

***569 STUDENT FEES AND STUDENT RIGHTS: EVOLVING CONSTITUTIONAL PRINCIPLES**

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The constitutionality of imposing mandatory activity fees on state university students generated remarkably little concern for most of this century, even as challenges to other policies affecting student life increasingly drew the attention of the courts. Even now, the mandatory fee issue has never reached the Supreme Court. [FN1] Though the very first volume of this Journal carried a seminal article on the subject by Johns Hopkins University General Counsel Estelle Fishbein, [FN2] litigation of student fee challenges remained a relatively recondite topic until the 1990s. Now, within a brief period, the legal attack on mandatory activity fees has exploded. Major cases have been decided in New York [FN3], California, [FN4] Wisconsin, [FN5] and Oregon, [FN6] with suits pending in Minnesota and Ohio, among other states, and working their way through federal and state court systems. [FN7] This seems an appropriate time to assess the causes of this change, its constitutional dimensions, and some of its implications for university policy.

I. LEGAL BACKGROUND AND ANTECEDENTS

There may be several reasons for the rapid and dramatic emergence of the mandatory fee issue. Though it is not easy to trace or date the precise origins of the present practice of charging and allocating mandatory fees to the support of student groups, the current arrangement does seem to be relatively recent at most campuses. [FN8] Prior practice seems typically to have included *570 comprehensive tuition and fee charges, or activity fees allocated in a less visible manner. Legal challenges to the earlier arrangement were not unknown. The earlier cases tended, however to challenge specific expenditures, most commonly the use of student fees to support a campus newspaper, the contents of which evoked enough concern to cause a few students to take the issue to court. [FN9] The courts during this period displayed a high level of deference to institutional judgments about collecting and allocating fees, and regularly rebuffed student complaints. [FN10] Indeed, the only dissonant note in this generally harmonious pattern involved a student challenge to a specific fee which Rutgers University had imposed for the support of the New Jersey Public Interest Research Group (PIRG), an organization engaged in highly visible, largely off-campus political activity. [FN11]

Indeed, the shift from issue or group-specific challenges to comprehensive legal assaults on the mandatory fee system represents one of the major changes of the 1990s. The most recent cases, notably those in California and Wisconsin, involved attacks not on the support of a newspaper or a specific organization, but more broadly on the constitutionality of the entire process of allocating mandatory student fees to groups that may be characterized as "political" and/or "ideological." It is that very process that the state courts in California [FN12] and the federal courts in Wisconsin (including the Seventh Circuit) [FN13] have drawn in question. Thus, the new judicial skepticism on the part of these courts may reflect in part the changing posture of the plaintiffs' challenges to the mandatory fee imposition. Yet there does seem to be more at work here than simply an expansion

of the scope of the complaints that have brought the fee issue before courts in the 1990s. Other factors also need to be entered in the equation.

A second significant change lies in the nature of the challenge. The earlier cases were quite local and isolated. Individual students or small groups of students attracted the attention of (or hired) an attorney who represented their interests, almost uniformly without success -- sometimes, as in the Vermont case, apparently failing to allege or prove the requisite burden on conscience or expression. By the mid-1990s, the mandatory fee issue had become a cause for conservative litigation support groups. Such organizations and attorneys associated with them have filed and litigated the Wisconsin, *571 Oregon, Minnesota, and Ohio cases, at least. [FN14] It would hardly be surprising if the more effective coordination and preparation of such lawsuits had not attracted greater judicial concern and, in addition, begun to yield a more mixed pattern in the outcome of the cases. Yet, with all deference, a more effective litigation strategy and coordination would not alone seem likely to explain so stark a shift as has occurred in this field of law during the past decade.

What is most distinctive about the fee cases of the 1990s is a perceived change in several facets of the applicable constitutional principles. Three notable Supreme Court decisions in quite different ways emboldened those who stood ready to challenge state university fee mandates. First among them was the Court's decision in *R.A.V. v. City of St. Paul*, [FN15] holding that a government may not, on the basis of message or viewpoint, discriminate even in its regulation of less than fully protected expression. That judgment may well have implied the Court's greater responsiveness to claims of viewpoint bias on the part of students who felt their beliefs compromised by compelled support of political and ideological causes through mandatory fees.

