I'm Paying for That - Assessing the Constitutionality of Mandating Student Activity Fees to Support Objectionable Political and Ideological Activities at Public Universities in Southworth v. Grebe

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I'M PAYING FOR THAT?—ASSESSING THE CONSTITUTIONALITY OF MANDATING STUDENT ACTIVITY FEES TO SUPPORT OBJECTIONABLE POLITICAL AND IDEOLOGICAL ACTIVITIES AT PUBLIC UNIVERSITIES
IN SOUTHWORTH v. GREBE

I. INTRODUCTION

Today, student activity fees fund a diverse group of organizations to accommodate students' varied interests and to promote the expression of diverse viewpoints.\(^1\) In addition to providing financial support, universities have fostered such ambitious goals by encouraging the creation of new campus organizations.\(^2\) Where there was once only the glee club, marching band and student council, today there exists an overwhelming array of student groups numbering into the hundreds.\(^3\) To fund the growing collection of campus groups, universities have resorted to assessing mandatory student activity fees, amounting at times to several hundred dollars per year.\(^4\) Although courts have permitted State Regents to collect

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\(^1\) For a discussion of the various groups sponsored by today’s universities, see infra note 22 and accompanying text.

\(^2\) For a discussion of the promotion of the marketplace of ideas at today's universities, see infra notes 35-48 and accompanying text.

\(^3\) See Smith v. Regents of the Univ. of Cal., 16 Cal. Rptr. 2d 181, 185 (1993) (stating that Associated Students of University of California at Berkeley currently funds 150 recognized groups). The University of Wisconsin funds over 200 student groups and services. See Anne-Marie Cusac, Suing For Jesus: A New Legal Team Wants to Cleanse the Campuses For Christ (Alliance Defense Fund), THE PROGRESSIVE, Apr. 1, 1997, at 30 (discussing breadth of student groups and services that 39,826 University of Wisconsin Madison students funded during 1996-97 academic year).

\(^4\) See Southworth v. Grebe, 151 F.3d 717, 719 (7th Cir. 1998) (stating that, at time of suit brought against University of Wisconsin Regents, students paid mandatory student fee of $165.75 per semester), cert. granted, 119 S. Ct. 1332 (1999). Revenues and student activity fees have not always been as high as those collected today. See Arrington v. Taylor, 380 F. Supp. 1348, 1351 (M.D.N.C. 1974) (noting that between 1970 and 1972, University of North Carolina charged undergraduate students $9 per semester, graduate and professional students $7 per semester and summer school students $3 per semester, totaling in excess of $250,000 per year); Larson v. Board of Regents of the Univ. of Neb., 204 N.W.2d 568, 570 (Neb. 1973) (assessing University of Nebraska student fee of $51.50 per semester in 1971); Lace v. University of Vt., 303 A.2d 475, 476 (Vt. 1973) (assessing University of Vermont student fee of $21.50 per semester).

In contrast, State University of New York (SUNY) Albany gave $57,600 to the New York Public Interest Research Group, Inc. (NYPIRG) fund in 1992 (at $3 per student), adding to the $2.7 million NYPIRG annual budget, roughly 30% of which came from student activity fees across New York State. See Carroll v. Blinken, 957 (257)
mandatory student activity fees, the constitutionality of using those fees to fund private organizations remains unsettled. Recently, in Southworth v. Grebe, the United States Court of Appeals for the Seventh Circuit held that it is unconstitutional for mandatory student fees to fund organizations engaged in political or ideological advocacy or speech.

This Note addresses the limited question as posed in Southworth and demonstrates how it fits into the larger body of First Amendment jurisprudence involving compelled funding. In Part II, this Note delineates the constitutional and statutory sources by which State Regents obtain the power to collect and disseminate mandatory student activity fees. Part II also discusses the limitations on the allocation of fee revenues by using the United States Supreme Court’s labor union and integrated bar dues paradigm as it pertains to collection and dissemination of mandatory student activity fees. In addition, Part II addresses the appropriateness of using the union fees and integrated bar dues paradigm set forth most succinctly in Abood v. Detroit Board of Education and Keller v. State Bar of California. Part III recounts the facts and procedural history of Southworth, in which the Seventh Circuit enjoined the Wisconsin State Regents from using the allocable portion of objecting students’ mandatory student activity fees to fund controversial organizations. Part IV sets forth and critically analyzes the court’s reasoning, particularly focusing on the propriety of its reliance on the Lehnert v. Ferris Faculty Ass’n analysis. Part IV also addresses the adequacy of the court’s equitable remedy and the potential obstacles to its enforcement. Finally, Part V discusses the possible legal

F.2d 991, 993-94 (2d Cir. 1992) (discussing student activity fees used to fund NYPIRG).

5. For a further discussion of the constitutionality of using mandatory student activity fees to fund private organizations, see infra notes 119-75 and accompanying text. For a further discussion of the Regents’ role in allocating student activity fees, see infra notes 17-19 and accompanying text.


7. For a discussion of the court’s holding in Southworth, see infra note 118 and accompanying text.

8. For a discussion of the constitutional and statutory sources by which State Regents obtain the power to collect and disseminate mandatory student activity fees, see infra notes 17-48 and accompanying text.

9. For a discussion of the labor union and integrated bar dues paradigm, see infra notes 49-90 and accompanying text.


11. 496 U.S. 1 (1990). For a discussion of the use of the union dues and integrated bar fees paradigm in mandatory student activity fee cases, see infra notes 91-105 and accompanying text.

12. For a discussion of the facts of Southworth, see infra notes 106-18 and accompanying text.


14. For a discussion and critique of the court’s reasoning in Southworth, see infra notes 119-40, 149-75 and accompanying text.

15. For a discussion of the adequacy of the Southworth court’s equitable remedy, see infra notes 141-48, 173-75 and accompanying text.
and social ramifications that may result from permitting objecting students to opt out of paying student activity fees that support objectionable speech.\(^{16}\)

**II. BACKGROUND**

**A. Rationale for Permitting the Collection of Mandatory Student Activity Fees—The Pre-Abood Years**

1. *The Balancing Test*

State legislatures typically delegate to State Regents the authority to allocate student activity fees.\(^ {17}\) States such as Kansas and Texas delegate almost unlimited power to the Regents for assessing and allocating fees.\(^ {18}\) In contrast, states like Oklahoma exercise more control over the Regents' role in collecting and disseminating student activity fees.\(^ {19}\)

\(^{16}\) For a discussion of the possible impact of the *Southworth* decision, see infra notes 176-88 and accompanying text.

\(^{17}\) See *Alaska Stat.* § 14.40.170(b)(3) (Michie 1997) (“The Board of Regents may . . . set student tuition and fees.”); *Fla. Stat. Ann.* § 240.235(1) (West 1998) (“Each University is authorized to establish separate activity and service . . . fees. When duly established, the fees shall be collected as component parts of the registration and tuition fees and shall be retained by the university and paid into the separate activity . . . funds.”); *Haw. Rev. Stat.* Ann. § 304-8.6(a) (Michie 1997) (establishing University of Hawaii student activities revolving fund); *Iowa Code Ann.* § 262.34B(2)-(3) (West 1996) (“The student fee committee shall consider any proposed student activity changes at the university and shall make recommendations concerning student activity fee changes to the president of the affected university. . . . The state board of regents shall make the final decision on student activity fee changes.”); *Kan. Stat. Ann.* § 76-719 (1997) (“[T]he board of regents shall fix tuition, fees and charges to be collected by each state educational institution. If a state educational institution collects a student-activity fee, the funds so collected shall be set apart and used for the purpose of supporting appropriate student activities.”); *Okla. Stat. Ann.* tit. 70, § 3218.12(A)-(G) (West 1998) (permitting Oklahoma State System of Higher Education to set and waive student activity fees within guidelines set forth by state legislature); *Tex. Educ. Code Ann.* § 54.5061 (West 1996) (establishing Board of Regents' power to assess voluntary or compulsory student activity fees and enumerating allocation system by which individual universities may disseminate such fees); *Wash. Rev. Code Ann.* § 28B.15.041 (West 1997) (establishing Board of Regents' power to collect student activity fees within Washington State University system).

\(^{18}\) See *Kan. Stat. Ann.* § 76-717 (1997) (permitting Board of Regents to collect student activity fees subject only to statute); *id.* § 76-742 (1997) (stating student fees may not be used to fund debt services on academic or health facilities absent student referendum); *Tex. Educ. Code Ann.* § 54.5061 (West 1996) (permitting Board of Regents to collect both voluntary and compulsory student activity fees if fees are reasonable and used solely for supporting student services); see also Regents of the Univ. of Cal. v. City of Santa Monica, 143 Cal. Rptr. 276, 279-80 (Ct. App. 1978) (finding that California Constitution expressly delegates to Regents full powers of organization and government over University of California, thus granting Regents "virtual autonomy in self-governance").

Generally speaking, once the student activity fees are collected, universities divide the funds raised into monies to be allocated by the students and those to be allocated by the university itself. Fees collected by the university tend to support student extracurricular activities and infrastructure, such as buildings, salaries of deans and general administrative funds. Monies allocated by students, the area most susceptible to constitutional challenge, lend financial support to the plethora of organizations recognized by the university. Students have almost exclusive control over such monies, subject only to administrative oversight.

Early rationale for permitting the collection of mandatory fees at public colleges and universities focused on the educational value of supplementing formal curricular activities. Courts deciding fee cases routinely

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20. See Southworth v. Grebe, 151 F.3d 717, 719 (7th Cir. 1998) (recognizing that while students review and make recommendations regarding use of nonallocable fees, Regents control final distribution of such fees), cert. granted, 119 S. Ct. 1332 (1999).

21. See id. ("The nonallocable fees cover expenses such as debt service, fixed operating costs of auxiliary operations, student health services, and the first and second year of the Recreational Sports budget."). Not all allocable student activity fees fall directly under student control. See Carroll v. Blinken, 957 F.2d 991, 993-94 (2d Cir. 1992) (noting that at SUNY Albany, NYPIRG and Student Association have contractual agreement whereby $3 from each student’s activity fee per semester, totaling $57,600 per year, automatically goes to support statewide NYPIRG, subject only to student referendum once every two years).

22. See Southworth, 151 F.3d at 720 (discussing variety of student groups funded by allocable portion of student activity fees). For example, the 18 organizations in dispute in Southworth were: Wisconsin Public Interest Research Group (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 on Latin America; La Colectiva Cultural de Aztlan; the Militant Student Union of the University of Wisconsin; the Student Labor Action Coalition; Student Solidarity; Students of National Organization for Women; MADPAC; and Madison Treaty Rights Support Group. See id. (enumerating organizations at source of controversy).

Fees at SUNY Albany fund such diverse groups as the Irish Club; the Korean Students Association; Dance, Theater and New Art Councils; the Black Alliance; the Pan-Caribbean Association; a geography club; Fuerza Latina; the Feminist Alliance; Amnesty International; the Revisionist Zionist Alternative; the Gay and Lesbian Alliance; and NYPIRG. See Carroll, 957 F.2d at 993 (listing student organizations at issue).

23. See Carroll, 957 F.2d at 993 (finding that once organization meets criteria set forth by university, that organization must petition for funding and be selected by SUNY Albany Student Association and then president’s office must approve funding); Arrington v. Taylor, 380 F. Supp. 1348, 1351 (M.D.N.C. 1974) (stating that University of North Carolina Board of Governors has ultimate authority over collection and allocation of funds collected from student activity fees with students acting in advisory role).

24. See, e.g., Widmar v. Vincent, 454 U.S. 263, 265 (1981) ("It is stated policy of the University of Missouri at Kansas City to encourage the activities of student organizations."); Carroll, 957 F.2d at 999 (finding that SUNY Albany’s interest in funding NYPIRG from student activity fees presents effort to expand campus
recognized the ability of student organizations to integrate classroom theory with practical application, thus increasing learning opportunities for students.\textsuperscript{25} Funding for such student groups frequently came from speech by facilitating exposure to wide variety of speakers); Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 362, 367 (8th Cir. 1988) (recognizing Gay and Lesbian Student Association as registered student organization, serving valid purpose to campus as whole by educating people about homosexuality and providing support group for homosexuals); Galda v. Rutgers, 772 F.2d 1060, 1067 (3d Cir. 1985) (noting that "[t]here is room for argument that a university's role of presenting a variety of ideas is a sufficiently compelling reason for some infringement of First Amendment rights"); Veed v. Schwartzkopf, 353 F. Supp. 149, 152 (D. Neb. 1973) (finding that by promoting extracurricular activities, University of Nebraska Regents "embraced an educational philosophy that the education of students extends beyond that which takes place in the classroom under the tutelage of instructors and professors"); Smith v. Regents of the Univ. of Cal., 16 Cal. Rptr. 2d 181, 201 (1993) (discussing how collection and disbursement of student fees play integral part in university's educational mission "to combat orthodoxy by encouraging the dissemination of a multiplicity of views and interests, many of which will inevitably provoke controversy, debate and opposition"); Larson v. Board of Regents of the Univ. of Neb., 204 N.W.2d 568, 570 (Neb. 1973) (finding that University of Nebraska Regents had right to fund additional services and facilities that "were essential to the creation of a better educational environment"); Good v. Associated Students of the Univ. of Wash., 542 P.2d 762, 764 (Wash. 1975) (stating that state statute permits University of Washington Regents to collect and disburse student activity fees to fund student activities and programs as they see fit).

25. See, e.g., Widmar, 454 U.S. at 267-68 (finding that extracurricular activity in public forum increases students' "social and cultural awareness as well as their intellectual curiosity"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312-13 n.48 (1978) (noting president of Princeton University stated that "a great deal of learning occurs informally. It occurs through interactions among students ... who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences"); Carroll, 957 F.2d at 1000-01 (quoting President Vencent O'Leary of SUNY Albany, "[T]he activity fee 'create[s] a forum for the expression of diverse views at Albany,' which is "consonant with the educational mission' of the university"); Galda, 772 F.2d at 1062 (noting expert testimony supporting mandatory student fee for Public Interest Research Group (PIRG), because PIRGs benefit student body by providing leadership opportunities, research projects and other training in creating good citizens); Veed, 353 F. Supp. at 152 ("[E]ducation of students extends beyond that which takes place in the classroom under the tutelage of instructors and professors."); Larson, 204 N.W.2d at 570 (discussing University of Nebraska officials' right to create additional services from mandatory student fees to promote better educational environment); Good, 542 P.2d at 768-69 (discussing campus-wide debate's positive impact on students).

