Socialist Organization, Campus Women's Center, the Ten Percent Society and Amnesty International).

<sup>143</sup> See *Southworth*, 151 F.3d at 718.

<sup>144</sup> Section 36.09(5) provides in part:

[S]tudents shall have primary responsibility for the formulation and review of policies concerning life, services, and interests. Students in consultation with the chancellor and subject to the final confirmation of the board shall have the responsibility for the disposition of those student fees which constitute substantial support for campus student activities.

WIS. STAT. ANN. § 36.09(5) (West 1998).

<sup>145</sup> See *Southworth*, 151 F.3d at 719.

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> See *id.*; see also *supra* note 141 and accompanying text.

<sup>149</sup> See *Southworth*, 151 F.3d at 719.

<sup>150</sup> See *id.*

turn, the ASM budget and GSSF are distributed to other student organizations.<sup>151</sup> Both the ASM and GSSF have different allocation procedures.<sup>152</sup>

The ASM budget funds student groups, but they must be registered student organizations to qualify.<sup>153</sup> These operation grants are not available to recipient organizations of the GSSF.<sup>154</sup> The registered student organization "must be a formalized not-for-profit group, composed mainly, but not necessarily exclusively, of students, and controlled and directed by students."<sup>155</sup> After reviewing an application, the ASM may grant the organization funding for operational costs from the ASM budget.<sup>156</sup>

The GSSF is also allocated to student organizations by a student committee.<sup>157</sup> Registered student organizations, university departments and community-based service organizations are eligible for funding from the GSSF.<sup>158</sup> The committee reviews an organization's application and then determines whether to grant or deny the organization's request for funding.<sup>159</sup> If the committee approves a grant to the applicant organization, it then decides the amount budgeted to the organization.<sup>160</sup>

In addition to submitting an application to the ASM, or the committee that distributes grants from the GSSF, a registered student organization may seek funding from these budgets by student referendum.<sup>161</sup> WISPIRG, one of the organi-

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<sup>151</sup> *See id.*

<sup>152</sup> *See id.*

<sup>153</sup> *See id.* at 719-20. In the 1995-1996 academic year the ASM distributed \$109,277 in student fees to campus organizations. *See Southworth*, 151 F.3d at 719.

<sup>154</sup> *See* Associated Students of Madison Bylaws, Art. 7, § 4(d)(3) (1998) (on file with the *Brooklyn Law Review*).

<sup>155</sup> *Southworth*, 151 F.3d at 720.

<sup>156</sup> *See id.* at 719. Such operational costs may include related travel expenses or funding to sponsor an event. *See id.* at 720.

<sup>157</sup> *See id.* at 720. The committee is known on the UWM campus as the Student Services Finance Committee ("SSFC"). The committee consists of students elected to the ASM. *See id.* at 719. During the 1995-1996 academic year the SSFC distributed roughly \$109,277 in student fees to campus organizations. *See Southworth*, 151 F.3d at 720.

<sup>158</sup> *See id.* at 720.

<sup>159</sup> *See id.*

<sup>160</sup> *See id.*

<sup>161</sup> *See id.*



zations to which the objecting students cite, secured funding by a student referendum in the 1995-1996 academic year.<sup>162</sup>

After the three aforementioned methods of student fee allocation are complete, budgetary decisions are sent to the Chancellor of the Regents for review and final approval.<sup>163</sup> The ASM has total authority over the allocation of most student fees, but the Board of Regents has the final authority to approve or disapprove the budgetary decisions.<sup>164</sup>

### B. *The District Court Decision*

In a memorandum and order, Judge Shabaz of the Western District of Wisconsin recognized that the "corollary" speech and association rights of the First Amendment were at issue.<sup>165</sup> Since the objecting students' First Amendment rights were implicated by the Regents' expenditure of their mandatory fees, Judge Shabaz applied the *Hudson* strict scrutiny standard.<sup>166</sup> The *Hudson* strict scrutiny standard requires that the Regents offer a compelling state interest to justify the First Amendment infringement resulting from the fee expenditures.<sup>167</sup> The *Hudson* analysis further obligates the Regents to achieve the compelling state interest through the means least restrictive of the students' rights.<sup>168</sup>

At issue, the Judge explained, was the tension between UWM's interest in the expression of an array of diverse viewpoints and the objecting students' constitutional guarantee against the compelled funding of political and ideological activities.<sup>169</sup> Judge Shabaz considered this tension of interests

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<sup>162</sup> See *Southworth*, 151 F.3d at 720. WISPIRG secured \$49,500 in student fees that year. See *id.* WISPIRG, Wisconsin Public Interest Research Group, is analogous to NJPIRG and NYPIRG, the organizations challenged in *Galda* and *Carroll*. See *supra* notes 101 and 106.

<sup>163</sup> See *Southworth*, 151 F.3d at 720.

<sup>164</sup> See *id.*; see also WIS. STAT. ANN. § 36.09(5) (West 1998); *supra* note 144.

<sup>165</sup> *Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. Dist. LEXIS 20980, at \*12 (citing *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>166</sup> See *id.*

<sup>167</sup> See *id.*; see also *supra* notes 79-83 and accompanying text.

<sup>168</sup> See *Southworth*, 1996 U.S. Dist. LEXIS 20980, at \*12.

<sup>169</sup> See *id.* at \*13.

analogous to those competing concerns of the lawyers and the bar in *Keller*<sup>170</sup> and of the teachers and the union in *Abood*.<sup>171</sup>

Quoting the California Supreme Court in *Smith*,<sup>172</sup> the district court adopted the *Abood* and *Keller* "teaching" that the Regents may allocate mandatory fees to political and ideological organizations for a compelling reason if the allocation of funds is germane to the purposes that justify the imposition of the fee.<sup>173</sup> The Regents argued that the *Abood* and *Keller* doctrine was inapplicable because, unlike a union or bar association, the organizations to which the objecting students disagreed "d[id] not purport to speak for all students."<sup>174</sup> Judge Shabaz quickly rejected this argument because the rights to freedom of speech and association are guaranteed "regardless of whether or not the infringement of said rights is perceived by others."<sup>175</sup> The Judge found that the Regents' defense was irrelevant to the determination of whether the objecting students' First Amendment rights had been violated because peoples' perceptions of the support garnered by certain organizations would not eradicate an occurring violation.<sup>176</sup> The Regents also argued that the objecting students, unlike a union or bar association, could work within the democratic process in place through UWM's representative student body.<sup>177</sup> The Judge likewise rejected this defense because the distinction of an available democratic process was not considered by the Supreme Court in *Keller*.<sup>178</sup>

In support of funding student organizations through the mandatory fee program, the Regents argued that the UWM was not compelling the objecting students to speak and associate, but rather, the UWM was creating a public forum for the interaction of disparate viewpoints.<sup>179</sup> Judge Shabaz rejected

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<sup>170</sup> See *supra* notes 84-86 and accompanying text.

<sup>171</sup> See *Southworth*, 1996 U.S. Dist. LEXIS 20980, at \*14-\*15; see also *supra* notes 66-73 and accompanying text.

<sup>172</sup> See *supra* notes 122-132 and accompanying text.

<sup>173</sup> *Southworth*, 1996 U.S. Dist. LEXIS 20980 at \*16.

<sup>174</sup> *Id.* at \*16-\*17.

<sup>175</sup> *Id.* at \*16.

<sup>176</sup> See *id.* at \*16-\*17.

<sup>177</sup> See *id.* at \*18-\*19.

<sup>178</sup> See *Southworth*, 1996 U.S. Dist. LEXIS 20980, at \*18-\*19.

<sup>179</sup> See *id.* at \*31.

the Regents' public forum argument because the activities of the cited organizations appeared more like political and ideological advocacy than the exchange of ideas.<sup>180</sup> Further, it did not appear that most of the activities occurred on the UWM campus.<sup>181</sup> The Judge distinguished the political and ideological organizations at issue in *Southworth* from the school newspapers at issue in *Kania*<sup>182</sup> and *Hays*<sup>183</sup> because a newspaper "clearly" provides a forum for students to express a spectrum of ideas, while the political and ideological organizations did not always open such a forum.<sup>184</sup>

In another argument to save the allocation of mandatory fees to the political and ideological student groups, the Regents argued that the fees were not actually used to fund political and ideological activities.<sup>185</sup> The Regents argued that the objecting students had no proof that their fees were actually and directly funding the political and ideological groups with which they disagreed.<sup>186</sup> The court summarily dismissed this argument as a matter of "bookkeeping."<sup>187</sup>

The court did not determine the purpose of each of the eighteen cited organizations, but made a general determination that the organizations were primarily political.<sup>188</sup> Adopting the balancing analysis created by the California Supreme Court in *Smith*, the district court determined that the educational value of the funded organizations was only incidental to political motives.<sup>189</sup> Thus, the court held that the funding of such organizations was no longer germane to the university's educational purpose.<sup>190</sup> Since the funding of these organizations was not germane to the Regents' interest in education and a more narrowly tailored program could have been implemented, the court held that the Regents had infringed on the objecting students' First Amendment speech and association

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<sup>180</sup> See *id.* at \*33.