If *R.A. V.* implied such receptivity on the Court's part, two cases in the mid-1990s must have sent a far stronger signal. In *Hurley v. ILGO*, [FN16] the Court enhanced the right not to be forced to express an abhorrent view by rejecting an Irish gay and lesbian group's claim that a state's anti-discrimination law could give that group a right to take part in the dominant St. Patrick's Day parade, against the wishes of the sponsoring organization. "While the law is free to promote all sorts of conduct in place of harmful behavior," the Court concluded, "it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one." [FN17] This judgment seemed to imply a heightened sensitivity to First Amendment claims against governmentally compelled expression in any form.

The third of the mid-1990s cases was undoubtedly the most pertinent. When the Supreme Court ruled in *Rosenberger v. Rector and Visitors of the University of Virginia* [FN18] that public universities may not deny student fee funding to a category of expression or activity -- religious publications, to be specific -- the authority of universities to impose such fees was not in question. The only issue before the Court, on which it was bitterly divided, was the fee allocation process, and university regulations governing that process. *572 Yet the underlying fee issue was implicated in at least two significant ways by the *Rosenberger* case.

For one, there was Justice O'Connor's almost casual, but portentous, recognition of "the possibility that the student fee is susceptible to a Free Speech Clause challenge by an objecting student that she should not be compelled to pay for speech with which she disagrees." [FN19] Some observers took alarm at this comment, warning in one case that Justice O'Connor had sounded the "death knell" for existing student fee arrangements. [FN20] Even less apocalyptic commentators recognized that the issue of imposing and collecting the fee itself, and not simply of allocating the proceeds, had now been placed obliquely on the Supreme Court's agenda.

The other way in which *Rosenberger* may have changed the equation was its view of the fee funding process for student organizations and activities as a forum to which the desiderata of viewpoint neutrality must now apply. The Court had earlier, in *Widmar v. Vincent*, [FN21] imposed such criteria on the allocation by a state university of access to physical space, specifically meeting rooms in the student

union. The Court observed that the "campus of a public university, at least for its students, possesses many of the characteristics of a public forum." [FN22] The potential relevance of that reference to the student fee issue was noted long before Rosenberger, [FN23] although courts which reviewed challenges to mandatory fees and their use did not, on the whole, perceive the connection until the 1990s.

In fact, it could well be argued that an even earlier Supreme Court decision, Healy v. James, [FN24] made clear the relevance of public forum analysis. In holding that state universities could not deny recognition to student groups because of their political views, or even because of disruption at other places, the Court declared that "the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" [FN25] Thus courts might much earlier have analogized the fee collection and allocation process to the process of recognition or the allocation of space, and treated the fee issue in public forum terms, though few did so. After Rosenberger, the connection and the analogy would have been hard to miss, even without Justice O'Connor's invitation.

II. THE NEW VIEW OF MANDATORY FEES -- DEVELOPMENTS IN CALIFORNIA AND WISCONSIN

The catalyst for change was not simply the suggested analogy between mandatory fees and more familiar public fora. Even more significant were *573 several emerging, rapidly changing, dimensions of First Amendment law. These substantive trends provide the final, and most crucial, element in the metamorphosis of the 1990s. We address each dimension in turn, starting with the "compelled speech" doctrine, which has played a crucial role in the fee area.