In addition, quoting a former chancellor of SUNY Albany, the Carroll court stated:

The experience of a student on any campus extends beyond a classroom experience. The basic philosophy of an educational experience in any institution that I am familiar with is to provide for a student as wide a range of opportunities and exposures which will allow for the development of the potentials of an entire individual. I would stress the importance of [students] reaching out during their undergraduate years to sample, to explore, to see various kinds of activities, because it is one of the rare times in an individual's life when you have an opportunity to learn a great deal more about different kinds of activities and events.
mandatory student activity fees. As a general rule, courts tended to, and continue to, defer to state statutes in upholding mandatory student activity fees, thereby granting educational institutions broad authority in managing and controlling their internal affairs.

Over the years, the assessment and allocation of mandatory fees has generated a number of legal challenges based on the violation of certain First Amendment rights. By forcing students to fund and associate with programs that are objectionable to individual students, universities have encroached upon students' rights of free speech and free association. While recognizing the First Amendment's guarantee of freedom of speech, courts have upheld mandatory fees as a means to achieve educational ends.

Carroll, 957 F.2d at 999-1000. In total, activity fees support three interests: "[T]he promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate." Id. at 1001.

26. See, e.g., Hays County Guardian v. Supple, 969 F.2d 111, 123-24 (5th Cir. 1992) (finding that Southwest Texas State University financial support for student-run newspaper was "narrowly tailored means" of advancing educational ends); Carroll, 957 F.2d at 1001 (finding that SUNY Albany was not unique in using student activity fees as means to nurture campus debate); Galda, 772 F.2d at 1066 (noting valuable experience gained by participating in New Jersey Public Interest Research Group (NJPIRG)); Arrington, 380 F. Supp. at 1363 (finding that funding of student-run newspaper through mandatorv student fees did not violate First Amendment); Veed, 353 F. Supp. at 153 ("[A] university is not constitutionally prohibited from financing through mandatory student fees programs which provide a forum for expression of opinion."); Larson, 204 N.W.2d at 570 (discussing University of Nebraska officials' use of mandatory student fees to promote better educational environment); Good, 542 P.2d at 768 (stating that universities are free to assess mandatory fees, though allocation of those fees is subject to First Amendment scrutiny).

27. See, e.g., Healy v. James, 408 U.S. 169, 180 (1972) (recognizing authority of states and school officials to prescribe and control conduct in schools); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 507 (1969) (recognizing authority of states and school officials in prescribing and controlling conduct in schools); Veed, 353 F. Supp at 152 (finding that determination of educational nature of activities is left to individual Regents, subject only to First Amendment scrutiny); Smith, 16 Cal. Rptr. 2d at 186 (recognizing Regents' authority to levy student activity fees as granted by California State Constitution); Larson, 204 N.W.2d at 571 (recognizing without question University of Nebraska's right to support partially campus newspaper with student fees); Good, 542 P.2d at 764 (deferring to Washington State's higher education code to determine extent of Regents' power to allocate student fees).

Many state statutes give broad authority to State Regents in collecting student activity fees. See, e.g., ALASKA STAT. § 14.40.170(b)(3) (Michie 1997) (providing that "[t]he Board of Regents may ... set student tuition and fees"). Not all states, however, cast the language of their statutes in such permissively broad language. See FLA. STAT. ANN. § 240.235(1)-(2) (West 1998) (directing State Regents to spell out, with excruciating precision, manner of collection and distribution of student activity fees).

28. See U.S. CONST. amend. I (providing that "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 redress of grievances").

29. See IRVING BRANT, JAMES MADISON: THE NATIONALIST 354 (1948) ("[T]o compel [an individual] to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.").
and freedom of the press, critics of mandatory student activity fees point out two immutable corollaries to the First Amendment: (1) the right not to speak\textsuperscript{30} and (2) the right not to be compelled to subsidize the speech of others.\textsuperscript{31}

Courts have held that students' First Amendment rights are not abandoned with the donning of academic robes.\textsuperscript{32} In \textit{Tinker v. Des Moines Independent Community School District},\textsuperscript{33} the Supreme Court firmly established that the First Amendment safeguards: (1) the right to express one's political beliefs; (2) the right not to be coerced into expressing or supporting beliefs one disagrees with; and (3) the right not to be punished for one's personal beliefs.\textsuperscript{34}

In 1972, the Supreme Court held that the \textit{Tinker} analysis applies to colleges and universities when it decided \textit{Healy v. James}.\textsuperscript{35} The \textit{Healy} Court defined the academic community as "the college classroom with its sur-

\textsuperscript{30} See \textit{West Virginia State Bd. of Educ. v. Barnette}, 319 U.S. 624, 642 (1943) ("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."). It is interesting to note that the Supreme Court ruling in \textit{Barnette} struck down a West Virginia law compelling public school students to salute and pledge allegiance to the U.S. flag. See \textit{id.} West Virginia enacted the law in the midst of World War II, a time when public patriotism reached a fevered pitch. See Jeff Homer, \textit{Student Fees and First Amendment Concerns}, 120 West's Educ. L. Rep. 911, 911 (1997) (noting that despite overwhelming public sentiment in favor of compelled flag saluting, Supreme Court struck down law requiring flag saluting, thus remaining steadfast in its protection of First Amendment liberties).

\textsuperscript{31} See \textit{Keller v. State Bar of Cal.}, 496 U.S. 1, 10 (1990) (holding that using compulsory dues to finance objectionable political and ideological activities of State Bar violates right to free speech guaranteed by First Amendment) (citing BRANT, supra note 29, at 354); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (deciding that payers of union dues need not pay, nor be coerced into paying, for advancement of ideas to which they object).

\textsuperscript{32} See \textit{Healy}, 408 U.S. at 180 ("[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment. . . . [T]he precedents of this Court leave no room for the view that. . . First Amendment protections should apply with less force on college campuses than in the community at large."); \textit{Tinker}, 393 U.S. at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

\textsuperscript{33} 393 U.S. 503 (1969).

\textsuperscript{34} See \textit{id.} at 505-06, 514 (reaffirming notion that "pure speech" is entitled to comprehensive protection under First Amendment). The Court held that wearing armbands "was entirely divorced from actually or potentially disruptive conduct by those participating in it" and is a form of pure speech protected under the Constitution. See \textit{id.} (holding that in absence of demonstrated facts that might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities, prohibiting wearing of black armbands on students' sleeves to protest Vietnam War presented unconstitutional denial of students' right to free expression of opinion).

\textsuperscript{35} 408 U.S. 169 (1972).
rounding environs" where there exists a "marketplace of ideas," secured by a nation dedicated to "safeguarding academic freedom." The Court went on to hold that the First Amendment requires a balance between student, faculty and administrator interests in promoting "an environment free from disruptive interference with the educational process" and the state's "equally significant interest" in providing "the widest latitude for free expression and debate." Only if the speech poses a substantial impediment to other students' opportunities to obtain their educations may the university restrict students' First Amendment rights.

As stated above, the initial line of student activity fee cases strove to balance students' First Amendment rights with a university's desire to foster a marketplace of ideas. These first cases, using a balancing test, suggested that mandatory fees would withstand constitutional muster if "(1) they are used to promote a college environment supportive of learning, debate, dissent and controversy and (2) do not support any particular political or personal philosophy." Such early cases held that universities were not prohibited from using mandatory fees to finance programs that provided a viewpoint-neutral forum for the expression of opinion.

36. Id. at 180-81 (citing Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("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."); see also Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (advocating "free trade of ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market"); Veed v. Schwartzkopf, 353 F. Supp. 149, 152 (D. Neb. 1973) (recognizing that University of Nebraska has embraced educational philosophy that exposure to speakers outside of classroom concerning widely divergent set of opinions provides important educational tool); Good v. Associated Students of the Univ. of Wash., 542 P.2d 762, 769 (Wash. 1975) (recognizing role of university in fostering dissemination of wide range of ideas, theories and beliefs).

37. Healy, 408 U.S. at 171.

38. See id. at 184 (recognizing that colleges, while having legitimate interests in preventing upheaval on campus, such as disruption of classes and infringement of campus rules, have "heavy burden" in demonstrating appropriateness of restricting free speech); cf. Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-19 (1971) (finding that prior restraint of expression has heavy presumption against constitutional validity); Freedman v. Maryland, 380 U.S. 51, 57 (1965) (finding heavy presumption against constitutional validity for prior restraints of expression in exhibiting motion pictures); Near v. Minnesota, 283 U.S. 697, 713-16 (1931) (finding statute authorizing restraint on certain publications to be inconsistent with historical freedom of press).


40. Id. at 606-07; see Veed, 353 F. Supp. at 152 ("Within wide limitations a state is free to adopt such educational philosophy as it chooses."); Good, 542 P.2d at 764, 768 (upholding University of Wisconsin Regents' broad power to conduct its own affairs).

41. See Veed, 353 F. Supp. at 152 (finding that so long as funding is not "arbitrary or capricious," university has vast latitude in allocating student activity fees).
jurisprudence on the subject also acknowledged the potential damaging effect of pro rata fee reimbursement on a university's educational mission.\textsuperscript{42} In contrast, recent cases have downplayed the potential crippling effect on free speech that would occur if students were permitted to withhold portions of their student activity fees that fund objectionable causes.\textsuperscript{43}

Underlying the idea of the university as a marketplace of ideas is the public forum doctrine.\textsuperscript{44} The Supreme Court in \textit{Perry Education Ass'n v. Perry Local Educators' Ass'n}\textsuperscript{45} stated that the public forum doctrine pertains to those domains held immemorially in the public trust.\textsuperscript{46} Courts have

The court clarified its statement by adding that the activities must not: (1) be chosen in an arbitrary and capricious manner; (2) force students to accept or practice religious, political or personal viewpoints offensive to them; or (3) have a chilling effect on student exercise of constitutionally protected rights. See \textit{id.} (setting forth test in determining constitutionality of allocations).

\textsuperscript{42} See \textit{Good}, 542 P.2d at 768-69 (arguing that permitting dissenters to withhold minimal financial contributions required by university "would permit a possible minority view to destroy or cripple a valuable learning adjunct of university life").

\textsuperscript{43} See \textit{Southworth v. Grebe}, 151 F.3d 717, 725 (7th Cir. 1998) ("The mere incantation of the rubric 'education' cannot overcome a tactic, repugnant to the Constitution, of requiring objecting students to fund private political and ideological organizations."); \textit{cert. granted}, 119 S. Ct. 1332 (1999); \textit{Smith v. Regents of the Univ. of Cal.}, 16 Cal. Rptr. 2d 181, 184 (1993) (noting that Regents may continue to fund student political activities, but only with fees from nonobjecting students); see also \textit{Schmitz}, \textit{supra} note 39, at 601 (noting that \textit{Smith} court failed to address idea of university as forum for varying views, theories and beliefs); Carolyn Wiggin, \textit{A Funny Thing Happens When You Pay for a Forum: Mandatory Student Fees to Support Political Speech at Public Universities}, 103 \textit{Yale L.J.} 2009, 2009-10 (1994) (noting that largely unnoticed \textit{Smith} decision, in attempt to protect paradoxically First Amendment rights, may in fact "severely diminish student speech on issues of public concern at state universities"); \textit{Karen M. Kramer, Comment, The Free Rider Problem and First Amendment Concerns: A Balance Upset by New Limitations on Mandatory Student Fees, 21 J.C. & U.L. 691, 691-92 (1995) (noting that \textit{Smith} merits close attention because of its potentially far-reaching effect of "alter[ing] the climate of debate on university campuses and . . . limit[ing] student exposure to diverse extracurricular activities that, in large part, define the college educational experience")}.

\textsuperscript{44} For a discussion of the public forum doctrine, see \textit{infra} notes 45-48 and accompanying text.

\textsuperscript{45} 460 U.S. 37 (1983).

\textsuperscript{46} See \textit{id.} at 45-47 (discussing different types of public forums). Two commentators summarized the \textit{Perry} analysis in the following manner:

"In a classic, or quintessential, public forum, such as a park or a sidewalk, the Court strictly scrutinized a content-based regulation to see whether it is narrowly drawn to serve a compelling governmental interest. The Court also requires a compelling interest to justify any blanket prohibition of all speech. When the forum [often called a limited or designated forum] is not a historic type of public forum, but has nonetheless been opened to the public's first amendment activities, the Court again strictly scrutinizes content regulation, but allows the government to close the forum entirely. Finally, in a nonpublic forum, the government is free to exclude speech or speakers based upon the content of the message, except in cases of viewpoint discrimination."
traditionally found universities to operate limited public forums, an offshoot of traditional public forum jurisprudence. As a limited public forum, a public university may use the campus in any manner consistent with its mission as an educational institution dedicated to promoting a marketplace of ideas.

2. Early Union Fees and Integrated Bar Dues Cases

Since the balancing test era, a second line of cases has emerged analogizing mandatory student fees to union fees or integrated state bar association dues. Despite wide acceptance of the union dues and integrated


47. See Widmar v. Vincent, 454 U.S. 263, 263 (1981) (finding University of Missouri to have created limited public forum open to activities sponsored by registered student groups). The Widmar Court recognized that:

First Amendment rights must be analyzed "in light of the special characteristics of the school environment. . . ." A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. Id. at 268 n.5 (quoting Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969)).

48. See Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 818-19 (1985) (Blackmun, J., dissenting) (finding that, in limited public forum, there is need to confine expressive activity on property to uses compatible with purposes of operating institution); see also Waring, supra note 46, at 557 (noting that, while remaining controversial subgroup, concept of limited public forum conforms with concept of college campus as place to disseminate plethora of ideological and political ideals).