<sup>181</sup> See *id.*

<sup>182</sup> See *supra* notes 93-95 and accompanying text.

<sup>183</sup> See *supra* notes 96-99 and accompanying text.

<sup>184</sup> *Southworth*, 1996 U.S. Dist. LEXIS 20980, at \*32.

<sup>185</sup> See *id.* at \*33.

<sup>186</sup> See *id.*

<sup>187</sup> *Id.* at \*34.

<sup>188</sup> See *id.* at \*26.

<sup>189</sup> See *Southworth*, 1996 U.S. Dist. LEXIS 20980, at \*22-\*23.

<sup>190</sup> See *id.* at \*26.

rights.<sup>191</sup> The court suggested "some sort of opt-out provision or refund system" for objecting students, but it did not fashion an appropriate remedy as the parties had agreed to do this on their own.<sup>192</sup>

### C. *The Seventh Circuit Opinion*

Unlike the district court, the Seventh Circuit employed the Supreme Court's three-prong *Lehnert* inquiry<sup>193</sup> to determine whether the Regents' expenditure of the mandatory fees violated the objecting students' free speech rights.<sup>194</sup> The *Lehnert* analysis evolved from *Abood* and *Keller* as a practical method for determining the "germaneness" of union expenditures under agency shop provisions.<sup>195</sup> Applying this three prong analysis to the expenditure of mandatory student fees, the Seventh Circuit discussed (1) whether the expenditure of the mandatory fees was germane to the interests of the Regents;<sup>196</sup> (2) whether the Regents offered vital policy interests to justify compelled speech and association;<sup>197</sup> and (3) whether the funding of the political and ideological groups added to the burden on speech rights inherent in a compulsory fee program.<sup>198</sup>

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<sup>191</sup> See *id.* at \*30.

<sup>192</sup> *Id.* Since the parties had agreed to fashion a remedy on their own, the court simply ordered that the Regents initiate a system of mandatory fee distribution tailored narrowly enough to comport with the guarantees of the First Amendment. See *id.* However, when the Regents first appealed the district court decision, the Seventh Circuit dismissed the appeal as impermissibly interlocutory because the district court had not yet addressed the objecting students' prayer for injunctive relief. See *Southworth v. Grebe*, 124 F.3d 205 (7th Cir. 1997). On remand, the district court fashioned a detailed injunctive remedy that required the Regents to cease the appropriation of mandatory fees to political and ideological groups. See *Southworth v. Grebe*, 96-C-09292-S (W.D. Wis. July 24, 1997) (unpublished mem. and order). The district court ordered that the Regents notify all students of the political and ideological groups to be funded and the amount of each student's fee that went to each group. See *id.* The injunctive order further required that the Regents submit to arbitration proceedings for disputes over the amount of each student's fee allocated to support each group or the nature of the groups listed. See *id.*

<sup>193</sup> See *supra* notes 87-89 and accompanying text.

<sup>194</sup> See *Southworth*, 151 F.3d at 724.

<sup>195</sup> *Id.*

<sup>196</sup> See *id.*

<sup>197</sup> See *id.* at 727.

<sup>198</sup> See *id.* at 729.

In the first prong of the analysis, the court began its "germaneness" inquiry with two questions: "whether there is some otherwise legitimate government interest justifying any compelled funding; and then whether the specifically challenged expenditure is germane to that interest."<sup>199</sup> Summarily, the court noted that it did not need to address the first question because the objecting students had not claimed that the Regents were without a legitimate interest in maintaining the mandatory fee program.<sup>200</sup> The court, thus, only had to decide the second issue, whether the Regents' expenditure of mandatory fees to political and ideological groups was "germane" to its educational mission.<sup>201</sup>

The Regents argued that the expenditure of fees to political and ideological groups was germane to its interest in education because the support of such groups allowed for "diverse expression," which was in turn educational.<sup>202</sup> The court rejected this argument because the Regents' interpretation of germaneness was too broad.<sup>203</sup> Looking to *Keller*, where the Supreme Court recognized that the Bar's mission was rather broad, the Seventh Circuit rejected a reading of education broad enough to encompass the compulsion of speech and association.<sup>204</sup> The court decided that the funding of political and ideological organizations was not "germane" to education because most student organizations did not receive funding from activity fees and because the groups that did receive funding were open to students and non-students alike.<sup>205</sup>

The Board of Regents argued that its interest in education was inherently broader than those interests offered by the defendants in *Abood* and *Keller*.<sup>206</sup> As a result, more activities were germane in this context, including activities of political

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<sup>199</sup> *Southworth*, 151 F.3d at 724.

<sup>200</sup> *See id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *See id.* at 727.

<sup>204</sup> *See Southworth*, 151 F.3d at 725; *see also supra* notes 84-86 and accompanying text. The California State Bar's interest and aim was to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." *Keller v. State Bar of Cal.*, 496 U.S. 1, 15 (1990).

<sup>205</sup> *See Southworth*, 151 F.3d at 725.

<sup>206</sup> *See id.*

and ideological groups.<sup>207</sup> The breadth of the educational mission, the Regents asserted, could not be compared to the interests offered by the defendants in *Abood* and *Keller*—collective bargaining and the oversight of the bar—because a union or bar association has a narrower focus than a university and therefore encompasses fewer germane activities.<sup>208</sup> The court recognized the inherent breadth of an educational mission, but rejected the Regents' argument that this breadth made more activities germane.<sup>209</sup> The court opined that "everything is in a sense educational," which would place no limit on "germaneness."<sup>210</sup>

In addition, the Regents cited *Carroll*, in which the Second Circuit acknowledged that the funding of NYPIRG could be germane to education.<sup>211</sup> In *Carroll*, the Second Circuit balanced the university's interest in education against the objecting students' rights against compulsion and ordered that NYPIRG use the amount of its budget equivalent to its funding grant for activities only on campus.<sup>212</sup> The Seventh Circuit in *Southworth* did not adopt the *Carroll* court's compromise.<sup>213</sup> Instead, the court found *Galda* and *Smith* more persuasive.<sup>214</sup> In siding with *Galda*<sup>215</sup> and *Smith*,<sup>216</sup> the court decided that the ideological and political groups were only incidentally educational, which could not justify the burden on the objecting students' First Amendment rights.<sup>217</sup> Furthermore, in a footnote, in accord with the court below, the Seventh Circuit hastily distinguished *Kania*<sup>218</sup> and *Hays*<sup>219</sup> as newspa-

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<sup>207</sup> See *id.*

<sup>208</sup> See *id.*

<sup>209</sup> See *id.*

<sup>210</sup> *Southworth*, 151 F.3d at 725.

<sup>211</sup> See *id.* at 725-26.

<sup>212</sup> See *supra* notes 105-110 and accompanying text; see also *Carroll v. Blinken*, 957 F.2d 991, 1002 (2d Cir. 1992).

<sup>213</sup> See *Southworth*, 151 F.3d at 726-27.

<sup>214</sup> See *id.*

<sup>215</sup> See *supra* notes 100-104 and accompanying text.

<sup>216</sup> See *supra* notes 122-132 and accompanying text.

<sup>217</sup> See *Southworth*, 151 F.3d at 726. The burden on the objecting students is the third prong of the court's analysis; however, the court discusses this burden in relation to germaneness in the first prong.

<sup>218</sup> See *supra* notes 93-95 and accompanying text.