The notion that government may not require citizens to pay to support abhorrent views is hardly new. It would be hard to find a more direct condemnation than Thomas Jefferson's insistence that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." [FN26] The courts have long recognized the right of citizens not to be compelled to express an abhorrent belief, through a mandatory salute to the flag [FN27] or the display of an abhorrent message on one's automobile license plate. [FN28] Surprisingly, it took longer for the courts to embrace Jefferson's view about resisting monetary exactions as a protected form of expression -- and then in the somewhat oblique context of compulsory union dues. In a series of cases, the Supreme Court protected members of union or dues shops from being required to support, through payments assessed as a condition of initial or continued employment, union activities or messages that were not "germane" to the collective bargaining role that justified the assessment. [FN29] Later, the Supreme Court extended this protection to members of integrated state bars, who are similarly obliged to pay dues as a condition of eligibility for the practice of law. [FN30]

The potential relevance of the union dues/state bar dues doctrine to mandatory student fees is hard to escape, and has played a role in the analysis for some time. What has been most divisive in the recent cases, however, is the precise bearing of these precedents. The Wisconsin fee challenge offers perhaps the best illustration of divergent views on that issue. The Seventh Circuit majority in Southworth v. Grebe [FN31] found the challenge to the Regent-imposed student activities fee to be entirely controlled by the union and bar dues cases. Mainly on that basis, the court ruled that the Regents could not constitutionally mandate fees for support of "political and ideological" groups. [FN32]

The Regents sought rehearing from the full court of appeals. That request was rebuffed in a memorandum opinion that simply reaffirmed the panel's judgment. From the denial of rehearing, however, three judges dissented, taking sharp exception to the majority's confident assimilation of fees and dues. The dissenters noted several vital differences between the two situations.*574 Chiefly, they stressed that state university students, unlike union or integrated bar members, paid "fees not to the challenged groups, but to the student government which then uses the money" both for its own activities and for support of more than a hundred organizations. [FN33] Thus, in contrast to union and state bar activities, "the speech of the offending groups can hardly be attributed to the student government, which funds groups of

radically different views." [FN34] That being the case, the First Amendment "burden" that demanded protection for objecting dues shop or state bar members simply had no precise counterpart in the very different student fee context.

The Seventh Circuit dissenters added, in a prescient aside, that the Regents and student government must, under Rosenberger, "determine funding in a content-neutral manner." [FN35] Indeed, that very obligation led one commentator to suggest an emerging anomaly that courts will need to address in future cases. [FN36] Arguably, a state university may not, on its own, or presumably even under court order, refuse equal funding to certain student groups because those groups are deemed "political and ideological" -- thus placing the selective relief sought by student mandatory fee challengers in direct contravention of the content-neutrality that Rosenberger demands.

This novel conundrum needs to be addressed more fully by courts inclined to do as the Seventh Circuit has done, and to impose upon the fee-eligibility determination criteria that are as content-based as was the University of Virginia's refusal to fund with mandatory fees student publications that were "religious" in character. But we need not resolve this issue quite yet; the focus of current debate -- notably within the Seventh Circuit -- is whether the union and state bar dues cases are sufficiently relevant to require the exclusion from the mandatory fee package.

For several reasons, the Southworth dissenters seem to have the better of the argument. First, the nature of the alleged "burden" is dramatically different in the two situations. While union shop and state bar members cannot easily disclaim views espoused by an entity to which the law compels them to contribute, the student fee payer could hardly be said to be forced to support any of the vastly divergent views of the myriad groups that receive funding from the pool to which those fees go. The only meaningful analogy to the union shop or state bar is the student government itself -- a different situation to which we turn later.

As for the funded groups, whether or not deemed "political and ideological," the inescapable variety -- indeed cacophony -- of their publicly expressed views avoids any plausible inference or attribution of sponsorship on the part of any individual dues payer. The one exception -- a situation in *575 which a federal appeals court years ago did enjoin a mandatory fee [FN37] -- involves a special student fee that is collected, allocated and earmarked for a single organization whose views could be attributed to each student whose fees go to support it. In the typical situation that has recently been before the courts, no such inference of endorsement could reasonably be drawn.

The Southworth dissenters seem correct in their view of the case for a second reason. Even if the union and state bar cases did control, they provide a means of relieving the burden on individual objectors in the form of a pro rata rebate or refund. Other courts had found the refund or rebate to provide whatever safety valve the First Amendment required, as much for the student fee payer as for the union shop or state bar member. The Wisconsin fee, as it came before the court, contained no refund/rebate option. But the Regents offered during oral argument to create such a procedure, believing such an offer would relieve any burden dissenting students might otherwise incur.