49. See generally Hays County Guardian v. Supple, 969 F.2d 111, 123 (5th Cir. 1992) (extrapolating from Abood that "government may compel an individual to subsidize non-governmental speech when such compulsion accomplishes the government's vital policy interest"); Carroll v. Blinken, 957 F.2d 991, 997-98 (2d Cir. 1992) (comparing mandatory nonunion member fees for funding objectionable ideological activities and SUNY Albany's requirement of NYPIRG student fee); Galda v. Rutgers, 772 F.2d 1060, 1063-64 (3d Cir. 1985) (finding Abood Court's labor union analysis to be proper for assessing constitutionality of mandatory student activity fees); Kania v. Fordham, 702 F.2d 475, 479-80 (4th Cir. 1983) (discussing efficacy of using Abood analysis in assessing validity of mandatory student activity fees); Arrington v. Taylor, 380 F. Supp. 1348, 1360-62 (M.D.N.C. 1974) (adopting integrated bar dues analysis found in Lathrop v. Donohue, 367 U.S. 820 (1961), as analytical tool in assessing constitutionality of student activity fees); Larson v. Board of Regents of the Univ. of Neb., 204 N.W.2d 568, 570 (Neb. 1973) (finding that while union dues cases present proper starting point in determining constitutionality of student activity fees, there exist important distinctions between activities of labor unions and extracurricular activities at universities); Lace v. University of Vt., 303 A.2d 475, 479 (Vt. 1973) (adopting International Ass'n of Machinist v. Street, 367 U.S. 740 (1961), union dues analysis as proper analytical tool for assessing constitutionality of mandatory student activity fees).
bar fees paradigm, not all jurisdictions have adopted this model in assessing the constitutionality of mandatory student activity fees, thus producing a circuit split.50 In addition, unlike the pure balancing test cases that consistently held in favor of the university, cases adopting the union fees and integrated state bar association dues paradigm have not been as favorable to the Regents in recent decisions.51

In early attempts to analogize mandatory student activity fees and union or state bar association dues, the courts relied on International Ass'n of Machinists v. Street52 and Lathrop v. Donohue.53 For example, in Larson v. Board of Regents of the University of Nebraska,54 the Nebraska Supreme Court distinguished between the political and economic activities supported by union dues and those supported by mandatory student fees.55 Finding in favor of the university, the court held that extracurricular activities are “essential to the creation of a better educational environment” and that

50. For a further discussion of the circuit split concerning the application of the union dues and integrated bar fees analysis, see infra notes 91-105 and accompanying text.

51. See Smith v. Regents of the Univ. of Cal., 16 Cal. Rptr. 2d 181, 214 (1993) (upholding long line of jurisprudence permitting State Regents to impose mandatory student activity fees while prohibiting Regents from using fees to compel and coerce dissenting students to subsidize objectionable political and ideological causes); see also Schmitz, supra note 39, at 645 (finding decision in Smith poorly reasoned, contrary to settled law and susceptible to being overruled); Kramer, supra note 43, at 691 (finding ruling in Smith to be new constitutional limitation on university's use of mandatory student fees); Waring, supra note 46, at 541 (finding Smith decision, with its "indifference to the principles of academic freedom threatens the free exchange of ideas at public universities").

52. 367 U.S. 740 (1961); see Communications Workers v. Beck, 487 U.S. 735, 736 (1988) (finding that Street Court's reasoning established that National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-168 (1994), did not permit unions to use objecting nonmember dues to fund activities unrelated to collective bargaining activities, thereby preserving Congress' intent to authorize "compulsory unionism only to the extent necessary to ensure that those who enjoy union negotiated benefits contribute to their cost").

53. 367 U.S. 820 (1961). The Court raised two issues in Lathrop: (1) whether compulsory membership in an integrated state bar association violates a person's free association rights and (2) whether the requirement of paying mandatory bar association dues and compelling a person to subscribe to opinions opposed to their own violates a person's free speech rights. See id. at 822-23 (addressing constitutionality of mandatory fees in state with integrated bar). The Court held that compulsory membership requiring only the payment of annual dues did not violate a person's constitutional free association rights. See id. at 827-28, 843. In addition, the Court deemed the free speech issue not ripe for consideration because the plaintiff failed to allege specific positions and views that were taken by the bar association which conflicted with the plaintiff's views. See id. at 847 (finding claim not ripe for adjudication).

54. 204 N.W.2d 568 (Neb. 1973).

55. See id. at 570 ("There is an important distinction between the political activities of a labor union and extracurricular activities at a university.").
facilitating such an environment by use of mandatory fees was within the school’s discretionary authority.\textsuperscript{56} Further efforts to analogize mandatory student fees and integrated bar dues focused on the criteria set forth in \textit{Arrington v. Taylor}.\textsuperscript{57} In adopting the criteria enumerated in \textit{Larson}, the district court in \textit{Arrington} determined that “[e]conomic capacity and First Amendment rights are [at best] remotely related.”\textsuperscript{58} Rather than viewing mandatory fees as eliminating minority viewpoints by requiring students to support financially majority viewpoints, the \textit{Arrington} court found that mandatory fees were used to provide a forum for all students to express their opinions.\textsuperscript{59} Finally, the \textit{Arrington} court compared student nonpayment with failure to pay taxes, stating that permitting “a taxpayer to refuse to pay that portion of his taxes which is used for informational purposes would undermine the entire tax collection system.”\textsuperscript{60} In a recently decided case, \textit{Gay \& Lesbian Students Ass’n v. Gohn},\textsuperscript{61} the United States Court of Appeals for the Eighth Circuit recognized the merit of the taxpayer analogy in analyzing student activity fee cases.\textsuperscript{62} Although the analogy may prove helpful,  

\textsuperscript{56} See id. at 570-71 (stating that “[w]ithin reasonable limits, it is appropriate that many different points of view be presented to the students”). The court went on to state that the mere fact that students disagreed with some of the views expressed was not controlling. See id. (finding disagreement with views expressed not dispositive). Furthermore, exposing students to a variety of viewpoints, “within reasonable limits” and with “reasonable supervision” by college officials, is necessary in “promoting and permitting the reflection of a broad spectrum of university life and reasonable representation of the various aspects of student thought and action.” Id. at 571.  

\textsuperscript{57} 380 F. Supp. 1348 (M.D.N.C. 1974). The \textit{Arrington} court adopted the following four out of five criteria set forth in \textit{Lathrop} to determine whether the collection of mandatory student activity fees withstood constitutional challenge: (1) whether the mandatory payment would “reduce a dissident member’s economic capacity to espouse causes in which he [or she] believes”; (2) whether such fees could lead to the “governmental ‘establishment’ of political belief”; (3) whether the increased power of the group collecting fees “could tend to ‘drown out’ the voice of its dissenting members”; and (4) whether compelling “a person to pay dues to an organization which espouses views contrary to [a person’s] own in effect compels [that person] to adopt and affirm those views.” Id. at 1361 (citing \textit{Lathrop}, 367 U.S. at 849-85 (Harlan, J., concurring)).  

\textsuperscript{58} Id. at 1361-62. The court also noted that “[a]ny contention that the mandatory fee exacted from the plaintiffs . . . reduces their economic ability to further their positions is unsupported.” Id.  

\textsuperscript{59} See id. at 1362 (finding that such fees provide forum for those who write for student-run paper to express their views).  

\textsuperscript{60} Id. According to the court, “[T]he \textit{Daily Tar Heel}’s position on a given subject is no more attributable to (and therefore imposed upon) plaintiffs than is the position of the Federal Government on South Vietnam attributable to each of the citizens who annually pay their federal taxes.” Id.; see United States v. Lee, 455 U.S. 252, 260 (1982) (“The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.”).  

\textsuperscript{61} 850 F.2d 361 (8th Cir. 1988).  

\textsuperscript{62} See id. at 362 (finding that, while university need not supply funds to student organizations, once it decides to do so, First Amendment requires that univer-
the union fees and integrated bar dues paradigm remain the guiding analytical tools in compelled funding cases.63

B. Abood and the Union Dues Paradigm

The Supreme Court’s decision in Abood affirms lower court decisions that draw an analogy between mandatory student fees and union dues.64 In Abood, teachers in the Detroit school system challenged the constitutionality of an agency-shop agreement that required them to join the union and pay a mandatory union service fee.65 The Supreme Court held that the Board of Education could compel nonunion teachers to pay the

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63. For a further discussion of the pervasiveness of the union fees and integrated bar dues paradigm, see infra notes 64-90 and accompanying text. The compelled funding cases’ reliance on the income tax analogy also fails to take into account the societal universality of the income tax as compared to the relatively diminutive cross section of society affected in compelled funding cases involving student activity fees. See Autenrieth v. United States, 279 F. Supp. 156, 156 (N.D. Cal. 1968) (finding that tax involved in case is “imposed on all citizens regardless of religious practices and affects the very life of the civil government under which we live”).

64. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222-23 (1977) (finding that nonunion teachers payment of agency fee to promote collective bargaining does not violate Constitution).

65. See id. at 211-13 (determining constitutionality of permitting union and local employer to charge nonunion members compulsory service fees). Specifically, the Court sought to determine the constitutionality of agency-shop agreements. See id. The Court stated the issue as whether:
service fee so long as the money collected advanced ideological and political causes germane to the Board’s duties as a collective bargaining representative.\textsuperscript{66} Simply opposing a union organization on strategic grounds as opposed to substantive grounds was not sufficient to obtain valid exceptions to the payment of mandatory fees.\textsuperscript{67}

The \textit{Abood} Court, in reaching its decision, relied on \textit{Railway Employees’ Department v. Hanson}\textsuperscript{68} and \textit{Street}.\textsuperscript{69} While both \textit{Hanson} and \textit{Street} discussed the constitutionality of using fees of union members for noncollective bargaining purposes, the \textit{Abood} Court posited the same question as it related to nonunion members.\textsuperscript{70} Recognizing the potential free rider problem inherent in permitting nonunion members to reap the benefit of union collective bargaining, nonunion members typically pay agency fees dedicated solely to the advancement of collective bargaining.\textsuperscript{71} The issue in

\begin{quote}

[Permitting unions and local employers] to agree to an “agency shop” arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment . . . violates the constitutional rights of government employees who object to public-sector unions as such or to various union activities financed by the compulsory service fees. \textit{Id.} at 211.

\textsuperscript{66} See \textit{id.} at 225-26 (finding that spending of union dues contributed by nonunion members must be germane to collective bargaining). The Court held that “insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, . . . [the Supreme Court decisions in \textit{Hanson} and \textit{Street}] appear to require validation of the agency-shop agreement before us.” \textit{Id.}

\textsuperscript{67} See \textit{id.} at 222 (citing \textit{Hanson} and \textit{Street}, Court found that peripheral interference with constitutional rights of union workers is “justified by the . . . important contribution of the union shop to the system of labor relations established by Congress”).

\textsuperscript{68} 351 U.S. 225 (1956). The Court in \textit{Hanson} was concerned with financial support for the union under the Railway Labor Act, 45 U.S.C. §§ 151-162 (1994). \textit{See Hanson}, 351 U.S. at 238 (Frankfurter, J., concurring) (finding that “the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work . . . does not violate . . . the First . . . Amendment”).

\textsuperscript{69} See \textit{Abood}, 431 U.S. at 222 (citing \textit{Hanson} and \textit{Street}); \textit{see also} \textit{International Ass’n of Machinists v. Street}, 367 U.S. 740, 769-70 (1961) (finding that compulsory union dues for political purposes were impermissible under Railway Labor Act because it did not represent justified expenses related to union negotiation, administration of collective bargaining agreement and adjusting of grievances and disputes).

\textsuperscript{70} See \textit{Abood}, 431 U.S. at 211 (discussing issue of union fee payment by nonunion workers).

\textsuperscript{71} See \textit{id.} at 221-22 (discussing myriad of costs associated with reaching successful collective bargaining agreement and representing interests of employees in settling disputes and processing grievances). A free rider is an employee who takes advantage of the union’s responsibilities as exclusive employee representative to negotiate and administer the collective bargaining agreement, including the representation of all employees in dispute and grievance resolution; however, he or she refuses to contribute to the union. \textit{See Schmitz, supra} note 39, at 611 n.81 (discussing free rider problem). The free rider problem is solved by requiring nonunion members to pay an agency fee equivalent to that portion of union dues used for negotiation and administration of the collective bargaining agreement,
Abbood concerned the constitutionality of using such agency fees for noncollective bargaining purposes. In adopting the nonunion members' argument, the Court held that a union may not spend a portion of nonunion members' required service fees "to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative."

Although it is a watershed case in the area of compelled funding, Abbood failed to address adequately each aspect of the restrictions placed on the collection of union dues. Both in Abbood and Chicago Teachers Union v. Hudson, the Supreme Court recognized the need to adopt procedural safeguards to prevent the unconstitutional allocation of compulsory fees. In designing a procedure to minimize infringement upon nonunion employees' constitutional rights, the Hudson Court held that the union's collection of agency fees must include: (1) "an adequate explanation" of the fee calculation; (2) "a reasonably prompt opportunity" for nonunion employees to question the fee calculation "before an impartial decisionmaker"; and (3) "an escrow for the amounts reasonably in dispute" until fee dispute resolution. Additionally, the Court in Ellis v. Brotherhood of including grievance resolution. See id. (discussing solution to free rider problem); see also Chicago Teachers Union v. Hudson, 475 U.S. 292, 300-01 (1986) (involving agency fee amounting to 95% of union members' dues).

72. See Abbood, 431 U.S. at 211 (stating that issue before Court was whether agency-shop arrangement "violates the constitutional rights of government employees who object to public sector unions as such or to various union activities financed by the compulsory service fees").

73. Id. at 234. The Court found that whereas the union was prevented from assessing fees to objecting members and nonmembers for political or ideological causes unrelated to public employment, the union could still fund such causes with monies collected from employees "who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." Id.

74. See Hudson, 475 U.S. at 302-03 (1986) (recognizing need to adopt procedural safeguards that prevent infringement on First Amendment rights of objecting employees without restricting union's ability to require contribution to cost of collective bargaining activities).

75. 475 U.S. 292 (1986).