<sup>219</sup> See *supra* notes 96-99 and accompanying text.

per cases.<sup>220</sup> The court did not discuss why *Kania* and *Hays* upheld the constitutionality of the expenditure of mandatory student fees simply because the objecting students in *Southworth* had not challenged the funding of a newspaper.<sup>221</sup> Despite its conclusion that the allocation of fees to political and ideological groups was not germane to the Regents' interest in education, the court continued to the next two prongs of the *Lehnert* analysis.<sup>222</sup>

Under *Lehnert*, the second prong considers "whether the compelled fee is justified by vital policy interests of the government."<sup>223</sup> In *Abood* and other agency shop cases, the government's policy interest was to promote labor peace and avoid free-riders.<sup>224</sup> In *Keller*, the interest was to regulate and improve legal services.<sup>225</sup> In *Southworth*, since the Regents had not mentioned the *Lehnert* analysis in their brief, the court focused on the Regents' asserted interest in education, which included allowing the students to share in the governance of the university system.<sup>226</sup>

The court found that the Regents' interest in education was vital, but not so vital as to justify the compulsion of funding of "private or quasi-private activity."<sup>227</sup> As a central component of its analysis, the court borrowed from the labor union cases the notion that there must be a "common cause" to justify the compulsion of funding.<sup>228</sup> To justify fee expenditures in an agency shop agreement, the "common cause" analysis requires that the non-union and union workers have a shared interest in the expenditure of the fee.<sup>229</sup> Here, the court decided that a "common cause" was absent.<sup>230</sup> The court opined that, while the Regents and the objecting students had a "common cause" in education, there was no "common cause" be-

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<sup>220</sup> See *Southworth*, 151 F.3d at 727 n.8.

<sup>221</sup> See *id.*

<sup>222</sup> See *id.* at 727.

<sup>223</sup> *Id.*

<sup>224</sup> See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 220-22 (1977).

<sup>225</sup> See *Keller v. State Bar of Cal.*, 496 U.S. 1, 15 (1990).

<sup>226</sup> See *Southworth*, 151 F.3d at 727.

<sup>227</sup> *Id.* The court did not determine whether the students' shared governance of the university was a vital interest. See *id.*

<sup>228</sup> *Id.* at 727-28.

<sup>229</sup> *Id.* at 728.

<sup>230</sup> *Southworth*, 151 F.3d at 728.

tween the political and ideological groups and the objecting students due to their disparate views.<sup>231</sup>

The Regents further asserted that, as in *Abood*, there would be a free-rider problem if objecting students were not required to fund activities open to them and all UWM students.<sup>232</sup> Here, the court rejected the Regents' free-rider argument by distinguishing a university from a union shop.<sup>233</sup> The court reasoned that, under the principle of union exclusivity, the government imposes on the union the duty to fairly represent the interests of both union and non-union employees.<sup>234</sup> Conversely, in the university context, a free-rider problem would not arise because the campus organizations do not exist in a representative capacity and do not furnish the objecting students with a "free" benefit.<sup>235</sup> To reject the Regents' argument, the court recognized the inherent contextual differences that render the free-rider concern absent and inapplicable in *Southworth*.<sup>236</sup>

Lastly, in the third prong of the analysis, the court addressed whether the compelled funding significantly added to the burdening of free speech inherent in a mandatory fee system.<sup>237</sup> This prong acknowledges that there will be an incidental burden on speech when the government compels funding, but such a burden can be justified by an important governmental interest.<sup>238</sup> Although it claimed to have concluded that the Regents had no "vital governmental interest," the court assumed *arguendo* that such an interest existed.<sup>239</sup> Thus, the court determined that the Regents' distribution of compelled fees to political and ideological groups significantly added to the burden on the objecting students' free speech rights under the First Amendment.<sup>240</sup>

Quoting *Lehnert*, the court explained that the intensity of the objecting students' disagreement with the political and

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<sup>231</sup> *Id.*

<sup>232</sup> *See id.*

<sup>233</sup> *See id.*

<sup>234</sup> *See id.*

<sup>235</sup> *Southworth*, 151 F.3d at 728.

<sup>236</sup> *See id.*

<sup>237</sup> *See id.* at 729.

<sup>238</sup> *See id.*

<sup>239</sup> *Id.*

<sup>240</sup> *See Southworth*, 151 F.3d at 729.



ideological groups was relevant in determining the extent of the burden on their speech rights.<sup>241</sup> Accordingly, since the objecting students disagreed with the political and ideological groups based on "deeply held religious beliefs," and since the groups typically tackled "such emotionally charged issues as abortion, homosexuality, and the United States' democratic system," the court held that the fee policy was a particularly great burden on the students.<sup>242</sup> In response, the Regents asserted that, without funding to the political and ideological groups, less speech, and less controversial speech, would result on campus.<sup>243</sup> The court rejected this argument on the grounds that, while the Constitution does confer a right to free speech, it does not guarantee funding for speech.<sup>244</sup>

Within this third prong of the analysis the court quickly addressed and rejected the Regents' remaining arguments supporting the appropriation of funds from mandatory student fees. First, the court addressed the Regents' assertion that the district court erred in applying a mixed strict scrutiny and germaneness analysis.<sup>245</sup> While the Seventh Circuit recognized that the lower court did "intermingle" these tests, the possible error was dismissed as harmless since the case was reviewed *de novo* on appeal.<sup>246</sup>

Second, the court rejected the Regents' claim that there was no evidence that the mandatory fees were being used to fund groups' actual political and ideological activities.<sup>247</sup> Like the court below, the Seventh Circuit found that this claim was an irrelevant matter of bookkeeping and noted that a similar claim was rejected in *Abood*.<sup>248</sup>

Third, the Regents argued that the First Amendment was not violated because the political and ideological groups did not profess to speak for all students.<sup>249</sup> Also in accordance with the opinion of the court below, the Seventh Circuit rejected

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<sup>241</sup> See *id.* at 729; see also *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521-22 (1991) (plurality).

<sup>242</sup> *Southworth*, 151 F.3d at 729.

<sup>243</sup> See *id.*

<sup>244</sup> See *id.* at 729-30.

<sup>245</sup> See *id.* at 731.

<sup>246</sup> *Id.*

<sup>247</sup> See *Southworth*, 151 F.3d at 732.

<sup>248</sup> See *id.*

<sup>249</sup> See *id.*

this argument as irrelevant, finding that it did not matter whether a third party attributed a group's views to an objecting student.<sup>250</sup>

Fourth, the Regents sought to distinguish *Abood* and *Keller* because the objecting students had the university's democratic process available to them.<sup>251</sup> While the court acknowledged that the non-union teachers in *Abood* did not have the union's democratic process, the court noted that this was not the case in *Keller*.<sup>252</sup> Essentially, the court did not address the availability of the democratic process to the objecting students because *Keller* had not distinguished bar dues from agency shop fees on this basis.<sup>253</sup>

Lastly, the Regents relied on a case upholding the legislature's appropriation of tax funds to political and ideological groups, and a campaign finance reform case, to support the Regents' similar expenditure of student fees.<sup>254</sup> Relying on O'Connor's concurrence in *Rosenberger*, the court distinguished the tax appropriation cases using the rationale that the student fee is not characterized as a tax, but a fund belonging to the students.<sup>255</sup>

In conclusion, the court granted the objecting students' declaratory relief, holding that the Regents' funding of political and ideological groups with objecting students' mandatory fees violated their First Amendment right to freedom of speech.<sup>256</sup> As a result of its decision on the free speech claim, the court did not separately or singularly discuss whether the free association claim strengthened the objecting students' constitutional argument.<sup>257</sup> However, the court did consider the free association clause to the extent it relied on the union shop cases,

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<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

<sup>252</sup> See *Southworth*, 151 F.3d at 732.

<sup>253</sup> See *id.*

<sup>254</sup> See *id.* The Regents relied on *Libertarian Party of Indiana v. Packard*, 741 F.2d 981 (7th Cir. 1984) (holding that Indiana's scheme of raising revenue from personalized license plates, then distributing part of the revenue to political parties, was not a violation of the First Amendment), and *Buckley v. Valeo*, 424 U.S. 1 (1976) (holding, in part, that limits on candidates' expenditures on their own campaigns violated the right to freedom of speech).

<sup>255</sup> See *Southworth*, 151 F.3d at 732.

<sup>256</sup> See *id.* at 732-33.

<sup>257</sup> See *id.* at 733 n.15.

which hinged on an indistinct hybridization of the free speech and association clauses.<sup>258</sup>

Having addressed the issues of declaratory relief, the Seventh Circuit discussed the district court's order granting injunctive relief.<sup>259</sup> The district court had ordered that the Regents "cease the funding of private groups that engage in ideological or political advocacy."<sup>260</sup> Further, the district court had ordered that the Regents publish written notice setting forth organizations that engaged in political and ideological activities, including a determination of each student's pro rata share of fees to be allocated to such activities.<sup>261</sup> The Regents were to submit to arbitration proceedings for disputes over amounts of fees paid and the nature of the organizations involved.<sup>262</sup>

While, under *Ellis*,<sup>263</sup> the district court had properly rejected the Regents' proposal for a refund system,<sup>264</sup> the Seventh Circuit found the district court's order to be, as worded, over-broad.<sup>265</sup> The district court's order was over-broad because it mandated that the Regents cease the funding of political and ideological groups with *all* student fees, not just the fees of those students objecting to the groups.<sup>266</sup> In actuality, the objecting students had challenged the funding of political and ideological activities with *their* mandatory fees, *not* the fees of non-objecting students.<sup>267</sup> Moreover, the district court's order permitted the Regents to use mandatory fees only for "activities reasonably intended to promote its educational mission."<sup>268</sup> This mandate was over-broad because the objecting students only challenged the appropriation of their mandatory

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<sup>258</sup> See *supra* Part I.B.