Startlingly, the Seventh Circuit rejected the offer. Even a refund would not suffice; the majority, invoking Supreme Court skepticism in a different context, insisted that collecting and "then refunding months later the portion that [the union] was not allowed to exact in the first place" because "even then the union obtains an involuntary loan for purposes to which the employee objects." [FN38] Thus, incredibly, the Seventh Circuit not only struck down the non-refundable fee before it, but by clear implication the remedy suggested by the Regents. That remedy, a proposal to bring its fee-collection procedure into line with those of other universities and with the vast majority of union and bar dues requirements, had been sustained by other courts because of the presence of such an escape valve.

Third, the Southworth dissenters were correct on another central constitutional point. Even if the union and bar dues cases fully controlled, they would not bar all

expression of potentially abhorrent views by the fee recipient. Rather, the Supreme Court has ruled (as the Seventh Circuit noted but then seemed to disregard) that such activities must be "germane" to the role or responsibility that warrants collecting dues in the first place. Though the Southworth court did undertake a cursory analysis of germaneness, it failed to invoke in that process those educational interests that might justify not only mandating activity fees in the first place, but including within the potential beneficiaries some groups that are "political and ideological."

It is at this point in the analysis that the recent California litigation becomes helpful. In a suit actually filed before 1990 to challenge the University of California's mandatory student activities fee, the Smith plaintiffs advanced First Amendment arguments quite similar to those that have driven the later cases. The focus was primarily on fee-funded activities of the student (ASUC) senate, a target more closely analogous to the union/bar cases than the indirect funding of other student groups. The state supreme court opinion *576 in 1993 sounded what seemed at the time the first dissonant note in the generally deferential chorus. [FN39] That court essentially split the difference. It first ruled that the objecting students had shown a "real and substantial" burden on their First Amendment rights, by analogy to the union and state bar cases, and were thus properly in court. [FN40] Though there was no doubt the Regents had the legal authority to impose such a fee, the exercise of that power must be tested by strict scrutiny. Thus, the Regents' mandate behind the activities fee could be, but had not yet been shown to be, compatible with the union and bar cases -- specifically, that the educational benefits provided by fee-supported activities outweigh the advancement of political and ideological interests, and were not simply incidental to those interests.

That sounded at the time like a tall order. On remand, however, lawyers for the Regents persuaded the trial judge that the fee mandate fully met this heavy burden - - that the fee-supported ASUC activities did indeed provide benefits that were not merely incidental to the primary educational values. Thus, the California Superior Court found the undoubted burden on individual students to be justified, and the court of appeals affirmed. [FN41]

One uncertainty remained in the California saga, and has just been resolved by a federal court. After the remand process, the Regents still felt legally obligated to bar the use of mandatory fees to support ASUC lobbying, while permitting other student government activities to be fee-funded. In January 1999, a federal district judge struck down that bar, ruling that the Regents had "misrepresent[ed]" the California Supreme Court's Smith ruling by treating lobbying as categorically ineligible for fee support. [FN42]

So long as individual student objectors could seek and obtain a pro rata refund of the lobbying-related portion of their fee, the same formula that applied to other ASUC activities might validate lobbying expenditures. The California Supreme Court had drawn no such clear and sharp line between lobbying and other political activity, the federal judge stressed, noting that the presumptive educational benefits that might validate other applications of fee funding applied no less to lobbying. Finally, the judge offered in dictum his view that a ban on funding of lobbying alone among ASUC expressive activity "raises serious First Amendment and equal protection concerns since the Regents are prohibiting political speech, even when that speech is funded voluntarily by students and not by dissenting students." [FN43]

The California saga seems to have run its course. Despite ominous emanations from the state supreme court in the 1993 judgment, the student activities fee seems now to have survived virtually intact. The Regents have persuaded both federal and state courts of underlying educational values that *577 are not incidental to political or ideological goals. So long as objecting students may claim a pro rata refund, the Regents may charge the fee and permit the ASUC to use it for indisputably political purposes. Indeed, the Regents almost certainly must permit a range of ASUC political activities, unfettered by content constraints that would (as the federal judge recently warned) likely raise serious Rosenberger problems.