77. Hudson, 475 U.S. at 310. The Court required "absolute precision" in agency fee calculation. See id. at 307 n.18 (noting need for precision in calculating agency fees) (citing Railway Clerks v. Allen, 373 U.S. 113, 122 (1963)). To ensure accuracy, the union could base its agency fee on the previous year's expenses and was required to have such expenditures verified by an independent auditor. See id. (permitting calculation of union fee on basis of expenses during preceding year). Additionally, the Court enumerated several inadequate procedural approaches that failed to safeguard nonunion members' constitutional rights. See id. at 305-07 (criticizing (1) pure rebate approach; (2) advance reduction of dues; and (3) lack of prompt decision by impartial decisionmaker). A pure rebate approach was, in effect, an involuntary loan to the union for purposes to which the employee ob-
Railway, Airline & Steamship Clerks\textsuperscript{78} restricted the broad holding in \textit{Abood} by finding that a union's nonpolitical social activities, even if unrelated to collective bargaining, may be financed through union dues.\textsuperscript{79}

C. \textit{The Supreme Court After Abood—The Application of the Union Dues Paradigm to Other Compelled Funding Scenarios}

In \textit{Keller}, the Supreme Court revisited the issue of compelled funding.\textsuperscript{80} The attorneys in \textit{Keller} set forth a reverse First Amendment argument to challenge the California Bar's use of mandatory dues to finance political and ideological activities objectionable to some bar members.\textsuperscript{81} The Supreme Court held that as long as the use of such fees remains germane to the promotion and improvement of the legal profession, such fees are not unconstitutional.\textsuperscript{82} In so ruling, the Court likened the benefits received by employees from union-management negotiations to the benefits the State Bar enjoyed in self-governance, and thus held that bar members should be required to pay their fair share of the costs of professional involvement.\textsuperscript{83}
The germaneness criteria, set forth principally in the Supreme Court's *Abood* and *Keller* decisions, provided the foundation for assessing the constitutionality of mandatory student activity fee allocation.\(^8\) The Court in *Lehnert* established a three-prong analysis for determining the constitutionality of mandatory fees in the union context.\(^8\) Drawing on *Abood* and *Keller*, the Court held that chargeable activities for nonunion employees must: (1) be "germane" to collective bargaining activity; (2) be justified by the government's vital policy interest in promoting labor peace and avoiding "free riders" who benefit from union efforts without paying for union services; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.\(^8\)

criteria for admission to the bar, control of lawyer discipline and development of the codes of professional conduct) presented some unique advantages of bar membership. See *id.* (emphasizing importance of sharing costs of professional involvement for regulation of law profession).


\(^8\)  See *Lehnert* v. Ferris Faculty Ass'n, 500 U.S. 507, 516-18 (1991) (finding decisions in *Abood* and *Keller* to address directly constitutionality of union fees distribution in public employment context). While differing on the proper place of *Abood* in analogizing compelled funding cases other than those involving unions, cases deciding the constitutionality of mandatory student activities fees nevertheless primarily use *Abood* as a focal point of analysis. See *id.* (analyzing constitutionality of student activity fees under *Abood* analysis); see also *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir. 1992) (extrapolating from *Abood* that government may compel individuals to subsidize nongovernmental speech where such compulsion accomplishes "government's vital policy interest"); *Carroll v. Blinken*, 957 F.2d 991, 997 (2d Cir. 1992) (analogizing automatic NYPIRG membership at SUNY Albany to mandatory fees paid by nonunion employees in labor context); *Galda v. Rutgers*, 779 F.2d 1060, 1063 (3d Cir. 1985) (finding *Abood* Court's labor union analysis to be proper analysis in assessing constitutionality of mandatory student activity fees); *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1982) (discussing efficacy of using *Abood* analysis in assessing validity of mandatory student activity fees); *Smith v. Regents of the Univ. of Cal.*, 16 Cal. Rptr. 2d 181, 187 (1993) (citing *Abood* and *Keller* as support for contention that government may not compel person to contribute money to support political or ideological causes).

\(^8\) See *Lehnert*, 500 U.S. at 519 (adopting three-prong analytical approach to compelled funding cases).

\(^8\) See *id.* at 516-19 (setting forth three-prong analysis in assessing compelled funding cases involving union dues). Despite the Court's clearly laid out test set forth in *Lehnert*, two recent decisions, *Smith* and *Carroll*, have not explicitly adopted the three-prong test. For a discussion of the *Smith* decision, see *infra* notes 100-03 and accompanying text. For a discussion of the *Carroll* decision, see *infra* notes 95-96 and accompanying text. Nevertheless, the Supreme Court reaffirmed the *Lehnert* test. See *Air Line Pilots Ass'n v. Miller*, 118 S. Ct. 1761, 1766 (1998) (relying
Although the Court's analysis centered only on a union paradigm, the Court did not explicitly exclude the use of such guidelines in determining the constitutionality of other compelled funding scenarios.  

Most recently, the Supreme Court in *Rosenberger v. Rector & Visitors of the University of Virginia*,  
while declining to address the issue before the court in *Southworth*, directed that the proper test for such a question resides in the *Abood* and *Keller* analyses. Additionally, the Court implicitly upheld early student activity fee jurisprudence by finding that the denial of free speech on campus for reasons of religious bias undermined both the Establishment Clause and the ideal that university campuses should be used for the presentation of all viewpoints.  

on *Lehnert*’s three-prong test). While breaking new ground in its use of the *Lehnert* test in a mandatory student activities fees case, the *Southworth* court, given the reaffirmation of the test in *Miller*, holds truest to the Supreme Court’s probable analysis should it grant certiorari on the issue of mandatory student activity fees for funding of private organizations. See *Southworth v. Grebe*, 151 F.3d 717, 732-33 (7th Cir. 1998) (holding use of mandatory student activity fees for funding private organizations violated free speech rights of objecting students), *cert. granted*, 119 S. Ct. 1332 (1999).  

87. *See Lehnert*, 500 U.S. at 519 (stating that three-prong analysis sets forth “several guidelines to be followed in making such determinations” in compelled funding cases generally); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 840-41 (1995) (directing courts dealing with issues similar to those presented in *Southworth* to look to *Abood* and *Keller* for guidance).  


89. *See id.* at 840 (noting that answer to question presented in cases such as *Southworth* turns on analyses found in *Abood* and *Keller*). The *Rosenberger* Court stated that “[t]he fee is mandatory, and we do not have before us the question whether an objecting student has the First Amendment right to demand a pro rata return to the extent the fee is expended for speech to which he or she does not subscribe.” *Id.* (citing *Keller v. State Bar of Cal.*, 496 U.S. 1, 15-16 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235-36 (1977)); *see id.* at 851 (O’Connor, J., concurring) (“Finally, although the question is not presented here, I note the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that [he or] she should not be compelled to pay for speech with which [he or] she disagrees.”). For an additional discussion of the use of the *Abood* and *Keller* analyses, *see infra* notes 122-25 and accompanying text.  

90. *See Rosenberger*, 515 U.S. at 840, 845-56 (finding that University of Virginia engaged in viewpoint discrimination against Christian newspaper by denying funding, thus violating First Amendment). In finding that the university’s denial of funding to the campus Christian paper, *Wide Awake: A Christian Perspective at the University of Virginia*, for the sole reason that the paper “primarily promotes or manifests a particular belief in or about a deity or an ultimate reality,” the Court did not reach the issue of “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 825, 840. By finding the denial of funding unconstitutional, the Court implicitly upheld the concept set forth in early student fee jurisprudence permitting the university to create a marketplace of ideas void of viewpoint discrimination within the campus walls. *See id.* at 844 (finding university to be “a pure forum for the expression of ideas” that would otherwise remain under-represented).  

A number of commentators have addressed *Rosenberger* and its impact. *See*, e.g., David Schimmel, *Discrimination Against Viewpoints Prohibited in Public Colleges and Universities: An Analysis of Rosenberger v. The University of Virginia*, 102 EDUC.
D. The Circuit Split—How to Apply the Abood and Keller Analyses to Student Activity Fee Cases

The Abood and, in recent years, the Keller analyses have provided a springboard for examination of compelled funding cases in not only union fee and integrated bar dues cases, but also in student activity fee cases.91 Despite agreement as to the proper analytical framework, the courts of appeals are split on exactly how to apply the union dues and integrated bar fees analyses to student activity fee cases.92

The controversy surrounds whether the above paradigm includes the use of mandatory fees to finance independent organizations outside of the campus that promote political and ideological philosophy or whether on-campus speech is also included.93 On the one hand, the United States Court of Appeals for the Third Circuit in Galda v. Rutgers94 and the United States Court of Appeals for the Second Circuit in Carroll v. Blinken95 limit their analyses to mandatory fees that finance "an independent outside organization that espouses and actively promotes a political and ideological..."


91. See Schmitz, supra note 39, at 614 (disagreeing with adoption of Abood standard in analyzing mandatory student activity fee cases where funding remains exclusively on campus). One critic argues that two categories of cases exist in the post-Abood era: those in which courts are “willing to adopt an analogy between labor union and/or integrated state bar association dues and mandatory student fees and those [in which courts are] unwilling to do so.” Id. Those courts choosing to adopt the labor union or integrated state bar association dues analogy to mandatory student fees include Carroll and Galda. See id. at 614-17 (discussing adoption of Abood and Keller analyses by courts in Carroll and Galda). The courts in Supple, Kania and Turner v. Sayers, 575 So. 2d 1135 (Ala. Civ. App. 1991), reject such an analogy under Schmitz’s analysis. See Schmitz, supra note 39, at 614-17 (discussing rejection of Abood and Keller analyses by courts in Supple, Kania and Turner).

92. For a discussion of the current circuit split in applying the union dues and integrated bar fees paradigm, see infra notes 93-105 and accompanying text.

93. For a further discussion of this controversy, see infra notes 94-103 and accompanying text.

94. 772 F.2d 1060 (3d Cir. 1985).

95. 957 F.2d 991 (2d Cir. 1992).
philosophy.\textsuperscript{96} In contrast, the United States Courts of Appeals for the Fourth and Fifth Circuits in \textit{Kania v. Fordham},\textsuperscript{97} and \textit{Hays County Guardian v. Supple},\textsuperscript{98} respectively, read \textit{Abood} broadly to encompass any speech that accomplishes the government’s vital policy interest, regardless of its relationship to the campus environment.\textsuperscript{99}

The California Supreme Court’s decision in \textit{Smith v. Regents of the University of California}\textsuperscript{100} presents one of the most recent decisions addressing the constitutionality of mandatory student activity fees.\textsuperscript{101} In \textit{Smith}, the California Supreme Court held that the collection of mandatory student activity fees was within the constitutional authority of the Regents; however, the use of such fees to fund political and ideological groups violated the constitutional rights of freedom of speech and association of the students who opposed such views.\textsuperscript{102} Commentators, however, have criticized the \textit{Smith} decision both for its misapplication of the then-infant \textit{Lehnert} doctrine and its overly broad holding.\textsuperscript{103}

Against the above backdrop of cases involving issues of free speech, union dues, bar association fees and conflicting notions of educational purpose, the court in \textit{Southworth} tackled the issue of the constitutionality of mandatory student activity fees that support private organizations outside the campus environment.\textsuperscript{104} The \textit{Southworth} decision represents

\begin{itemize}
\item \textsuperscript{96} Galda, 772 F.2d at 1064; see Carroll, 957 F.2d at 997 (finding that like “non-union employees bound to pay fees to a union that . . . spends the money on political speech, or members of a state bar whose dues finance ideological activities like lobbying, appellants [correctly] see the student activity fee and . . . automatic NYPIRG membership as vehicles for compelled speech and association”).
\item \textsuperscript{97} 702 F.2d 475 (4th Cir. 1983).
\item \textsuperscript{98} 969 F.2d 111 (5th Cir. 1992).
\item \textsuperscript{99} See id. at 123 (finding educational goals of Southwest Texas State University “sufficiently weighty to justify the University’s subsidy of a student-run newspaper”); see also Kania, 702 F.2d at 480 (concluding that University of North Carolina did not violate students’ constitutional rights by funding student-run paper with mandatory student activity fees because financing of paper was “germane to the University’s duties as an educational institution”).
\item \textsuperscript{100} 16 Cal. Rptr. 2d 181 (1993).
\item \textsuperscript{101} See id. at 192 (drawing on, but not whole-heartedly embracing, decisions in \textit{Carroll, Galda, Abood} and \textit{Keller}, \textit{Smith} court fashioned central question in compelled funding cases to be whether collection of mandatory fees is germane to university’s educational mission).
\item \textsuperscript{102} See id. at 198 (finding that system of funding in existence at time of litigation must be discontinued until such time as university fashions appropriate remedy for dissenting students).
\item \textsuperscript{103} See Schmitz, \textit{supra} note 39, at 645 (finding decision in \textit{Smith} poorly reasoned, contrary to settled law and susceptible to overruling by subsequent decision); Kramer, \textit{supra} note 43, at 691 (finding ruling in \textit{Smith} to be new constitutional limitation on university’s use of mandatory student fees); Waring, \textit{supra} note 46, at 541 (finding \textit{Smith} decision, with its “indifference to the principles of academic freedom,” to be threat to free exchange of ideas at public universities).
\item \textsuperscript{104} See \textit{Southworth v. Grebe}, 151 F.3d 717, 718 (7th Cir. 1998) (objecting to university practice of supporting private organizations engaged in political and ideological activities), \textit{cert. granted}, 119 S. Ct. 1332 (1999).
\end{itemize}
NOTE

the most recent attempt to untangle the complex analogy between union fees and integrated bar dues and the mission of present-day public universities.105

III. FACTS

Students attending the University of Wisconsin-Madison must pay a mandatory student activity fee.106 In *Southworth*, Plaintiffs Scott Southworth, Amy Schoepke, Keith Bannach, Rebecca Bretz and Rebecka Vander Werf were law students at the University who challenged the above policy by bringing a suit against the Board of Regents of the University of Wisconsin System ("the Regents").107 Plaintiffs claimed that the Regents' use of the mandatory student activity fees to fund private organizations that engage in political and ideological advocacy, activities and speech violated their rights of free speech and association.108 Specifically, the students challenged "whether the Regents can force objecting students to fund private organizations which engage in political and ideological activities, speech, and advocacy."109

105. For a discussion of the court's decision in *Southworth*, see infra notes 106-75 and accompanying text.

106. See *Southworth*, 151 F.3d at 717 (discussing university's policy regarding mandatory student activity fees). Students refusing to pay such mandatory student activity fees cannot receive their grades or graduate. See id. at 719. Fees for the 1995-96 academic year, the year during which plaintiffs filed suit, were $165.75 per semester. See id. (citing amount of mandatory student activity fees for 1995-96 academic year). The University of Wisconsin is not alone in treating mandatory fees as a necessary portion of tuition. See *Arrington v. Taylor*, 380 F. Supp. 1348, 1351 (M.D.N.C. 1974) (noting that University of North Carolina Board of Governors assessed late fees to delinquent students and withheld grades, transcripts and even diplomas if fees remained unpaid).