<sup>259</sup> See *Southworth*, 151 F.3d at 733.

<sup>260</sup> *Id.*

<sup>261</sup> See *id.*

<sup>262</sup> See *id.*

<sup>263</sup> See *supra* notes 75-79 and accompanying text.

<sup>264</sup> See *Southworth*, 151 F.3d at 733.

<sup>265</sup> See *id.*

<sup>266</sup> See *id.*

<sup>267</sup> See *id.* at 733-34.

<sup>268</sup> *Id.*

fees to political and ideological groups with which they disagreed, they had not challenged the appropriation of their mandatory fees to fund groups that did not engage in political or ideological activities.<sup>269</sup>

Furthermore, the Seventh Circuit vacated the injunction to the extent that it ordered "detailed and specific procedures" for the Regents to perform.<sup>270</sup> The detailed measures of the district court's injunction implicated notions of federalism because the Board of Regents is an agency of state government.<sup>271</sup> Since the district court had not first given the Regents a chance to comply with a broader injunction, it could not fashion a mandatory injunction with the specificity reserved for extreme cases of noncompliance.<sup>272</sup>

### III. THE STANDARD OF REVIEW

The Seventh Circuit's employment of the *Lehnert* analysis did not clearly articulate a standard for reviewing the Regents' interest in relation to the constitutionality of the compelled funding. In each of the three prongs of the *Lehnert* analysis, the court posed a different standard for assessing the interests offered by the Regents. In the first prong of the analysis, the "germaneness" prong, the court stated that the interests offered by the Regents to justify the compelled funding had to be "legitimate."<sup>273</sup> This legitimacy standard of the first prong is less stringent than the standard imposed by the second prong of the analysis, which requires that the compelled funding be justified by "vital" policy interests.<sup>274</sup> Lastly, in the third prong of the analysis, the court assessed whether the burden imposed on the objecting students by the mandatory fee was justified by an "important" governmental interest.<sup>275</sup> While each of these prongs referred to the Regents' interest in education, it is unclear whether that interest needed to be "legitimate," "vital," or "important," to justify the compelled funding.

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<sup>269</sup> See *Southworth*, 151 F.3d at 734.

<sup>270</sup> *Id.* at 734.

<sup>271</sup> See *id.*

<sup>272</sup> See *id.*

<sup>273</sup> *Id.* at 724.

<sup>274</sup> *Southworth*, 151 F.3d at 727.

<sup>275</sup> *Id.* at 729.

Without a clear standard of review, the notion of education as a vital interest was obscured, and the objecting students' interests were doubly counted.

Moreover, while the district court announced the *Hudson* strict scrutiny standard requiring that a First Amendment infringement serve a "compelling state interest,"<sup>276</sup> the Seventh Circuit did not articulate any level of scrutiny. In *Smith*, the California Supreme Court applied the *Hudson* strict scrutiny test.<sup>277</sup> However, in dissent, Justice Arabian observed that neither *Abood* nor *Keller* had announced a level of scrutiny, and that the Second Circuit in *Carroll* had applied a "middle-tier test."<sup>278</sup> While the three prong *Lehnert* inquiry employed in *Southworth* drew up three distinct and orderly avenues of analysis, it likewise never clearly articulated the level of scrutiny applicable to compulsory fee cases.<sup>279</sup> Further, in *Rounds*, decided subsequent to *Southworth*, the Ninth Circuit articulated what it dubbed an "intermediate level of scrutiny."<sup>280</sup> Quoting the *Lehnert* Court, the Ninth Circuit required that the expenditures of mandatory student fees be "adequately supported by a governmental interest."<sup>281</sup> Certainly, even *Rounds* fails to qualify the standard the government's interest must meet, requiring only that the interest be "adequate."<sup>282</sup> Therefore, the level of scrutiny applicable to mandatory student fee cases remains largely unclear, and the *Southworth* decision, by articulating a different level of scrutiny in each prong of the analysis, does little to clarify this sloppy and confusing area of the law.

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<sup>276</sup> *Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. Dist. LEXIS 20980, at \*12 (W.D. Wis. Nov. 29, 1996).

<sup>277</sup> *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 506 (Cal. 1993).

<sup>278</sup> *Id.* at 523.

<sup>279</sup> See, e.g., Joseph A. Ciucci, Note, *Defining the Permissible Uses of Objecting Members' Agency Dues: Solution Any Clearer After Lehnert v. Ferris Faculty Ass'n?*, 70 U. DET. MERCY L. REV. 89, 107-08 (1992).

<sup>280</sup> *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1037 (9th Cir. 1999).

<sup>281</sup> *Id.* (quoting *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 518 (1991)).

<sup>282</sup> *Rounds*, 166 F.3d at 1037.

A. *Germaneness: Education as a Legitimate Interest*

In the first prong of its analysis, the Seventh Circuit set a standard of legitimacy for the Regents' interest to justify compelled funding.<sup>283</sup> However, while it announced this standard, the court did not address the legitimacy of the Regents' interest in compelling funding because it noted that the objecting students had not claimed that the Regents lacked a legitimate interest.<sup>284</sup> Instead, without discussing the "legitimacy" of the Regents' interest the court skipped to the question of "germaneness" and found that the compelled funding was not "germane" to the broad interest in education.<sup>285</sup> This conclusion did not rest on an evaluation of the government's interest in education or its power to insure the achievement of its interest. The court determined that the compelled funding was not "germane" to the Regents' interest in education based not on "legitimacy," but on the ethereal and broad nature of education.<sup>286</sup>

The court did not determine more narrowly whether the appropriation of mandatory fees to political and ideological student organizations was germane to a university chartered to disseminate and apply knowledge in "the search for truth."<sup>287</sup> Instead, the court found the interest in education too broad to justify the compulsion of speech.<sup>288</sup> The court based the broadness of the Regents' interest in education on the precedent of *Abood* and its progeny.<sup>289</sup> In relying on the labor and bar contexts, the court failed to recognize its own musing that "everything is in a sense educational."<sup>290</sup> This recognition of the broadness of education should not have likened *Southworth* to *Abood* and *Keller*, but should have distinguished it instead. As the Regents had argued, the interest of

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<sup>283</sup> See *Southworth v. Grebe*, 151 F.3d 717, 724 (7th Cir. 1998).

<sup>284</sup> See *id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 725.

<sup>287</sup> WIS. STAT. ANN. § 36.01(2) (West 1998).

<sup>288</sup> See *Southworth*, 151 F.3d at 725.

<sup>289</sup> See *id.*

<sup>290</sup> *Id.*

education can be broader than the limited interests of the bar or a union, and thus, may encompass a larger array of "germane" activities.<sup>291</sup>

None of the decisions in this context that employ the germaneness analysis defines the word "germane." *The American Heritage College Dictionary* defines the word "germane" as "being both pertinent and fitting."<sup>292</sup> In assessing the "germaneness" of the Regents' interest in education, the court ignored the meaning of the word "germane." The court determined that the funding of political and ideological groups was not "germane" to the Regents' interest in education because the groups were open to students and non-students and that such funding was not necessary to the groups' existence.<sup>293</sup>

First, the fact that the political and ideological organizations were open to both students and non-students does not change their pertinence to the UWM's educational mission. By statute, the UWM is, *inter alia*, directed "to extend knowledge and its application beyond the boundaries of its campuses . . . ."<sup>294</sup> This extension of knowledge would be impossible without interaction between student and non-student groups.

Second, it is not clear why the court found the necessity of funding relevant to the question of whether certain appropriations were "germane" to the interest of education. "Germaneness," described by the dictionary as "being pertinent and fitting,"<sup>295</sup> does not rely on necessity. Just because the student groups may not *need* funding to exist, one cannot assume that the funding is not "germane" to the educational mission of the university. Moreover, even if "germaneness" depends upon necessity, it is doubtful that these political and ideological groups could exist to a meaningful extent without a grant from the mandatory student fees.<sup>296</sup> In his dissent in *Smith*, Justice Arabian commented, "[w]ithout such funding, . . . I have

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<sup>291</sup> See *id.*; see also *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 520 (Cal. 1993) (Arabian, J., dissenting).

<sup>292</sup> THE AMERICAN HERITAGE COLLEGE DICTIONARY 571 (3d ed. 1993).