There is a fourth and final dimension on which the Southworth dissenters seem to have the better of the argument. As most other courts have recognized, especially the California courts throughout the tortuous Smith saga, [\[FN44\]](#) they deal here not with the powers of labor unions or bars groups with regard to their members, but the vastly different relationship between institutions of higher learning and their students. While unions and other membership groups speak for and represent their members, such organizations could hardly claim an educational role or responsibility. When it comes to student fees, however, the university's educational mission becomes central. Accordingly, educational values are entitled to -- and historically in this context have received -- a major place in the equation. [\[FN45\]](#) As the Southworth dissenters noted: "Numerous courts have recognized that the free expression of a wide range of ideas is central to the educational mission of a university, teaching students to think for themselves and to separate the 'wheat from the chaff.'" [\[FN46\]](#) The role of such interests and their recognition by courts is essentially to enhance the degree of deference that courts would normally pay to judgments by a governing board to impose and collect fees.

It is here that the public forum analogy underscores the case in support of mandatory fee arrangements. Where the primary function of such fees is to create and sustain a forum where diverse viewpoints not only emerge, but are likely to flourish because of the support which a mandatory fee potentially provides to such diverse views, there is clear evidence of the educational value of a fee system. The failure to recognize this value most severely undermines the Southworth majority's view, and helps to explain why that view is so dramatically discordant with the judgments of many other courts that have passed on challenges to state university mandatory fees.

***578** Before leaving the Southworth analysis, we need to acknowledge two situations in which the majority's reasoning has greater force. One is the rare situation we noted earlier, where an organization-specific fee (like the Rutgers PIRG fee) is made mandatory. That situation much more closely resembles the union/bar dues case; the nexus (and thus the prospect of attribution or apparent sponsorship) is much closer than in the typical process where student government allocates a total fee pool among so diverse a welter of student groups that no one fee payer could possibly be linked to the views of any of the beneficiaries, much less to all of them. Yet even here, a refund or rebate would seem an entirely adequate remedy. Any student who wishes not to be inferentially associated with such a group, and/or not in fact to support its activities, may opt out and should thus be fully relieved of whatever burden mandatory support might impose.

The other special situation is that of direct support for student government activity and expression as such -- the dynamic on which the California Smith case focused in its later and crucial stages. Here, the potential exists both for the appearance and the reality of involuntary support of an abhorrent message. Yet here again the refund or rebate procedure should amply meet the needs of dissenting students, as the California courts have recognized. To enjoin the whole fee collection process because a small number may object to the ways in which those fees are used risks requiring the university to apply the very content or viewpoint criteria which (as the federal judge in the UC- Riverside case recently warned) Rosenberger precludes on First Amendment grounds. There is also a practical risk in so prophylactic an approach. As the Southworth dissenters cautioned, such a solution could "logically result in excluding everyone" since few among the organizations now receiving student fees could escape the wrath of some group of students who might envision a better use for their mandatory fee payments. [\[FN47\]](#)

The most recent judgment on these issues, the Ninth Circuit's late February ruling in favor of the University of Oregon's mandatory student fee policy (specifically upholding fee allocations to an educational arm of Oregon's Public Interest Research Group) reaffirmed and strengthened the prevailing consensus among federal and state courts. [\[FN48\]](#) The Ninth Circuit, after stressing certain factual differences between Oregon's and Wisconsin's fee arrangements, concluded that the challenged "distribution of funds ... serves a legitimate governmental interest that does not violate the First Amendment." This court, recognizing the divergent premises of its ruling and those of the Seventh Circuit's Southworth, concluded that on such constitutional matters "we respectfully disagree." Consequently, there exists a

fairly clear conflict among federal circuits--a condition that may yet attract the Supreme Court's attention and interest in the mandatory fee issue.