107. See *Southworth*, 151 F.3d at 718 (describing participants in case); see also Koshollek, supra note 62, at 2A (interviewing Scott Southworth on why he decided to sue university system and his relationship with Alliance Defense Fund, Christian rights organization).


109. *Southworth*, 151 F.3d at 722. The students did not ask that the court restrict the speech of any student organization; rather, they requested that they not be forced to subsidize financially speech with which they disagreed. See id. at 721 (noting that campus organizations may support particular causes, but First Amendment does not guarantee government subsidization of such speech). Additionally, the students did not challenge the following:

[T]he Regents' authority to collect student activity fees; the Regents' use of the non-allocable portion of the student activity fee; the Regents' use of the allocable portion of the student activity fee to fund the student government; the Regents' use of the allocable portion of the student activity fee to fund private organizations which do not engage in political or ideological speech, activities, or advocacy; the Regents' use of the alloc
Section 36.09 of the Wisconsin State Code provides for both Regents' and student control over the funds generated by the mandatory student activity fee. The Regents designate part of the monies as allocable and part as nonallocable. The former portion is dispersed primarily by the students under the auspices of the Associated Students of Madison (ASM) and the latter portion is almost exclusively controlled by the Regents. Plaintiffs challenged only the allocable portion of student fees.

Student groups may obtain portions of the allocable money through three different sources: the ASM budget, the General Student Service Fund (GSSF) and student referenda. All ASM-, GSSF- and student referenda portion of non-objecting students' activity fees to fund private organizations engaging in political or ideological speech, activities, or advocacy; or the Regents' use of the allocable portion of the student activity fee to fund the student newspaper, or the Distinguished Lecture Series.

Id. § 36.09(1)(L) (5).

111. See Southworth, 151 F.3d at 719 (noting that although student government representatives review and offer suggestions regarding nonallocable fees, Regents have primary control over such funds).

112. See id. ("[N]onallocable fees cover expenses such as debt service, fixed operating costs of auxiliary operations, student health services and the first and second year of the Recreational Sports budget.").

113. See id. (noting that because plaintiffs challenged only funding from allocable portion of student activity fees, Southworth court focused its analysis solely on those expenditures).

114. See id. at 719-20 (noting rather complicated distribution network for allocable student fees). Fees allocated by the ASM fund both the General Student Service Fund (GSSF) and the ASM budget. See id. at 719 (discussing "money trail" to explain source of plaintiffs' complaint). In turn, both the ASM and GSSF distribute funds to other private organizations. See id. (introducing differences between distribution process for GSSF and ASM). The GSSF funds are distributed to registered student organizations (RSOs), University departments and community-based service organizations by a committee of the ASM called the Student Services Finance Committee (SSFC). See id. (outlining application and qualification procedure followed to obtain money from GSSF). After reviewing the application, the SSFC determines the amount of funding the private organization will receive. See id. (explaining role of SSFC in allocation of grants or denials of money). During the 1995-96 school year, the SSFC distributed about $975,200 in student fees to private organizations. See id. (highlighting amount distributed in student fees during 1995-96).

Although the ASM budget also funds student groups, it may only fund RSOs. See id. at 719-20 (singling out limited groups eligible for ASM funding). To be designated as an RSO, the organization must "be a formalized not-for-profit group, composed mainly, but not necessarily exclusively, of students, and controlled and
erenda-approved allocations are subject to review and approval by the Regents. Although monies dispersed from the CSSF, the ASM budget and student referenda can fund a variety of different activities and organizations, the plaintiffs objected only to the funding of organizations that engaged in political and ideological activities. The court limited its analysis to address only those eighteen organizations deemed objectionable by the students. The Seventh Circuit affirmed the district court's

115. See Wis. Stat. Ann. § 36.09(1)(L) (5) (“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.”).

116. See Southworth, 151 F.3d at 720 (noting limited scope of plaintiffs’ claim).

117. See id. (listing objectionable organizations). For a list of the 18 objectionable organizations, see supra note 22 and accompanying text. While the record was replete with examples of objectionable political and ideological activities, the court examined several different organizations to demonstrate the students’ objections. See Southworth, 151 F.3d at 720-21 (adding that review of funding to 18 organizations that plaintiffs object to must be completed “in the light most favorable to the Regents”). For example, WISPIRG received $49,500 in student fees during the 1995-96 academic year, of which it distributed $2500 directly to its parent organization, U.S. PIRG, for use in lobbying Congress and developing candidate-voter guides that ranked various Congresspersons based on their views about specific pieces of federal legislation. See id. at 720 (revealing WISPIRG’s funding and use of monies during 1995-96). UW Greens and the Progressive Student Network lobbied the Wisconsin legislature to introduce three bills that would limit mining in the state. See id. (noting that UW Greens received $6905 of student fee money). The International Socialist Organization (ISO), another recipient of student fees, advocated the overthrow of the government. See id. (illustrating that ISO advocated revolution over reform due to inability of working class to successfully overtake and control capitalist government structures). Along with UW Greens and other groups, the ISO sponsored a rally at the state capitol and at a congressperson’s office. See id. at 720-21 (commenting on types of activities engaged in by ISO). In an unrelated event, the ISO, along with 400 other participants, demonstrated outside of a church to oppose the ideological views of the church speaker. See id. (revealing reactions of funded groups, like ISO, to beliefs and views contrary to their own).

The Campus Women’s Center, which received $34,200 in student fees, used its bimonthly newsletter, The Source, to oppose the Informed Consent Bill that proposed certain regulations on abortion. See id. at 721 (adding that newsletter sought support for united action against stipulated legislation). Finally, the Ten Percent Society used campus funding to advocate legislation authorizing same-sex marriages on their Internet home page. See id. (showing funding was provided to organizations that openly stated on funding applications that they were “active in the political arena”).

During the 1995-96 school year, the ASM budget distributed $109,277 in student fees to private organizations. See id. at 720 (highlighting ASM’s contribution to private organizations during 1995-96).
determination that forcing objecting students to fund private organizations engaged in political and ideological activities violated those students' First Amendment rights.118

IV. ANALYSIS

A. Narrative Analysis

1. The Declaratory Judgment

The Seventh Circuit addressed the limited question of whether the Regents retained the power to "force objecting students to fund organizations which engage in political and ideological activities, speech and advocacy."119 The court began with the premise that the First Amendment, despite its broad language, contains two necessary corollaries to the guarantee of free speech: (1) "the right not to speak"120 and (2) "the right not to be compelled to subsidize others' speech."121

The Supreme Court has not yet addressed the question of whether the First Amendment protects objecting students from subsidizing private political and ideological organizations at public universities.122 Nevertheless, the Supreme Court's decision in Rosenberger directed that the proper test for such a question resides in the Abood and Keller analyses.123 Not only did the Rosenberger Court suggest the adoption of the Abood and Keller analyses as the applicable standard for mandatory student activity fee cases, but so has every circuit faced with the present issue.124 The South-
worth court, therefore, deemed it appropriate to adopt the Abood and Keller standard as the authoritative analytical tool.125

While courts agree on the appropriate test to use in analyzing general compelled funding cases, the flagship cases of Abood and Keller gave only sparse guidance as to the actual application of the germaneness analysis in the student activity fee context.126 As a result, circuits are split on how to apply the analyses.127 The Southworth court was not, however, without guidance in determining the most appropriate analytical framework for mandatory fee cases.128 Relying on holdings from several Supreme Court decisions, most notably Lehnert, the Southworth court adopted a three-prong analysis with which to determine whether mandatory student activity fees violate students' First Amendment rights.129

First, under the germaneness prong of the Lehnert analysis, the court recognized two distinct questions: (1) whether there was some otherwise legitimate governmental interest justifying any compelled funding and (2) whether the specifically challenged expenditure was germane to that interest.130 Because the students did not contest the first proposition, the

Regents of the University of California, 16 Cal. Rptr. 2d 181 (1993), as an example of a state court relying on the union dues and integrated bar fees analogy. See Southworth, 151 F.3d at 723 (discussing additional circuits' finding support from Abood and Keller analyses).

125. See Southworth, 151 F.3d at 723 ("From Keller's holding ('The State Bar may therefore constitutionally fund activities germane to those goals. . . .') and Abood's qualification (the Constitution requires that expenditures for ideological cause not germane be financed by voluntary funds), courts have named the analysis born of Abood the 'germaneness analysis.'") (citations omitted); see also Wiggin, supra note 43, at 2014 (finding germaneness question central to compelled funding cases).

126. See Southworth, 151 F.3d at 723 (recognizing that circuits are split on how to apply Abood and Keller analyses to student fee cases).

127. For a further discussion of the circuit split in applying the Abood and Keller analyses, see supra notes 91-105 and accompanying text.

128. See Southworth, 151 F.3d at 724 (deferring to Lehnert three-prong analysis along with several prior decisions in determining framework for constitutional inquiry in mandatory student activity fee cases).

129. See id. (adopting Lehnert, labor union case involving issues analogous to issues in Southworth, as proper approach in applying germaneness test as set forth in Abood and Keller). The three-prong test as it pertains to questions of union fees is: (1) whether the expenditure must be germane to collective bargaining; (2) whether the expenditure was justified by the government's vital policy interest in labor peace and avoiding free riders; and (3) whether the expenditure would not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. See Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 519 (1991) (setting forth analysis). The Supreme Court recently upheld the Lehnert test. See Air Line Pilots Ass'n v. Miller, 118 S. Ct. 1761, 1766 (1998) (upholding Lehnert analysis as appropriate test in union dues context).

130. See Southworth, 151 F.3d at 724 (breaking down germaneness prong into two distinct questions) (citing Lehnert, 500 U.S. at 507, 519).
Southworth court dealt only with the latter. In finding for the plaintiffs on the germaneness prong, the court held that it could not read the germaneness prong so broadly as to justify the compelled funding of private organizations that engage in political and ideological speech. To support its conclusion, the court adopted a narrow view of the germaneness prong, citing both Keller and Lehnert. In so doing, the court rejected the more expansive, though still limited, view of germaneness found in Carroll and instead adopted the reasoning of those circuits that follow Galda and Smith.

Even assuming that the allocation of student activity fees to fund political and ideological speech proved germane to the University’s mission, the court found that the Regents failed to prove the second prong of the Lehnert analysis: whether there was a vital governmental policy interest necessary to justify compelled fees. Whereas the court recognized the Re-

131. See id. (noting that students did not argue that Regents lacked “legitimate interest in the compelled funding of the student government or student organizations”).

132. See id. at 725 (rejecting overly broad reading of germaneness prong) (citing Keller v. State Bar of Cal., 496 U.S. 1, 15-16 (1990); Lehnert, 500 U.S. at 520 (same).

133. See Southworth, 151 F.3d at 724-25 (citing Keller and Lehnert as examples of narrow interpretation of germaneness prong). The Court in Keller found that the State Bar’s assertion that funding of lobbying on nuclear weapons, abortion and prayer in public schools “in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice” was too broad in scope to withstand constitutional muster. Keller, 496 U.S. at 15. Similarly, the Lehnert Court held that “expenses that are ... ‘germane’ to the collective-bargaining functions of the union ... will be constitutionally chargeable to dissenting employees ... In the private sector, those functions do not include political or ideological activities.” Lehnert, 500 U.S. at 516. The Court went on to state: Where, as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter’s collective-bargaining agreement, but to financial support of the employee’s profession or of public employees generally, the connection to the union’s function as bargaining representative is too attenuated to justify compelled support by objecting employees.

Id. at 520.

134. See Southworth, 151 F.3d at 726-27 (analyzing various circuit courts’ compelled funding decisions). The court in Carroll permitted the allocation of activity fee funds to support NYPIRG “as long as that organization spends the equivalent of the students’ contribution on campus and thus serves the university’s substantial interests in collecting the fee.” Carroll v. Blinken, 957 F.2d 991, 992 (2d Cir. 1992). The Galda court, on the other hand, found that NJPIRG, while serving a valuable political and ideological purpose, produced only incidental benefits to the institution’s educational goals. See Galda v. Rutgers, 772 F.2d 1060, 1065 (3d Cir. 1985) (providing that only incidental educational benefit did not warrant infringing on dissenting students’ speech and association rights). The Southworth court also cited Smith v. Regents of the University of California, 16 Cal. Rptr. 2d 181 (1993), which, along with Galda, provided it with more persuasive arguments than those in Carroll. See Southworth, 151 F.3d at 726 (adopting Galda and Smith analyses).