<sup>293</sup> *Southworth*, 151 F.3d at 725.

<sup>294</sup> WIS. STAT. ANN. § 36.01(2) (West 1998).

<sup>295</sup> THE AMERICAN HERITAGE COLLEGE DICTIONARY 571 (3d ed. 1993).

<sup>296</sup> See RALPH NADER & DONALD ROSS, ACTION FOR A CHANGE: A STUDENT'S MANUAL FOR PUBLIC INTEREST ORGANIZING 33-34 (Grossman Publishers 1971).

no doubt that the campus would lose much of the diversity which is its lifeblood."<sup>297</sup>

Most significantly, these arguments *do* speak to the legitimacy of the interest offered by the Regents, which the objecting students had not challenged and which the court originally said it would not address.

Furthermore, in assessing whether compelled funding was "germane" to the Regents' interest in education, the court found that the political and ideological groups only offered "incidental" educational benefits.<sup>298</sup> The groups, the court determined, were primarily concerned with promoting their own political agendas.<sup>299</sup> By creating this dichotomy between incidental and primary benefits of student groups, the court neglected the judiciary's traditional philosophy of the university as a "marketplace of ideas."<sup>300</sup> Under this tradition, the focus would not be the primary motive of the political or ideological organization, but the educational value of the existence of another point of view.

Moreover, the Seventh Circuit, or perhaps the Regents, never attempted to narrow the interest of education in order to make it more palatable for the court to analyze. For example, if the Regents had argued with reference to its statutorily enacted mission,<sup>301</sup> there would have been more words and concepts for the court to employ in its "germaneness" analysis. This would have been helpful in focusing and limiting the ethereal and omnipresent nature of education. Moreover, neither the court nor the Regents proposed, as in *Carroll*,<sup>302</sup> a narrowing of the ideological and political organizations' activities in order to make them more "germane" to the university and to create less of an infringement on the objecting students' rights.

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<sup>297</sup> *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 527 (Cal. 1993) (Arabian, J., dissenting).

<sup>298</sup> *Southworth*, 151 F.3d at 725.

<sup>299</sup> *See id.*

<sup>300</sup> *See Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, D.C., 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); *see also infra* note 365 and accompanying text.

<sup>301</sup> *See* WIS. STAT. ANN. § 36.01 (West 1998).

<sup>302</sup> *See supra* notes 105-111 and accompanying text.



Thus, the court's "germaneness" analysis was confused because it first recognized that the objecting students had not challenged the legitimacy of the Regents' interest in compelled funding. By only challenging the use of their own fees to support political and ideological groups with which they disagreed, the objecting students were not questioning the "germaneness" of compelled funding to the Regent's interest in education. If the objecting students had argued that the compelled funding was not "germane" to the Regents' interest in education, the students would have argued against the funding of *all* political and ideological groups, including those with which they agreed and identified. The court's assessment of the broadness of education referred to the elusive nature and definition of the interest itself, which in turn referred to the legitimacy it summarily dismissed as unchallenged. In its analysis, the court blurred the edges between the legitimacy of the interest in education and the "germaneness" of that interest to the allocation of mandatory fees.

B. *The Justification of the Compelled Funding: Education as a Vital Interest*

In the second prong of the *Lehnert* analysis the court addressed whether the compelled fee was justified by a "vital" policy interest.<sup>303</sup> Since the Regents had not mentioned this prong in their brief, the court focused on the Regents' expressed interest in education and the shared governance of the university.<sup>304</sup> The court should have recognized that education is a "vital" interest, even in relation to the allocation of mandatory fees. Instead, the court determined that the interest in education was "no doubt" vital, but not vital enough to justify compelled funding.<sup>305</sup> The court furthered this conclusion based on the notion of a "common cause" identified in *Lehnert*.<sup>306</sup>

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<sup>303</sup> See *Southworth*, 151 F.3d at 727.

<sup>304</sup> See *id.*

<sup>305</sup> *Id.* The court never determined whether the Regents' interest in the shared governance of the university was a vital interest.

<sup>306</sup> See *Southworth*, 151 F.3d at 727-728; see also *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521 (1991).

In *Lehnert*, the Supreme Court found that union expenditures unrelated to collective-bargaining did not further the vital policy interests behind agency shop fees because the expenditures caused a dissonance between the goals of the union and the workers.<sup>307</sup> In essence, the discord instigated by the expenditures was inimical to the government's interest in labor peace. In *Southworth*, the Seventh Circuit described this idea of the *Lehnert* Court as the "importance of a common cause for justifying compelled funding."<sup>308</sup> However, the Court's notion of a "common cause" was ill fit in its application to the tension of interests presented by *Southworth*. This misapplication resulted primarily from the inherent distinction between the union shop and the university, a distinction the court later recognized to reject the Regents' free-rider argument.<sup>309</sup> Most significantly, unlike a union, a university does not exist in a representative capacity.<sup>310</sup> Instead, the university is unique in its ability to enfold contradicting factions and still be squarely within its purpose. This tension of ideas is integral to the university setting, whereas such debate could be harmful to an effective and exclusive representative body.

In *Southworth*, the Regents' interest in appropriating objecting students' mandatory fees to political and ideological organizations was not inimical to its interest in education. Unlike the goal of "labor peace," the object and legacy of education is the debate and opposition of ideas.<sup>311</sup> While the Seventh Circuit resolved that there may have been a "common cause" of education between the Regents and the objecting students, the court found no "common cause" between the objecting students and the political and ideological organizations they opposed.<sup>312</sup> The court's determination failed to rec-

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<sup>307</sup> See *Southworth*, 151 F.3d at 728; see also *Lehnert*, 500 U.S. at 521.

<sup>308</sup> *Southworth*, 151 F.3d at 727.

<sup>309</sup> See *id.* at 728.

<sup>310</sup> See *id.* ("The reason a free-rider problem exists in the context of unions, however, is significant (and in the case of student organizations lacking): In the case of unions, the government has imposed on unions the duty to fairly represent all employees . . .").

<sup>311</sup> See DAVID MEABON ET AL., A STUDENT ACTIVITY FEE PRIMER: CURRENT RESEARCH ON COLLECTION, CONTROL AND ALLOCATION 21 (1985) ("In conclusion, courts agree that colleges and universities are arenas where ideas and beliefs, whether accepted or rejected, should and will challenge each other.").

<sup>312</sup> *Southworth*, 151 F.3d at 728. In refuting the existence of a "common cause,"

ognize that the tension between the objecting students and the political and ideological groups did not sever a "common cause" in education. The aim of the UWM was not frustrated by a tension between the political and ideological values of the organizations and the objecting students.<sup>313</sup> Remarkably, this discord among students does not frustrate, but rather, serves to further the educational mission of the university. In the university context, the opposition of beliefs serves to refine ideas and heighten students' "intellectual, cultural and humane sensitivities."<sup>314</sup>

Furthermore, in creating this "common cause" analysis, the court never reviewed the interest in education separately from the labor or bar context. The court failed to explore the cultural values and expectations placed on educational institutions and the "vital" interests they serve for our country as a whole and for our immediate communities.

### C. *The Burdening of "Speech": Education as an Important Interest*

In the third prong of its analysis, the court recognized that a mandatory fee program might incidentally burden students' speech rights.<sup>315</sup> Therefore, the court questioned whether the specific appropriation to political and ideological groups further burdened the objecting students' First Amendment speech rights.<sup>316</sup> With the outcome determined, the court stated baldly that this added burden could be justified by an important governmental interest.<sup>317</sup> However, the court confused

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the court recognized the antagonistic relationship between the political and ideological organizations and the objecting students. *Id.* However, the remainder of the opinion only addresses the First Amendment rights of the objecting students in relation to the Regents, never considering the relationship between the organizations and the objecting students (or the effect of the holding on the organizations' existence).

<sup>313</sup> In fact, many students involved in the political and ideological organizations challenged by the objecting students probably opposed the ideas espoused by other organizations based on their own deeply held beliefs. This give and take in the equal funding of viewpoints allows the university to encourage robust debate. Surprisingly, the court never discusses how widely the fees are distributed and how more viewpoints could be represented if more students simply applied for funding.

<sup>314</sup> WIS. STAT. ANN. § 36.01(2) (West 1998).

<sup>315</sup> See *Southworth*, 151 F.3d at 729.

<sup>316</sup> See *id.*

<sup>317</sup> See *id.* ("This prong recognizes that any time the government forces individu-

the standard by reversing the appropriate line of questioning. The court did not first consider whether there was an added burden on the objecting students, then whether the added burden could be justified by an important governmental interest. Instead, the court first assumed *arguendo* that an important government interest existed, then determined whether there was an added burden on the objecting students.<sup>318</sup> This reversed line of reasoning never discussed whether the Regents truly had an important governmental interest and only addressed the added burden on the objecting students.