*579 What has been said here, and by the clear majority of courts that have sustained mandatory fees, should take nothing away from the well-settled principle that (in Thomas Jefferson's words) one may not be "compell [[[[ed] to furnish contributions of money for the propagation of opinions which he disbelieves." The right not to have government put words into one's mouth is well settled in such contexts as saluting the flag, displaying an abhorrent license plate motto, and being forced to include other groups in a holiday parade. In such situations the prospect of attribution is direct and irrefutable. There is no way in which a refund or rebate, or any comparable means of dissociation, could allay the appearance or the reality of sponsorship or endorsement. But where the relationship is as indirect and attenuated as it is in regard to mandatory student fees, the force of this doctrine is correspondingly diminished. Meanwhile, the fundamentally educational rationale for a mandatory fee system also sharply differentiates the two situations.

III. Surviving Southworth

For public universities in the Seventh Circuit, Southworth is the law. Other courts may be persuaded to a similar view, though the recent movement in the opposite direction by state and federal courts in California suggests that Southworth is likely to remain a minority view. At the institutions to which this doctrine does apply, some hope remains for meaningful mandatory fee systems. A few practical suggestions may be helpful.

First, no court has come close to suggesting either that governing boards lack legal power to impose fees for myriad purposes, or that student activity fees may not continue to be mandatory for most students. So long as some means exists for objectors to avoid supporting "political or ideological" groups (likely to remain a small fraction of all student organizations) there seems no reason why the vast majority who do not object may not continue to be assessed whatever amount the governing board deems appropriate for this purpose.

Second, the validity of such arrangements depends upon pooling the fee proceeds for allocation to eligible organizations by the student government or some other body, exercising authority specifically delegated by the governing board. What remains legally vulnerable is any special activity fee earmarked for a specific organization -- whether or not "political" or "ideological." But we did not need the Seventh Circuit to tell us that. We already knew it from the Third Circuit's decision a decade and a half ago striking down the earmarked Rutgers PIRG fee. It is, however, a point not to be forgotten in the current complexity.

Third, the refund/rebate issue has not really been foreclosed, even in the Seventh Circuit. Every other court has found such a mechanism to be constitutionally adequate and responsive, even with regard to direct support of student government lobbying. The Seventh Circuit's admittedly uncongenial view was clearly dictum; the Wisconsin fee program before the court contained no rebate, though the Regents offered during argument to initiate one. The primary thrust of the court of appeals' judgment at this point was to *580 salvage important elements of Regents' authority, which had been questioned by an even less sympathetic district judge. Thus, the constitutionality of a workable and responsive refund/rebate program remains a more than technically open option, even in the Seventh Circuit, and everywhere else offers an entirely adequate safety valve.

Fourth, it is the governing board and not the complaining students who determine what organizations are "political and ideological" and thus subject to exclusion by dissenters. The fear expressed by the Southworth dissenters -- that individualized "hit lists" could bring the system to its knees -- seems groundless. So long as the process is credible and subject to periodic review (presumably once a year) the composition of the roster of suspect groups seems clearly a board prerogative.

Fifth, that process should be both credible and open. There should be a procedure

by which individual students may request that groups not on the current list be added to it, for example, because their activities have within the past year become unacceptably "political" or "ideological." There should also be an opportunity for any group so listed to remove itself from the roster, either by showing that its program has been misperceived or that its mission has so markedly changed that it no longer deserves to be on the list. [FN49]

Sixth, it should be clear that no doubt has been raised with respect to any other portion of the student-fee assessment process. None of these cases, and surely not Southworth, questioned the power of governing boards to impose fees for a host of other purposes essential to the university's operations. Nonetheless, it might be wise to separate the student activities fee more sharply from the rest of the fee package than many institutions have done in the past.

Finally, state universities and their students need to be reassured that the fee support of student organizations engaged in "political" or "ideological" activities has not been foreclosed -- at most, it has been made a bit more cumbersome by recognizing the concerns of students who do not wish, even indirectly, to endorse the messages of certain campus groups. For the vast majority of students, life should continue. For the vast majority of fee-supported groups, life will also continue, albeit with slightly smaller shares of the total fee pool.