135. See Southworth, 151 F.3d at 727 (finding that “labor peace is not especially served by ... charging objecting employees for lobbying, electoral and other
gents’ vital government interest in education, the court found no essential policy interest in permitting compelled funding of private and quasi-private activity.\textsuperscript{136} Finally, the court dismissed the notion of a free rider problem emerging from the restriction on mandatory fees.\textsuperscript{137}

The Regents’ third and final argument failed to prove that the University’s compelled funding would not “significantly add to the burdening of free speech inherent in achieving those interests.”\textsuperscript{138} Applying the \textit{Lehnert} standard, the court found that using student activity fees created an unacceptable degree of infringement upon free expression, touching upon such sensitive areas as abortion, homosexuality and the democratic system of the United States.\textsuperscript{139} Finding that the mandatory fees comp-

\textsuperscript{136} See id. at 727 (discussing justification of compelled fee by determining “vital policy interest of the government”). Specifically, the State Regents set forth two arguments: (1) the Regents’ interest in education and (2) their interest in allowing students to share in the governance of the university system. See id. (distinguishing Regents’ interests from those of unions and state bars). The court found neither of these interests to be vital under the guidelines set forth in \textit{Lehnert}. See id. (finding vital policy interests must survive scrutiny of \textit{Lehnert}). In fact, the court could not posit a hypothetical situation in which the latter interest would prove vital at all. See id. (revealing that court’s initial doubt concerning whether second interest was “vital” proved to be warranted). Furthermore, forcing objecting students to fund objectionable organizations may in effect undermine educational ideas such as individualism and dissent. See id. at 728 (emphasizing potential disadvantages due to compelled funding of private organizations).

\textsuperscript{137} See id. at 728-29 (rejecting Regents’ contention that free rider problem, similar to that present in \textit{Abbood}, existed in present case). In distinguishing \textit{Abbood} from \textit{Southworth}, the court pointed out that in the case of unions, the government has imposed upon unions the duty to represent fairly all employees; as a result, “forcing non-union employees to fund the union’s collective bargaining agreement [helps to] counteract[] the incentive that employees might otherwise have to become free riders—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.” \textit{Abbood} v. Detroit Bd. of Educ., 431 U.S. 209, 221-22 (1977). In comparison, the private organizations funded by the University of Wisconsin student activity fees have no obligation to represent fairly the students as is the case in the union context. See \textit{Southworth}, 151 F.3d at 728-29 (noting that Regents’ permitting outside students to join campus activities demonstrated their somewhat disingenuous claim to free rider concern).

\textsuperscript{138} \textit{Southworth}, 151 F.3d at 729 (quoting \textit{Lehnert}, 500 U.S. at 519).

\textsuperscript{139} See id. at 729-30 (recognizing that while hateful and objectionable speech has its place in our society, Constitution does not mandate that citizens pay for such speech) (citing \textit{Regan} v. \textit{Taxation With Representation}, 461 U.S. 540, 550 (1983)); see also \textit{Glickman} v. \textit{Wileman Bros. & Elliott}, Inc., 117 S. Ct. 2130, 2138 (1997) (finding that use of compelled funding for generic advertising of certain California fruits did not abridge plaintiff’s First Amendment rights because speech imposed did not limit plaintiff’s right to speak or compel plaintiff to endorse objectionable political and ideological views); \textit{Lehnert}, 500 U.S. at 521-22 (finding that political lobbying using objecting employees’ fees to garner public support
pelled students to contribute to organizations whose expressive activities conflicted with objecting students' freedom of belief, the court held that the Regents did not satisfy the third requirement under Lehnert.140

2. Injunctive Relief Held to be Overly Broad

The court next turned to the question of precisely how to issue an injunction against the Regents and protect the plaintiffs' right not to fund objectionable speech.141 The court rejected a pure refund mechanism because it permitted the Regents to use full dues to fund private political groups and only months later reimburse the students.142 By doing so, the Regents would effectively charge students for the funding of objectionable speech, albeit temporarily, thus causing them harm.143 Any post-allocation refund would not address the students' constitutional objections.144

presented undue interference with First Amendment rights of objecting employees); Abood, 431 U.S. at 234-35 (contrasting right not to be compelled to contribute to expressive activities opposed to one's personal belief with being compelled to support unobjectionable activities).

140. See Southworth, 151 F.3d at 731 (finding that students' objections embody values protected by "the heart of the First Amendment").

141. See id. at 733 (stating that district court ordered "that the defendants, their officers, employees and other agents shall forthwith cease the funding of private groups that engage in ideological or political advocacy"). In addition, the trial court ordered the Regents to: (1) publish written notice of organizations engaging in political and ideological speech; (2) list the pro rata share of mandatory fees devoted to those organizations; and (3) establish an arbitration proceeding for disputes over the amount of fees paid and the nature of the organizations involved. See id. (outlining provisions of injunction issued by district court).

142. See id. at 735 (discussing stringent prohibition against temporarily collecting dues from objecting students to fund private ideological and political activities).

143. See id. at 733 (prohibiting even temporary collection of objecting students' fees to fund political and ideological activities). The court borrowed the reasoning from Ellis where the Supreme Court stated:

By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects. Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435, 443-45 (1984).

144. See Southworth, 151 F.3d at 733 (noting pure rebate approach inadequately protects constitutional rights) (citing Ellis, 466 U.S. at 443-45). The court asserted that the administrative convenience of such programs was insufficient to overcome the constitutional infirmities. See id. (citing Hudson as example of successful refund system). Yet the court offered scant evidence to support such an assertion, pointing only to prior Court dicta stating that there indeed were acceptable alternatives. See id. (noting Supreme Court precedent permitting rebate systems to stand in union and bar association cases) (citing Chicago Teachers Union v. Hudson, 475 U.S. 292, 305 (1985); Ellis, 466 U.S. at 443-45).

http://digitalcommons.law.villanova.edu/vlr/vol44/iss2/4
The court attempted to limit the injunctive relief so as to address only those groups deemed objectionable by the plaintiffs.145 Rather than requiring the cessation of all funding to private groups engaged in ideological or political advocacy, the court pared down the injunctive relief.146 In granting relief, the court permitted the Regents to devise a fee system consistent with the court's opinion, giving particular attention to the principles of federalism.147 In the meantime, the University could not even temporarily collect any portion of student fees that support political and ideological speech offensive to the objecting students.148

B. Critical Analysis

The court's reliance on the tests set forth in *Abood* (union dues) and *Keller* (integrated bar fees) reflects the proper analytical framework under which compelled funding cases should be analyzed.149 Whereas scholars

145. See id. at 733-34 (rejecting portions of district court's injunction). The court showed its first signs of discomfort with any type of refund mechanism, recognizing both the impossibility of a straight refund and a lack of workable alternatives. See id. ("[W]e agree with the Regents that the [injunctive] order is overbroad in some respects."). In fact, earlier in the opinion, the court illuminated the problems inherent in earmarking objecting students' funds so as not to fall into the hands of political and ideological groups. See id. at 731-32 (referring to such practices as "merely a bookkeeping matter" where "[t]he dollars are fungible and splitting the same amount in two directions does not cure the obvious subsidy").

146. See id. at 733-34 (noting that sweeping pro rata solution advanced by district court permitted students to avoid paying for nonprivately funded campus organizations to which students did not object).

147. See id. at 734 (finding that district court failed to recognize that federalism concerns require caution in ordering states to take certain action). The court also stated that while it is appropriate to issue an injunction dictating what a state cannot do, federalism requires restraint in ordering a state to act. See id. (finding that problematic injunctions, replete with interpretive difficulties, should be used only as last resort) (citing ACORN v. Edgar, 56 F.3d 791, 798 (7th Cir. 1995)). In essence, federalism requires broad deference to the states whereby states should not be required to do more than is minimally necessary for compliance with federal law. See Clark v. Coye, 60 F.3d 600, 605 (9th Cir. 1995) (discussing three-prong test used in assessing enforceability of injunction).

148. See Southworth, 151 F.3d at 735 (reiterating restriction on University to forego temporary collection).

149. See Hays County Guardian v. Supple, 969 F.2d 111, 123 (5th Cir. 1992) (extrapolating from *Abood* that government may compel individuals to subsidize nongovernmental speech where such compulsion accomplishes "government's vital policy interest"); Carroll v. Blinken, 957 F.2d 991, 997 (2d Cir. 1992) (analogizing automatic NYPIRG membership at SUNY Albany with mandatory fees paid by nonunion employees in labor context); Galda v. Rutgers, 772 F.2d 1060, 1064 (3d Cir. 1985) (finding *Abood* Court's labor union analysis to be proper analysis in assessing constitutionality of mandatory student activity fees); Kania v. Fordham, 702 F.2d 475, 479-80 (4th Cir. 1983) (discussing efficacy of using *Abood* analysis in assessing validity of mandatory student activity fees).

Not all scholars agree that the *Abood* and *Keller* analyses apply to student activity fee cases where schools provide funding only to on-campus organizations. See Schmitz, *supra* note 39, at 625 (recognizing that cases such as *Smith* dealt with
have cited inherent problems with analogizing union dues and integrated bar fees cases to student activity fees cases, it is not appropriate for the appellate court system to disregard well-established Supreme Court precedent in this area.\footnote{150} Nevertheless, the court's heavy reliance on \textit{Lehnert} poses several problems.\footnote{151} Although the Court upheld the \textit{Lehnert} analysis in \textit{Air Line Pilots Ass'n v. Miller},\footnote{152} it has not expressly expanded the holding to encompass other compelled funding situations, such as integrated bar fees or student activity fees.\footnote{153}

Case law supports the \textit{Southworth} court's first contention that speech by private interest groups is not germane to a university's goals.\footnote{154} Mandatory fees used to fund activities of recognized student groups with purpose of exposing university community to "a potpourri of ideas and viewpoints" and not to fund independent organizations whose activities are directed towards public at large producing only incidental educational benefits to university students. Although the above view has merit, \textit{Southworth} deals with private organizations outside of the campus walls; therefore, such a theory does not apply to this Note's analysis. See \textit{Southworth}, 151 F.3d at 720-22 (describing activities of groups funded by student activity fees).

150. For a discussion of the efficacy of the \textit{Abood} and \textit{Keller} analyses, see supra notes 49-90 and accompanying text. \textit{But see Schmitz}, supra note 39, at 626 (finding employee-employer relationship in context of unions and state bar associations to differ dramatically from student-university relationship). One scholar contended that the employment relationship differs from the educational relationship with respect to organizational purpose, membership composition and the decisionmaking processes behind funding allocation. \textit{See id.} (finding purpose of relationship between students and university is education). For example, whereas labor unions organize for collective bargaining purposes and bar associations organize for professional solidarity and strength, university students enter the educational arena for less specified and less discernible reasons. See \textit{id.} at 626-28 (calling into question Smith's analogy involving labor union, integrated state bar association and student body). Additionally, this scholar points out that a university, unlike unions and bar associations, may not compel a student to be a member of a particular association as a condition to enrollment in the university (although it may collect mandatory fees). See \textit{id.} at 629 (noting difference in compelled association between unions and bar association and those at public universities); see also \textit{Galta}, 772 F.2d at 1071 (Adams, J., dissenting) (finding that mandatory student activity fees cases represent collision of as many as four lines of First Amendment doctrine; namely, compelled speech and association, content-based limitations on speech, public forum protections and judicial oversight of universities and academic freedom); Smith v. Regents of the Univ. of Cal., 16 Cal. Rptr. 2d 181, 201 (1995) (finding First Amendment doctrines addressed in union dues and integrated bar fees cases have never before been addressed by Supreme Court).

151. \textit{See Southworth}, 151 F.3d at 725 n.5 (rationalizing reliance on \textit{Lehnert} analysis by stating: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"" (quoting Marks v. United States, 430 U.S. 188, 193 (1977))).


153. \textit{See id.} (noting \textit{Lehnert}'s three-prong test).

154. \textit{See Lehnert v. Ferris Faculty Ass'n}, 500 U.S. 507, 520 (1991) (rejecting overly broad reading of germaneness); Keller v. State Bar of Cal., 496 U.S. 1, 15-16 (1990) (same). The Court in \textit{Lehnert} stated that germaneness cannot be read so broadly as to include ideological and political activities of private sector groups.
Although it is true that "[w]ithin wide limitation a state is free to adopt such educational philosophy as it chooses," the courts must differentiate between exposing students to speakers outside the classroom yet inside the campus walls and the promotion of private organizations entirely removed from the campus environs. The court in Southworth recognized such a distinction.

The second prong in the Lehnert analysis, requiring that union activities be germane to collective bargaining activity, creates a problematic jump in logic from the union dues paradigm. First, the problem of free riders, a vexing difficulty in the union dues paradigm, is not an issue in the student activity fees context. Second, and more notably, the failure

See Lehnert, 500 U.S. at 516 (following narrow definition of germaneness); see also Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435, 452 (1984) (holding that although union activities in question may benefit collective bargaining, benefits were too attenuated to be germane).


156. See Southworth, 151 F.3d at 726-27 (finding that if it were to decide case based solely on Carroll, Galda and Smith, it would find Galda and Smith analyses to be more persuasive). Unlike the court in Carroll, the Galda court recognized the deeply troubling break with precedent should students be forced into funding outside organizations espousing objectionable political and ideological views. See Galda v. Rutgers, 772 F.2d 1060, 1065-67 (3d Cir. 1985) (noting that whether monies allocated to outside organizations, such as PIRGs, in fact trickle down to campus level is immaterial). In the end, the impact on education of private organizations outside the campus environs, while visible, represents only a peripheral goal of the group whose primary purpose is the furtherance of an ideological and political agenda. See id. (finding PIRG's educational benefits "incidental"). The reliance on Smith, however, remains puzzling. The Smith court dealt with the constitutionality of mandatory student activity fees collected by the University of California at Berkeley that supported on-campus speech. See Smith v. Regents of the Univ. of Cal., 16 Cal. Rptr. 2d 181, 184 (1993) (noting that University of California students challenged fees used to support student groups that pursue political and ideological causes). In finding for the students, the court broke with well-established precedent permitting unrestricted on-campus speech. See Schmitz, supra note 99, at 601 (finding California Supreme Court abandoned traditional approach to compelled funding cases as they relate to student activity fees); Wiggin, supra note 43, at 2010 (stating that Smith decision will "severely diminish student speech on issues of public concern at state universities"); Kramer, supra note 43, at 691 (noting that majority's holding drew criticism for its failure, among other things, to establish meaningful standard to distinguish between "educationally beneficial" and "predominantly political" groups). But see Donna M. Cote, Comment, The First Amendment and Compulsory Funding of Student Government Political Resolutions at State Universities, 62 U. Chi. L. Rev. 825, 854 (1995) (finding that "student government political resolutions impose a substantial burden on the First Amendment rights of students who either disagree with the position taken in a particular resolution or who wish to remain silent on the issue"). The Southworth court failed to discuss adequately its motives in using such a controversial state supreme court decision in its analysis. See Southworth, 151 F.3d at 726-27 (noting only that Galda and Smith's conclusions and analyses are more persuasive than Carroll).

of the court to address adequately the public forum doctrine, a concept analogous to the Lehnert Court's labor peace criteria, also presents a significant gap in reasoning. Such a departure is particularly curious in light of the fact that the public forum doctrine "focuses on the government in its role as a regulator in the marketplace of ideas" where the government itself functions as a conduit by which student funding is facilitated. In addition, several circuits have noted that the public university is a limited public forum. Finally, the court appears to have ignored the substantial

See Waring, supra note 46, at 554 (noting that Smith court's failure to analyze either party's claims using public forum doctrine presents marked departure from case law).