The court only mentioned the "important" governmental interest standard in two brief sentences.<sup>319</sup> Once the court established that the added burden could be justified by an important governmental interest, the court provided: "Assuming there is a vital governmental interest in funding (which we have concluded that there is not), the question then becomes whether a specific expenditure adds to the burden on speech inherent in the mandated funding of the organization in the first instance."<sup>320</sup> Here, the court replaced the "important" standard with the "vital" standard of the second prong. Certainly, a "vital" standard is more stringent than an "important" standard. Thus, the court transposed the standards and settled for its assessment in the second prong that the Regents' interest was not "vital," when the interest could still have been "important."

With a transposed standard, the court's backward order of analysis discounted the Regents' interest, whether it need be vital or merely important, because it never asked whether the effected compulsion could be justified by the interest in education. The court, instead, measured the degree of the burden on the objecting students based upon the "extent and source" of the students' objections.<sup>321</sup> The court found an extreme burden on the objecting students since their disagreement

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als 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.").

<sup>318</sup> See *id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Southworth*, 151 F.3d at 729.

<sup>321</sup> *Id.*

stemmed from "deeply held religious and personal beliefs."<sup>322</sup> However, the court never then determined whether the Regents' interest in education was important, and thus, could justify this added burden on the objecting students' speech rights.

In failing to meaningfully assess the Regents' interest in appropriating funds to political and ideological groups, the court had a thumb on the scale in favor of the objecting students. In assessing only the extent of the burden on objecting students, the court not only failed to question the importance of the Regents' interest in education as a justification for the appropriations, the court also overlooked the democratic process in place at the UWM.

The court quickly discounted the Regents' argument that the university's democratic process distinguished *Southworth* from *Abood* and *Keller*.<sup>323</sup> The Regents argued that the objecting students could work through the democratic process, which was a distinction from *Abood* not mentioned in *Keller*.<sup>324</sup> While the teachers in *Abood*, as non-union employees, did not have the union's democratic process available to them, the lawyers in *Keller* did.<sup>325</sup> The court rejected the Regents' argument because the *Keller* Court never addressed this distinction.<sup>326</sup> Moreover, the court dismissed the power of the Regents' argument because objecting students, if elected, would not be able to "de-fund organizations whose viewpoints they opposed."<sup>327</sup> In its analysis the court wrongfully precluded the Regents from raising an important assertion merely because the court and counsel failed to recognize the argument in *Keller*.

It is significant that the UWM has a democratic process in place because the objecting students could have (1) campaigned to elect representatives whose views aligned more closely with their own, (2) sought funding for their own groups which opposed the views or values expressed by the groups with which they disagreed, (3) sought to change the university's policy in

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<sup>322</sup> *Id.*

<sup>323</sup> *See id.* at 732.

<sup>324</sup> *See id.*

<sup>325</sup> *See Southworth*, 151 F.3d at 732.

<sup>326</sup> *See id.*

<sup>327</sup> *Id.* at 732 n.14.

granting funding from mandatory fees to political and ideological groups, or (4) sought to change the university's policy regarding how the political and ideological groups may expend funds granted to them through mandatory fees. In a footnote, the court mentions the futility of what it sees as the only available option to the objecting students within the democratic process: trying to de-fund the groups with which they disagree.<sup>328</sup> Thus, instead of working within the university's own legislative process, the objecting students brought an action in federal court to de-fund political and ideological organizations at a state university.

The court found the Regents' democracy argument flawed based on the notion that the First Amendment rights of minority individuals trump the democratic process.<sup>329</sup> While this maxim is well founded in terms of the positive speech rights of the First Amendment, it is neither firmly grounded nor self-evident that the negative First Amendment rights of a minority trump the democratic process. Clearly, in terms of the positive rights of the free speech clause, a minority group of objectors may speak out or protest without invading the democratic majority. However, while this democratic majority cannot stop the minority from exerting their positive speech rights, it is unclear when a democratic majority can no longer compel the minority to follow fairly legislated decisions. There is no merit in the argument that a democratic regime does not at times force minority objectors to fund projects or values with which they disagree—for example, taxes.<sup>330</sup> Essentially, it is unclear at what point the negative speech rights of the minority are truly implicated by the majority's fairly elected decisions.

More concretely, based on the facts in *Southworth*, the Regents' allocation of mandatory fees only affected the objecting students indirectly because they claimed that their negative speech rights were implicated by the allocation of their mandatory fees to fund political and ideological groups. In other words, the objecting students were not, and did not claim to be, forced to join, or even participate, in the activities of the groups with which they disagreed.<sup>331</sup> Unlike the government

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<sup>328</sup> See *id.*

<sup>329</sup> See *id.* at 732.

<sup>330</sup> See, e.g., *Libertarian Party of Ind. v. Packard*, 741 F.2d 981 (7th Cir. 1984).

<sup>331</sup> The Ninth Circuit adopted this argument in *Rounds*, finding that the ob-

forcing an individual to say the pledge of allegiance or post a state motto on her license plate,<sup>332</sup> the expenditure of the mandatory fees did not force the objecting students to subscribe to any belief, and it did not represent that the objecting students agreed with all the beliefs of all of the groups funded. The students were not compelled, as in *Barnette*, to "confess by word or act" belief in any message or viewpoint.<sup>333</sup>

Moreover, the Seventh Circuit relied on *Lehnert*, which in turn relied on *Wooley v. Maynard*, to demonstrate that the First Amendment protects the objecting students from the "type of invasion" that "foster[s their] adherence to an ideological point of view . . . ."<sup>334</sup> This strong language is entirely out of context when applied to the Regents' mandatory fee system. Through its appropriation of fees the Board of Regents was not indoctrinating students to adhere to a set of beliefs or values. It was actually quite the opposite, as the Regents did not require that the objecting students attend the political and ideological organizations' meetings or events. The appropriation of the fees served only the purpose of ensuring the expression of diverse viewpoints,<sup>335</sup> not the indoctrination of specific viewpoints.

In addition, more practically, when the court focused on the burden on the objecting students, it failed to recognize the meager pro rata share of each objecting students' fees appropriated to each political and ideological organization. Each individual objecting student was forced to pay no more than a few cents per semester to each political or ideological organization.<sup>336</sup> This meager amount of money allowed the UWM students to host and encourage diverse debate. Likewise, given

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jecting students were not compelled to become members of, or speak for, OSPIRG EF, the organization with which they disagreed. *See Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1037-38 (9th Cir. 1999).

<sup>332</sup> *See supra* Part I.A.

<sup>333</sup> *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>334</sup> *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 521-22 (1991); *see also Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

<sup>335</sup> *See Southworth v. Grebe*, 151 F.3d 717, 724 (7th Cir. 1998).

<sup>336</sup> *See Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. Dist. LEXIS 20980, at \*7-\*8 (W.D. Wis. Nov. 29, 1996). In the first semester of 1996-1997 academic year, only \$6.48 of the students' \$190.45 fee was distributed to the GSSF. *See id.* at \*8. Likewise, of the \$190.45 semi-annual fee, only \$4.63 was distributed to the ASM. *See id.* Thus, each student paid a little over \$10.00, which was in turn distributed to some hundred organizations.

that the fees were appropriated to groups representing a diverse array of viewpoints, the body of organizations that each individual student supports with this small fee will likely even out between groups with which she both agrees and disagrees.

Further, so long as mandatory fees are allocated to student groups on a content neutral basis—that is regardless of the views they espouse—there is a valid argument that a limited public forum has been created by the University.<sup>337</sup> The court did not accept the Regents' argument that the challenged student groups were not, and were not perceived to be, the voice of all students. The court overlooked the fact that the co-existence of all of the groups funded by mandatory student fees, not just the eighteen with which the objecting students disagreed, created a diverse forum for the interaction of ideas—not unlike the fora created by the student newspapers in cases like *Kania*<sup>338</sup> or even *Rosenberger v. Rector*,<sup>339</sup> one of the ADF's very own battles.

In conclusion, the Regents' allocation of mandatory student fees to political and ideological organizations required the court to balance the objecting students' right to be free from compelled speech against the Regents' interest in maintaining the appropriations for their educational value.<sup>340</sup> Utilizing an unclear standard of review, relying on a line of labor law cases ill-fit in the university context, neglecting to recognize education as a vital interest, disregarding the university's own means by which the burden on objecting students' rights could be limited, and failing to recognize the adverse effect of its holding on the student organizations, the court found that the burden on the objecting students was not justified by the Re-

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<sup>337</sup> The Ninth Circuit embraced the university as a limited public forum in *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1038-40 n.5 (9th Cir. 1999).