See id. at 554-55 (finding government's role central to promoting access to funds necessary for establishing marketplace of ideas on college campuses) (citing Student Gov't Ass'n v. Board of Trustees, 868 F.2d 473, 477 (1st Cir. 1989)).

See Widmar v. Vincent, 454 U.S. 263, 267-68 n.5 (1981) (finding that public university campuses possess many characteristics of public forums); Carroll v. Blinken, 957 F.2d 991, 993 (2d Cir. 1992) (permitting distribution of student fees for limited purpose of funding activities by campus organization that are educational, cultural, recreational or social in nature) (citing Galda v. Bloustein, 686 F.2d 159, 166 (3d Cir. 1982)); Kania v. Fordham, 702 F.2d 475, 477 (4th Cir. 1983) (finding that University of North Carolina, by publishing student-run paper, furthers state's legitimate interest in creating forum for expression of different viewpoints and supporting university as marketplace of ideas); Veed, 353 F. Supp. at 153 (finding that university is not constitutionally prohibited from financing, through mandatory student fees, programs that provide forum for expression of opinion); see also Waring, supra note 46, at 560 (noting Second and Fourth Circuits' recent use of limited public forum doctrine). But see Board of Educ. v. Mergens, 496 U.S. 226, 242 (1990) (distinguishing between Widmar Court's notion of "limited public forum" and concept of "limited open forum").

The court in Carroll also noted that the university functions as a public forum: "This fee, a lump sum used to subsidize a variety of student groups, can be perceived broadly as providing a 'forum' for a diverse range of opinion. . . . Although many student-related groups have ideological overtones, to the extent that the university determines that an organization is an appropriate participant in the total university forum, considerable deference should be accorded that judgment. This deference stems from the long-standing recognition that the university as a whole functions as a forum for the exchange of diverse views."

Carroll, 957 F.2d at 1001 (quoting Galda, 686 F.2d at 166); see Kari Thoe, Note, A Learning Experience: Discovering the Balance Between Fees-Funded Public Fora and Compelled-Speech Rights at American Universities, 82 MINN. L. REV. 1425, 1426 (1998) (noting that Rosenberger decision could be "death knell" for student fees at American universities).

For a further discussion of the public forum doctrine, see Jeffrey T. Mains, Note, Constitutional Law—An Airport Terminal Operated by a Public Authority is a Non-public Forum for Purposes of First Amendment Analysis; Thus, a Ban on Solicitation Need
body of Supreme Court jurisprudence that upholds the principle of allocating funding based solely on content-neutral criteria.\footnote{\text{161}}

Yet, in the end, the court correctly recognized that failure to protect students' rights not to associate would infringe upon objecting students' freedom of speech.\footnote{\text{162}} Furthermore, the practice of analogizing the union's goal of promoting labor peace and a university's mission in creating a marketplace of ideas is neither novel nor without merit.\footnote{\text{163}} Finally, although no court has expressly adopted the \textit{Lehnert} analysis in mandatory student activity fees cases, the court in \textit{Carroll} adopted the second prong of the \textit{Lehnert} analysis in determining the constitutionality of compulsory New York Public Interest Research Group (NYPIRG) funding at State University of New York (SUNY)\footnote{\text{164}} Albany. Although problematic, the \textit{South-}


\footnote{\text{161. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 840-41 (1995) (finding that funding of campus organizations with student activity fees must take place on viewpoint-neutral basis and, as such, does not violate Establishment Clause); Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 362 (8th Cir. 1988) ("[A] public body that chooses to fund speech or expression must do so evenhandedly, without discriminating among recipients on the basis of their ideology."); see also David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. Rev. 675, 722-31 (1992) (establishing that universities should be considered "spheres of neutrality" for First Amendment purposes); Elizabeth E. Gordon, Comment, \textit{University Regulation of Student Speech: Considering Content-Based Criteria Under Public Forum and Subsidy Doctrine,} 1991 U. CHI. LEGAL F. 393, 398-99 (finding that once university decides to fund certain speech or expression, allocation of monies must take place on content-neutral basis); Waring, supra note 46, at 564-65 (noting that while state may refuse to subsidize speech, such decisions must take place in content-neutral context where limited public forum exists).}}

\footnote{\text{162. See Stanley Ingber, \textit{The Marketplace of Ideas: A Legitimizing Myth}, 1984 DUKE L.J. 1, 47 ("A right that cannot be meaningfully exercised is, after all, no right at all.").}}

\footnote{\text{163. See Galda v. Rutgers, 772 F.2d 1060, 1067 (3d Cir. 1985) ("There is room for argument that a university's role of presenting a variety of ideas is a sufficiently compelling reason for some infringement of First Amendment rights just as is the need for labor peace in the union dues cases."). The contention loses some force, however, when an organization independent of the university and dedicated solely to one position receives compelled contributions from objecting students. See id. (noting university's failure to ensure balanced access); see also \textit{Lehnert} v. Ferris Faculty Ass'n, 500 U.S. 507, 521 (1991) (finding that labor peace is not especially served by allowing union dues to fund activities unrelated to collective bargaining); \textit{Carroll}, 957 F.2d at 1001 (finding government's interest in "the promotion of extracurricular life, the transmission of skills and civic duty, and the stimulation of energetic campus debate" sufficiently offsets any infringement on students' First Amendment rights by their compelled funding of NYPIRG).}}

\footnote{\text{164. See \textit{Carroll}, 957 F.2d at 999 (stating task is to determine whether compelled student funding "promotes a substantial government interest that would be achieved less effectively absent the regulation" (quoting United States v. Albertini, 472 U.S. 675, 689 (1985))). NYPIRG is a statewide, not-for-profit corporation}}
worth court's adoption and application of the second Lehnert prong finds adequate support in case law.\(^{165}\)

The final Lehnert prong, whether compelled funding of private organizations significantly burdens free speech, requires that the court balance the university's right to create a marketplace of ideas with the objecting students' right not to associate.\(^{166}\) The Supreme Court's analysis in Lehnert has come under criticism for failing to provide any hard and fast rules.\(^{167}\) Particularly, in analyzing whether compelled funding burdens free speech, the Supreme Court has perpetuated a "give-it-a-try" litigation.

based in New York City with chapters on 19 SUNY campuses. See id. at 993 (describing overall structure of NYPIRG). Past on-campus NYPIRG-sponsored events have included a professor's forum on the arms race, a symposium on women's health care and a debate between representatives from a presidential campaign. See id. at 994 (describing various on-campus events). Off-campus funding supports general administrative functions of NYPIRG, newsletters and lobbying efforts. See id. (describing various off-campus events).

Every two years, students decide via referendum whether to fund NYPIRG. See id. (discussing referendum). Traditionally, students have approved such funding. See id. All students then become members of the organization regardless of individual consent. See id. at 995 (noting mandatory membership requirement). Although NYPIRG describes itself as a nonpartisan research and advocacy organization, the court recognized that NYPIRG programs inevitably affect political and social action. See id. at 994-95 ("I think you can sort of assume... without any dispute [NYPIRG] does have a program for affecting political and social action.").

165. See Waring, supra note 46, at 546 (finding ability to balance aggregate societal goals produced by marketplace of ideas paradoxical to goal of safeguarding individual autonomy). One commentator pointed out that in both Galda and Smith, the courts found that the right of some student organizations to obtain government subsidies was insufficient compared to fee payers' right not to subsidize objectionable speech. See id. at 546 n.32 (noting paradox created in conflicting interests).

166. See Galda, 772 F.2d at 1067 (finding that in situations where outside organizations dedicated to advancement of single issue receive compelled fees, "[the] university's ability to insure a balance in access is infringed... and the quid pro quo for a payment to a forum disappears"); see also Paul Cellupica, Recent Developments, 9 Harv. J.L. & Pub. Pol'y 731, 735 (1986) ("The inside-outside distinction created the best way to rule for the plaintiffs while limiting, as much as possible, future judicial intervention into the affairs of public universities."); Waring, supra note 46, at 575-76 ("In the case of PIRG, however, the court emphasized that the University has an obligation 'to insure a balance in access' to the forum, and 'an outside organization independent of a university and dedicated to advancing one position' infringes on that balance." (quoting Galda, 772 F.2d at 1067)).

167. See Lehnert, 500 U.S. at 551 (Scalia, J., concurring in part, dissenting in part) (finding each prong of test "involves a substantial judgment call"); see also Calvin Siemer, Comment, Lehnert v. Ferris Faculty Ass'n: Accounting to Financial Core Members: Much A-Dues About Nothing?, 60 Fordham L. Rev. 1057, 1074 (1992) (discussing flaws identified by Justice Scalia in his dissent in Lehnert and Court's failure to answer flaws unresolved questions in Communications Workers v. Beck, 487 U.S. 735 (1988)). Justice Scalia suggested that the Court adopt the following rule: "A union cannot constitutionally charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged." Lehnert, 500 U.S. at 558 (Scalia, J., concurring in part, dissenting in part).

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test certain to bog down the courts because of its reliance on an imprecise balancing test. 168

Despite the scholarly and judicial attacks on the Lehnert analysis, the court in Southworth properly integrated the third prong of the analysis into its reasoning. 169 In so doing, the Southworth court acknowledged that while "hateful speech has a place in our society," the Constitution does not mandate that citizens pay for such speech. 170 Since the time of the Framers, the Supreme Court has recognized that "[t]o compel [an individual] to furnish contributions of money for the propagation of opinions that he disbelieves, is sinful and tyrannical." 171 In sum, the court set forth sound, well-accepted grounds for applying the Lehnert standard to the facts in Southworth. 172

The court's decision, aside from the analytical problems mentioned above, creates a myriad of enforcement difficulties. First, the court failed to define what constitutes a constitutionally valid manner for the State Regents to pro rate student fees to reflect only that portion of the student activity fee for which the students agree to pay. 173 Second, the court declined to adopt adequate safeguards to prevent the administrative

168. See Lehnert, 500 U.S. at 551 (Scalia, J., concurring in part, dissenting in part) (finding test provides little guidance and does not eliminate confusion).


170. See id. (acknowledging that government need not subsidize protected speech); see also Regan v. Taxation With Representation, 461 U.S. 540, 545-46 (1983) (recognizing that person's First Amendment rights are not violated because government chooses not to subsidize speech); Southworth, 151 F.3d at 730 ("[I]t is error alone which needs the support of government. Truth can stand for itself."); cf Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130, 2139 (1997) (noting that requiring growers and handlers of California tree fruits to pay assessments subsidizing generic advertising does not "engender any crisis of conscience").

171. BRANT, supra note 29, at 354.

172. See Southworth, 151 F.3d at 781 (finding that compelling students to pay for objectionable speech strikes at heart of First Amendment's notion that "an individual should be free to believe as he will" (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977))). The Southworth court concluded its analysis of the third prong of the Lehnert standard by stating: In essence, allowing the compelled funding in this case would undermine any right to "freedom of belief." We would be saying that students like the plaintiffs are free to believe what they wish, but they still must fund organizations espousing beliefs they reject. Thus, while they have the right to believe what they choose, they nevertheless must fund what they don't believe.

Id. In a sense, the court could not find for the university without creating an untenable burden on free speech and association. See id. (finding that requiring students to pay mandatory student activity fees creates "a crisis of conscience").

173. See Schmitz, supra note 39, at 639 (suggesting Smith court adopt three-part solution found in Hudson). One commentator has suggested the adoption of the following three-prong Hudson method of pro-rata fee reimbursement:
nightmare created by permitting students to make a checklist of organizations they do not wish to support.\textsuperscript{174} Third and finally, the court did not consider how, in the aftermath of the \textit{Southworth} decision, it would handle the multitude of ensuing constitutional challenges by groups who receive reduced funding.\textsuperscript{175}

(1) absolute precision in fee calculation cannot be expected or required; (2) it would be acceptable for the university to base its fee calculation on previous year expenses; and (3) an adequate disclosure of expenses to dissenters would include the major expense categories and be verified by an independent auditor.

\textit{Id.} (citing Chicago Teachers Union v. Hudson, 475 U.S. 292, 307 n.18 (1986)). Even so, there exists a lack of flexibility, or perhaps too much oversight, in a system protectively micro-managing and guarding each funding decision from potential First Amendment intrusions. \textit{See id.} at 641 (discussing difficulty in calculating appropriate amount to deduct from mandatory fees). \textit{See generally} Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435, 452 (1984) (finding that it is not always easy to pro rate expenses properly incurred by union as collective bargaining representative with those involving political action). The \textit{Southworth} court recognized that any attempt to earmark certain funds represented “merely a bookkeeping matter, with the end result being that the objecting student subsidizes the political and ideological activities of the organization.” \textit{Southworth}, 151 F.3d at 732.