<sup>338</sup> See *supra* notes 91-95.

<sup>339</sup> 515 U.S. 819 (1995); see *supra* note 90. In *Rosenberger*, the Court required a public university to consider the funding of a religious student newspaper, neutral to its views, because the university funded other newspapers representing divergent viewpoints, thus, creating a public forum. See *Rosenberger*, 515 U.S. at 840. Essentially, the ADF wanted deeply religious students to "have their cake and eat it too"—i.e., religious campus papers should be considered for funding because of the right to freedom of speech and association, despite the separation of church and state; yet, all groups that offend religious students' beliefs should not be funded because of the religious students' freedom of speech and association.

<sup>340</sup> See *Southworth*, 151 F.3d at 732.



gents' interest in education. This balancing test weighed heavily the objecting students' underlying claim to "freedom of mind," which yielded the paradoxical result of a more uniform and colorless educational institution. The seminal negative speech rights cases invalidated indoctrination because "compulsory unification of opinion only achieves the unanimity of the graveyard."<sup>341</sup> Underlying this powerful language is the notion that the First Amendment protects diversity of thought. Unfortunately, and paradoxically, the decision in *Southworth* repudiates the precedent on which it relies by threatening the exchange of disparate political and ideological speech at public universities.

#### IV. THE AFTERMATH OF *SOUTHWORTH*

While the Seventh Circuit properly limited the district court's injunctive order, its decision in *Southworth* effectively abrogates a system of mandatory fee distribution designed to foster the exchange of diverse viewpoints. While the court held it unconstitutional to appropriate objecting students' fees to groups with which they disagreed, the practical implications of researching which students agree and disagree with which groups effectively eliminates the program. Administratively, it is inefficient and costly for the Regents to sift out and match up objectors and non-objectors to each political and ideological group funded through the mandatory fee program.<sup>342</sup> Accordingly, the Regents most efficient and cost-effective way of complying with the court's decision is to cease funding political and ideological groups altogether.<sup>343</sup> Forced to rely on donations, many of these politically and ideologically active groups will waste most of the short school year trying to secure funding.<sup>344</sup> Moreover, given the financial burden already presented by exorbitant college tuition bills, students will be discour-

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<sup>341</sup> *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

<sup>342</sup> The court rejected the Regents' administrative efficiency argument. *See Southworth*, 151 F.3d at 733.

<sup>343</sup> *See Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 519 (Cal. 1993) (Arabian, J., dissenting).

<sup>344</sup> *See NADER & ROSS*, *supra* note 296, at 34 ("Instead of obtaining educational benefits by performing substantive research, students would be continually forced to devise ways of raising money.").

aged from actively participating in extracurricular groups that require them to pay dues.<sup>345</sup> In effect, political and ideological organizations will go out of print, withering the extracurricular debate so vital to the university and the democracy it serves.

In the aftermath of the Seventh Circuit's decision, there are, however, arguments other universities might make, or actions they might take, in order to maintain the appropriation of mandatory student fees to organizations like the eighteen challenged by the objecting students in *Southworth*.<sup>346</sup>

First, since *Southworth* held, without any discussion of its basis, that the Regents could not appropriate mandatory activity fees to private organizations, a university may argue that the political and ideological groups funded through the appropriation of student fees are public organizations. In fact, in its compliance with the *Southworth* court's decision, the Wisconsin Regents could argue that the campus groups, including the eighteen cited in the law suit, are not private organizations. These student groups are creatures of the public university, and their funding is derived from public money. Moreover, the groups are not exclusive in nature, a characteristic attributed to private organizations, instead, they are opened to all interested individuals.

The plaintiffs, or objecting students, might argue in response that the political and ideological groups are private if they mirror or elect the name of a larger private organization that exists outside the university campus. While it is unclear whether this would nominate the organization a private one, universities could nevertheless counsel their student organizations to adopt different names without compromising their missions.

Second, universities, including perhaps the Regents in its compliance with the *Southworth* decision, may likewise argue

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<sup>345</sup> The amount of dues it would cost each interested student to participate in an organization would by far exceed the costs of submitting to a fee system that spreads costs over, and benefits, the entire university population.

<sup>346</sup> In fact, a committee of students and administrators at UWM defined two options for compliance with the *Southworth* ruling. The committee proposed to define which groups are political and ideological and then to let objecting students opt out of funding those groups. Alternatively, the committee proposed to allow students to opt out of paying for all groups. See Gwen Carleton, *UW Weighs Options in Fee Suit*, THE CAPITAL TIMES, Oct. 29, 1998 at 4A, available in 1998 WL 14536280.

that the student groups do not engage in political or ideological activities. In *Keller*, the Supreme Court warned that "those activities having political or ideological coloration . . . will not always be easy to discern."<sup>347</sup> Universities may take advantage of the fuzzy line between what constitutes and does not constitute a political or ideological activity. Many of the eighteen groups cited by the objecting students could more aptly be termed "cultural" or "ethnic" groups. For example, the Lesbian, Gay, Bisexual Campus Center could argue that their activities are neither political nor ideological in nature, but instead, the group exists as a social and support network. Likewise, a group like the Madison AIDS Support Network could argue that their activities are neither political nor ideological in nature, but instead, that their activities include health education and disease prevention.

Moreover, a student organization of a multifarious nature could argue that only some of its activities are political and ideological and utilize the funding from mandatory fees to sponsor its other events. For example, the Campus Women's Center could use its funding to maintain health education and support networks, yet solicit funding from elsewhere to support its political activities. However, many of the groups the objecting students cited in *Southworth* are at "extreme ends of the spectrum,"<sup>348</sup> and with clearly political and ideological missions, they cannot colorably claim otherwise.<sup>349</sup>

Third, a university faced with a challenge to the expenditure of mandatory student fees to fund political and ideological groups might offer a more narrow interest than "education" to justify the compelled funding. Since the Seventh Circuit found that the Regents' interest in education was too broad to be "germane" to the compelled funding, in the future a university should argue its interests with reference to its statutorily en-

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<sup>347</sup> *Keller v. State Bar of Cal.*, 496 U.S. 1, 15-16 (1990); see also Robert M. O'Neil, *Student Fees & Student Rights: Evolving Constitutional Principles*, 25 J.C. & U.L. 569, 579 (1999) (discussing the difficulty in determining which groups are "political and ideological" in nature).

<sup>348</sup> *Keller*, 496 U.S. at 16.

<sup>349</sup> Further, as suggested by *Rounds*, the organization could "bisect political and educational functions" so as to limit the use of its funding to educational activities. *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1038 (9th Cir. 1999). This, however, presupposes that the determination of educational and political functions is easily made. See, e.g., *infra* note 353.

acted mission statement. For example, if the Regents had argued that their interests reflected those set forth in § 36.01 of the Wisconsin statute, the broad and ethereal nature of “education” may have been circumvented. While the language of the statute is still rather lofty and broad, it offers the court more narrow notches and phrases in which to apply its “germaneness” analysis.<sup>350</sup> Likewise, in *Carroll*, SUNY Albany advanced “three distinct reasons” for appropriating mandatory fees to NYPIRG.<sup>351</sup> These specific reasons gave the Second Circuit more narrow facets in which to focus its analysis and might explain the case’s more diplomatic outcome.

Fourth, also in consonance with the Second Circuit’s compromise in *Carroll*, a university might enact a policy that requires political and ideological student organizations to spend as much money on activities on campus as they receive from the university through mandatory fees.<sup>352</sup> This policy would guarantee that objecting students like those in *Southworth* only fund activities that occur on campus and encourage the exchange of ideas for primarily educational benefits. Further, this policy would limit the objecting students’ contributions to lobbying and marches because the organizations would have to raise their own funding to participate in such activities. In effect, under this policy, the university could substantially curtail the infringement on objecting students’ negative speech rights and make the educational benefits of the organizations less incidental to their political agendas.<sup>353</sup>

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<sup>350</sup> For example, the interest of education would have been narrowed if the Board of Regents had argued that one of its interests in appropriating mandatory fees to political and ideological organizations was “to extend knowledge and its application beyond the boundaries of its campuses.” WIS. STAT. ANN. § 36.01(2) (West 1998). Likewise, some of the Seventh Circuit’s focus on certain factual findings, like the fact that the groups were opened to students and non-students, could have been diverted. In addition, the need for legislative deference would have been more pronounced.