174. \textit{See Ellis}, 466 U.S. at 440 (noting Ninth Circuit affirmed district court order requiring that protesting employees’ annual dues be reduced by amount spent in preceding year on activities deemed objectionable); \textit{Abood}, 431 U.S. at 237 (declining to mandate specific procedures and instead permitting parties to devise way of “preventing compulsory subsidization of ideological activity . . . without restricting the Union’s . . . collective bargaining activities,” such as permitting dissenters to indicate that they opposed any ideological expenditure unrelated to collective bargaining); Galda v. Rutgers, 772 F.2d 1060, 1066 (3d Cir. 1985) (“The courts have observed that it is not always easy to prorate the expenses properly incurred by a union as collective bargaining representative with those involving political action.”); \textit{see also} Schmitz, \textit{supra} note 39, at 636-37 (noting that \textit{Smith} court’s recommendation that University of California adopt voluntary funding system would turn student activity fee system into popularity contest subject to wealth of individual members); Cusac, \textit{supra} note 3, at 30 (noting “practical impossibility” and “formidable arithmetic” inherent in creating system whereby 39,826 University of Wisconsin students select which of 200 campus groups should receive their portion of student fees).

An opt-out system of payment as it pertains to private special interest groups is not totally unfeasible. \textit{See generally} International Ass’n of Machinists v. Street, 367 U.S. 740, 771-75 (1961) (describing various remedies available to union). For example, the University of Illinois permits students to withhold $7 per semester that would otherwise go directly to special interest groups. \textit{See Dave Newhart, College Student Fees Face 1st Amendment Test, CHICAGO TRIB., June 4, 1997, at 1 (describing opt-out mechanism at University of Illinois). The students may, however, lose access to student services, such as the student legal center. \textit{See id.} (discussing loss of privileges under opt-out scheme).

175. \textit{See Southworth}, 151 F.3d at 732 (recognizing that leaving dispersal of funds to democratic process of student government is inadequate because First Amendment trumps democratic process and protects individual rights “even when a majority of citizens wants to infringe upon them”).
The question presented in *Southworth* has narrowed the mandatory student activity fee controversy to a discreet and manageable issue. The issues of the disturbing and sweeping consequences of prohibiting the collection of student activity fees and the potential extinguishing of free speech on public university campuses are no longer before the courts. Nevertheless, there is evidence that future holdings in line with *Southworth* may signify the beginning of a right-wing Christian movement towards suppression of objectionable speech. In fact, the immediate impact of

176. For a discussion of the precise question presented in *Southworth*, see *supra* note 104 and accompanying text.

177. *See* Smith v. Regents of the Univ. of Cal., 16 Cal. Rptr. 2d 181, 184 (1993) (finding that use of mandatory fees to fund political or ideological student groups at public universities violates First Amendment). The court in *Smith* dealt with an uncomfortably broad issue, containing rather sweeping policy ramifications. For a further discussion of the *Smith* decision, see *supra* notes 100-03 and accompanying text. In contrast, the *Southworth* court addressed an identifiable group of students who objected to a specific facet of monetary allocation: the funding of the ideological agendas of private organizations outside the campus walls. *See Southworth*, 151 F.3d at 722 (challenging only funds used to promote private political and ideological activities). Note also that the ruling in *Southworth* does not affect private universities. *See Newbarto*, *supra* note 174, at 1 (stating that private universities remain unaffected by court's ruling).


The Alliance Defense Fund is a self-described grass roots Christian organization intent on "reclaiming legal ground in this country for the body of Christ." *Cusaco*, *supra* note 3, at 30. The Alliance Defense Fund was formed in January 1994 to identify strategic, precedent-setting suits beneficial to the Christian right. *See id.* (discussing founding purpose of Alliance Defense Fund). As one of their projects, the Alliance Defense Fund allocated $35,000 towards Scott Southworth's fight against the University of Wisconsin Regents. *See id.* (discussing Alliance Defense Fund's role in *Southworth* suit).

The Alliance Defense Fund receives backing from "the heaviest hitters in Christian rightdom," including James Dobson of Focus on the Family, Gary Bauer of the Family Research Council, Don Wildmon of the American Family Association and Alan Sears (the Alliance Defense Fund's president) who served as executive director of United States Attorney General Edwin Meese's 1985-86 Commission on Pornography. *See id.* (describing notable Alliance Defense Fund leaders). To date, the Alliance Defense Fund has tallied 47 wins and only 6 losses. *See id.* The Alliance Defense Fund's president, Alan Sears, stated that the *Southworth* decision allowed for "a lot of spinoff" where "[h]igh schools may be the next logical step." *Id.* Whether this represents the beginning of the abolition of church and state separation or the beginning of the end for public schools remains more suspect. *See id.*
Southworth may be the suppression of liberal speech and the bolstering of conservative thought.\textsuperscript{179}

While the ideal of the campus as a marketplace of ideas may be a nostalgic notion, even today, organizations such as the Alliance Defense Fund understand that the struggle to control access to this marketplace of ideas remains important.\textsuperscript{180} Such groups realize that a frontal attack on mandatory student activity fees flies in the face of several decades of Supreme Court jurisprudence establishing the campus as a marketplace of ideas.\textsuperscript{181} Although attacking private organizations funded by the university represents a roundabout method by which to attack liberal causes, evidence suggests that such tactics may prove effective.\textsuperscript{182} For

\[\text{(noting that decisions such as Southworth represent significant erosion of First Amendment sanctity).}\]

Finally, the Alliance Defense Fund summed up in their organizational newsletter the group’s true intentions in the wake of Rosenberger (another Alliance Defense Fund case): "We also have begun to select key cases that would build on this foundation and to look for other cases that will create additional key precedents in our quest for true religious freedom in America." \textit{Id.}

\textsuperscript{179. See Cusac, supra note 3, at 30 (finding that traditionally underrepresented groups such as Lesbian, Gay, Bisexual Campus Center would be primary targets of opt-out system); Newbart, supra note 174, at 1 (finding that curtailment in funding ‘could lead to the death of controversial or unpopular groups on college campuses, and eventually hurt the schools’ ability to foster a diverse environment’).}

\textsuperscript{180. See Waring, supra note 46, at 545-47 (discussing usefulness of marketplace metaphor in discussing student fees cases). One scholar posits three ways in which the marketplace metaphor remains helpful. \textit{See id.} (posing three ways in which marketplace metaphor remains helpful). First, given that values in the marketplace are generally accepted as true, the struggle to control access to the marketplace of ideas remains important for those ideas that have economic and political ramifications. \textit{See id.} (recognizing that marketplace metaphor remains helpful despite passage of time); \textit{see also} Ingber, supra note 162, at 26 (‘[A] person will perceive the marketplace as leading to the best result only if it favors those who, in that specific individual’s view, should be favored.’). Second, courts have used the marketplace model to explicate the paradox between promoting free expression as a means of benefiting society as a whole and the conflict over individual autonomy. \textit{See} Waring, supra note 46, at 545-46 (focusing on conflict between promoting aggregate and individual benefits to society). Third and finally, one author discussed the relevancy of laissez-faire policy in United States jurisprudence as it pertains to the government’s tendency to regulate, or not to regulate, ideas in the free marketplace. \textit{See id.} at 547 (discussing effect of regulation on free marketplace of ideas).}

\textsuperscript{181. See Southworth, 151 F.3d at 721 (finding that students challenged only narrow portion of allocable fees); \textit{see also} Cusac, supra note 3, at 30 (discussing Scott Southworth’s previously unsuccessful attempts to sabotage student fees distribution mechanism by, among other things, trying to dissolve entire University of Wisconsin student government). For a further discussion of the narrow issue presented in Southworth, see supra note 104 and accompanying text.}

\textsuperscript{182. See Cusac, supra note 3, at 30 (noting Scott Southworth’s statement that Southworth decision “definitely sent some shock waves through the educational community”). Lack of funding of state PIRG organizations from student fees may cause substantial financial hardship. \textit{See Galda v. Rutgers, 772 F.2d 1060, 1062 (3d Cir. 1985}) (noting that NJPIRG collected nearly $800,000 from mandatory student activity fees over 12-year period); \textit{see also} Carroll v. Blinken, 957 F.2d 991, 994 (2d
the Alliance Defense Fund, such victories represent only the begin-
ning.183

Underlying all of the above questions is an even broader public policy concern. First, in an effort to promote judicial economy and not burden the courts with unnecessary pro rata fee litigation, future courts will most likely delegate such details to the individual states.184 Consequently, state legislatures will be left with the onerous responsibility of designing statutes in compliance with vague judicial holdings.185 In addition, courts have recognized that to uphold the principles of federalism, the states themselves should have the sole power to regulate allocations of State Regents’ funds.186

Cir. 1992) (noting that 30% of NYPIRG’s $2.7 million budget comes from campus activity fees in SUNY system); Christopher Downey, First Amendment: SUNY Albany Student Fee Contribution to NYPIRG is Not Forced Speech, but NYPIRG May Not Count All Students as Members, N.Y.L.J., Mar. 2, 1992, at 5 (discussing Carroll decision); Deborah Pines, NYPIRG Held Entitled to SUNY Student Fees—Court Finds No Constitutional Violation, N.Y.L.J., Feb. 18, 1992, at 1 (discussing holding in Carroll permitting dispersal of funds to NYPIRGs so long as NYPIRG spends monies collected from student fees on campus in which they were raised).

183. See Cusac, supra note 3, at 30 (indicating Alliance Defense Fund’s larger agenda targets entire public school system and even doctrine of separation of church and state).

184. See Southworth, 151 F.3d at 734 (noting that protracted federal judicial supervision should be reserved only for “‘extreme cases of demonstrated noncompliance’” (quoting ACORN v. Edgar, 56 F.3d 791, 798 (7th Cir. 1995))).

185. See id. (finding that injunction set forth by court requires Regents, through state legislative action, to take detailed measures to ensure that students’ First Amendment rights are not curtailed). Because the Constitution does not mandate a specific remedy in enjoining the Regents from funding certain student programs, the court found that it is the legislature’s place and not that of the courts to implement appropriate measures to safeguard First Amendment rights. See id. at 735 (considering policies of federalism).

The State of Wisconsin’s Senate, in the wake of the district court’s initial decision in Southworth, proposed several pieces of legislation to comply with the court’s injunction. The proposed bill, section 36.11(27), reads: “Segregated fees. The board may not approve any fee for the support of a student organization whose educational benefits are incidental to its primary purpose of advancing a political or ideological cause unless it exempts from payment of the fee any student who objects to supporting the organization.” S.B. 134, 93d Leg., Reg. Sess. (Wis. 1997). The statute went into effect the first fall semester after its enactment. See id. (addressing implementation deadline for statute); see also Downey, supra note 182, at 1 (discussing proposed Wisconsin bill addressing court’s decision in Southworth).

186. See Consumer Party v. Davis, 778 F.2d 140, 146 (3d Cir. 1985) (“[F]ederal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs . . . .” (quoting Milliken v. Bradley, 433 U.S. 267, 280-81 (1977))); see also Lewis v. Casey, 518 U.S. 343, 362-63 (1996) (finding that injunctive relief against state should be no broader than is necessary to remedy constitutional violation); Clark v. Covy, 60 F.3d 600, 604 (9th Cir. 1995) (finding that injunctive remedy “protects the plaintiffs’ federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law”); Touissant v. McCarthy, 801 F.2d 1080, 1087 (9th Cir. 1986) (“[I]njunctive restraints that exceed constitutional minima must be narrowly tailored to prevent repetition of proved constitutional violations, and must not intrude unnecessarily on state functions.”) (citing Ruiz v.
It remains to be seen whether the courts’ passing the buck under the guise of federalism and judicial restraint will in turn cause a judicial quagmire. In conclusion, it is uncertain whether the Southworth court’s break from prior jurisprudence, with its decision favoring objecting students, presents a realistic possibility that the campus soap boxes of yesterday will begin to gather cobwebs.

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Estelle, 679 F.2d 1115, 1156 (5th Cir.), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982)). The court in Southworth adopted the above decisions as guidelines for the legislature in fashioning remedies for education. See Southworth, 151 F.3d at 734-35 (finding that state legislature should retain control of fee allocation because Constitution does not mandate exact injunctive procedure to be used in such student funding cases and because Wisconsin has not refused to comply). 187. See Jon Segal, Students Say UW Fee Panel is Unfair, CAPITAL TIMES, Sept. 18, 1998, at 2A (finding administrators and students in deadlock over how to distribute student activity fees in light of court’s decision in Southworth). Whereas the students point to Wisconsin State Code section 39.09(5), the University has attempted to wrestle control from the students by taking a majority of voting seats on the allocation committee. See id. (noting that statute gives students control of “the formulation and review of policies concerning student life, services and interests”); see also Nathan Arnold, Lyall Stands by a Split Student Fees Committee, BADGER HERALD (Sept. 18, 1998) <http://www.badgerherald.com/news/fall98/091898news2.html> (discussing new student fee committee designed by University of Wisconsin President Katherine Lyall).

With all the debate surrounding the constitutionality of student fee allocation, another round of lawsuits designed to determine the role of student input in fee dissemination may clutter the court dockets, creating an unacceptable standstill. See id. (stating that students such as Eric Brakken, Chairperson of ASM, will not bow to university pressure in light of Southworth).

188. See Schmitz, supra note 39, at 634 (finding that court’s decision in Smith threatened university’s discretionary power to determine best way to carry out its educational purpose). One commentator posited that “[i]nstead of carrying out its statutory mandate subject to judicial oversight of educational decisions, the university will potentially find itself inhibiting speech in order to avoid potential litigation costs.” Id. at 635.

While Smith presents the most significant break from prior jurisprudence insofar as the curtailment of on-campus speech is concerned, prohibition of funding off-campus private organizations received judicial approval as early as 1985. See Galda v. Rutgers, 772 F.2d 1060, 1068 (3d Cir. 1985) (enjoining assessment of mandatory student activity fees payable to NJPIRG). Nevertheless, the Galda court’s deeply divided ruling demonstrates courts’ hesitancy towards curtailment of subsidization even in reference to private organizations outside the campus walls. See id. (Adams, J., dissenting) (finding “a determination that speech is political or that a university’s decision is unwise” does not lead to conclusion “that an outlet for campus speech is unconstitutional and must be foreclosed”); see also Carroll v. Blinken, 957 F.2d 991, 1003 (2d Cir. 1992) (permitting funding of NVPIRG using student activity fees, but eliminating practice of automatic membership); Cusac, supra note 3, at 30 (quoting University’s position that “[t]he danger in accepting the plaintiffs’ position is that it may not be long before all student ideological expression funded by fees is silenced”).