<sup>351</sup> *Carroll v. Blinken*, 957 F.2d 991, 999 (2d Cir. 1992). In *Carroll*, the university advanced the following three interests: (1) promotion of extracurricular activities, (2) the encouragement of “participatory civics training”, and (3) the instigation of “robust campus debate on a variety of public issues.” *Id.*

<sup>352</sup> See *id.* at 1002.

<sup>353</sup> See *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 519 (Cal. 1993) (Arabian, J., dissenting) (“The dichotomy between ‘educationally beneficial’ and ‘ideological’ speech is a false and pernicious one.”).

Fifth, a university might be tempted to include the activity fee in the amount of tuition. While it would be unclear how a challenge to the expenditures would come out under this changed set of facts, it is not an intellectually honest way for a university to circumvent the First Amendment issues inherent in a mandatory fee system.<sup>354</sup>

Lastly, though the argument was rejected by the district court<sup>355</sup> and was not addressed by the Seventh Circuit, a university faced with a challenge similar to the Regents in *Southworth* might make the argument that it is a "public forum." Essentially, the university would argue, as in the newspaper cases, that it grants funding to political and ideological campus groups because, as a public forum, it must grant money on a viewpoint neutral basis.<sup>356</sup> The district court rejected

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<sup>354</sup> See NADER & ROSS, *supra* note 296. Even in this pamphlet, the authors and advocates for PIRGs admit that mandatory fees, while guaranteeing funding, are "shamelessly coercive." *Id.* at 35. To lessen this coercion, the authors suggest a refund system for the minority objectors. *See id.* at 36. However, to remain consistent in its agency shop analysis, the Seventh Circuit had to reject this suggestion because of *Ellis*, which held that a union's system of refunding political and ideological expenditures was unconstitutional. *See Ellis v. Brotherhood of Ry., Airline and Steamship Clerks, Freight Handlers, Express and Station Employees*, 466 U.S. 435, 444 (1984); *see also Southworth v. Grebe*, 151 F.3d 717, 733 (7th Cir. 1998).

<sup>355</sup> *See Southworth v. Grebe*, No. 96-C-0292-S, 1996 U.S. Dist. LEXIS 20980, at \*32 (W.D. Wis. Nov. 29, 1996). The district court found that,

[i]n this case, there are clearly many instances where portions of the segregated fee are being used to create a forum for student organizations to express their views. However, there are a number of situations where portions of the segregated fee are being used clearly to fund political or ideological activity, not to provide a forum for the free exchange of ideas.

*Id.*

<sup>356</sup> *See, e.g., Veed v. Schwartzkopf*, 353 F. Supp 149 (D. Neb. 1973) (public university did not violate freedom of association by financing a student newspaper and a speakers program with mandatory student fees because the institution did not advocate for the philosophy espoused by the paper or the speakers), *aff'd*, 478 F.2d 1407 (8th Cir. 1973); *Good v. Associated Students*, 86 Wash. 2d 94 (1975) (public university may constitutionally fund political and ideological student groups with student activities fees as long as the school does not promote any particular viewpoint). For a detailed discussion of the argument that a university is a public forum in the mandatory fee context, see Janine G. Bauer, Note, *The Constitutionality of Student Fees for Political Student Groups in the Campus Public Forum: Galda v. Bloustein and the Right to Associate*, 15 RUTGERS L.J. 135 (1983); 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 (1998); William Walsh, Comment, *Smith v. Regents of the University of California: The Marketplace is Closed*, 21 J.C. & U.L. 405 (1994); Carolyn Wiggins, Note, *A Funny Thing Happens When You Pay For A Forum: Mandatory Student*

this argument because it appeared that there were circumstances where the funding from the mandatory fees was not used by political and ideological organizations to create a forum for speech. In *Southworth*, the Seventh Circuit did not squarely address the public forum argument, but the Ninth Circuit in *Rounds* embraced the doctrine, distinguishing *Rounds* from *Southworth* on that ground.<sup>357</sup> It is unclear how such an argument will fare in the future—hopefully the Supreme Court will clarify this area in its review of the Seventh Circuit decision. It can be stated with certainty, however, that a university's stress on the neutrality of the fund-granting process, and the university's encouragement that groups represent more than one side of a contentious issue, could weigh heavily if clearly argued. In making a public forum argument, the university must demonstrate that the aggregate of the groups, not each individual group, or all the groups with which the objecting students disagree, together create a forum for diverse expression.<sup>358</sup>

Thus, there are still plausible arguments that a university can raise, or actions a university can take, that may help it to survive a First Amendment challenge to the appropriation of mandatory fees to fund political and ideological campus organizations. Presently, the ADF has two nearly identical pending actions in both Minnesota and Ohio.<sup>359</sup> Moreover, the Supreme Court has granted certiorari in *Southworth* to determine “[w]hether the First Amendment is offended by a policy or program under which public university students must pay mandatory fees that are used in part to support organizations that engage in political speech.”<sup>360</sup> The Supreme Court's decision will help further define the future of, and the arguments to be made for, the appropriation of mandatory student activity fees to fund political and ideological student organizations.

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*Fees to Support Political Speech at Public Universities*, 103 YALE L.J. 2009 (1994).

<sup>357</sup> See *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1040 n.5 (9th Cir. 1999).

<sup>358</sup> See MEABON ET AL., *supra* note 311, at 21.

<sup>359</sup> See Brakken, *supra* note 4, at 13; O'Neil, *supra* note 347, at 569.

<sup>360</sup> 119 S. Ct. 1332 (Mar. 29, 1999).

## CONCLUSION

In *Southworth*, the Seventh Circuit did not clearly articulate a standard for reviewing the constitutionality of the allocation of mandatory fees to fund political and ideological student organizations. It is unclear whether the Regents' interest in education had to be "legitimate," "vital" or "important" to justify the burden on the objecting students' First Amendment rights. Nevertheless, by the most stringent of the recited standards, education, especially as set forth in the UWM's statutory mission, is a "vital" interest which may justify the funding of political and ideological groups with mandatory fees.

The *Southworth* decision raises fundamental questions for universities, students, and courts to consider. For example, does the allocation of money, without any other act, amount to speech?<sup>361</sup> Does it amount to association? Were the objecting students, by solely paying a mandatory fee, compelled to associate with, and speak for, groups with which they disagreed?

Furthermore, *Southworth* has powerful political significance because it demonstrates how a conservative and religious legal organization can utilize the discourse of individual rights to judicially effect a de-funding of viewpoints which it opposes. Should judges heed these political underpinnings not argued or briefed by lawyers who present such cases? Is this judicial activism appropriate in a federal court to effect changes at a localized university?<sup>362</sup> Does this model of litigation empower those with the economic upper hand to de-fund viewpoints with which they disagree? After all, the objecting students did not seek out the lawyers at the ADF to recapture the couple of dollars they each indirectly lost when the Regents appropriated their mandatory fees.<sup>363</sup>

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<sup>361</sup> See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1019 (1976).

<sup>362</sup> For example, similar cases have heralded judicial deference to the academic judgment of the university. See, e.g., *Veed v. Schwartzkopf*, 353 F. Supp. 149 (D. Neb. 1973) ("Our states, through their colleges and universities, must retain the freedom and flexibility to put before their students a broad range of ideas in a variety of contexts. The wisdom or political desirability of the specific route chosen is not a question to be determined by the courts."), *aff'd*, 478 F.2d 1407 (8th Cir. 1973).

<sup>363</sup> The ADF devoted more than \$500,000 to the *Southworth* lawsuit. See Brakken, *supra* note 4, at 13.

The Seventh Circuit chilled robust student debate by holding that the funding of political and ideological groups through the mandatory fee program violated the objecting students' negative speech rights. Without funding, many of the political and ideological groups will not survive. Public universities will "lose much of the diversity which is [their] lifeblood."<sup>364</sup> Consequently, the court's holding will atrophy the interactive, extracurricular debate so central to the university and the democracy it serves. Justice Brennan commented, "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues . . .'"<sup>365</sup> In *Southworth*, the Seventh Circuit chilled the student debate so integral to the perfection of truth, an aim of both the UWM's mission and the guarantees of the First Amendment.<sup>366</sup>

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<sup>364</sup> *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 527 (Cal. 1993) (Arabian, J., dissenting).

<sup>365</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, D.C., 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

<sup>366</sup> The mission statement of the Regents of the University of Wisconsin concludes, "[b]asic to every purpose of the system is the search for truth." WIS. STAT. ANN. § 36.01(2) (West 1998). This goal of "truth" underlies not only the UWM system, but also the First Amendment guarantees of the United States Constitution. See JOHN B. HARRER, *INTELLECTUAL FREEDOM* 2, 3 (1992).