[FN1]. The only decision to approach the issue, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) clearly addressed only the allocation of mandatory student fees. Save for a passing comment by Justice O'Connor, discussed infra, the Court had no occasion to consider questions about the imposition and collection of student activity fees by state universities. See Southworth v. Grebe, 151 F.3d 717 n.3 (7th Cir. 1998).

[FN2]. Estelle A. Fishbein, Legal Aspects of Student Activity Fees, 1 J.C. & U.L. 190 (1974).

[FN3]. Carroll v. Blinken, 957 F.2d 991 (2d Cir. 1992).

[FN4]. Smith v. Regents of the Univ. of Cal., 844 P.2d 500 (Cal. 1993); Associated Students of the Univ. of Cal. at Riverside v. Regents of the Univ. of Cal., No. C 98-0021 CRB, 1999 WL 13711 (N.D. Cal. Jan. 8, 1999).

[FN5]. Southworth v. Grebe, 151 F.3d 717, reh'g denied, 157 F.3d 1124 (7th Cir. 1998), petition for cert. filed (U.S. Jan. 25, 1999) (No. 98-1189).

[FN6]. Rounds v. Oregon State Bd. of Higher Educ., No. 97-35189, 1999 U.S. App. LEXIS 2703 (9th Cir. 1999).

[FN7]. See Douglas Lederman, Conservative Groups Take Aim at Mandatory Student Fees, CHRON. HIGHER EDUC., Mar. 6, 1998, at A32.

[FN8]. See generally 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, 1428 (1998).

[FN9]. See, e.g., Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983).

[FN10]. See, e.g., Lace v. University of Vt., 303 A.2d 475 (Vt. 1973); Good v. Associated Students of Univ. of Wash., 542 P.2d 762 (Wash. 1975). The early cases may not have advanced in most cogent form the constitutional claims on which recent litigation has focused. In the Lace case, for example, the Vermont Supreme Court noted an absence of proof in the record that the student plaintiffs had "either pled or proved that they were required through the assessment of the mandatory student activities fee to finance the promotion of religious, political or philosophical causes." Lace, 303 A.2d at 479.

[FN11]. Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985). Despite its novel posture, the Galda decision has been viewed as a significant break with precedent. See Janice G. Bauer, Note, The Constitutionality of Student Fees for Political Student Groups in the Campus Public Forum: Galda v. Bloustein and the Right to Associate, 15 RUTGERS L.J. 135 (1983).

[FN12]. Smith v. Regents of Univ. of Calif., 844 P.2d 500 (Cal. 1993).

[FN13]. Southworth v. Grebe, 151 F.3d 717 (7th Cir. 1998).

[FN14]. See Lederman, *supra* note 7, at A32. The article describes at length the views and litigation activities of public interest attorneys Jordan W. Lorence and Mark T. Gallagher, the Northstar Legal Center and the Pacific Legal Foundation. The one notable exception among the litigation of the 1990s is the Smith case in California, which was actually filed in 1979, though not decided by the state supreme court until 1993, and still pending for several additional years in the lower courts. See Smith v. Regents of Univ of Calif., 56 Cal. App. 4th 979 (Cal. Ct. App. 1997).

[FN15]. 505 U.S. 377 (1992).

[FN16]. 515 U.S. 557 (1995).

[FN17]. Id. at 579.

[FN18]. 515 U.S. 819 (1995).

[FN19]. Id. at 851 (O'Connor, J., concurring).

[FN20]. See Jennifer Lynn Davis, The Serpentine Wall of Separation Between Church and State: Rosenberger v. The University of Virginia, 74 N.C. L. REV. 1225, 1254 (1996).

[FN21]. 454 U.S. 263 (1981).

[FN22]. Id. at 267 n.5.

[FN23]. See Christina E. Wells, Comment, Mandatory Student Fees: First Amendment Concerns and University Discretion, 55 U. CHI. L. REV. 363, 383-84 (1988).

[FN24]. 408 U.S. 169 (1972).

[FN25]. Id. at 180.

[FN26]. Thomas Jefferson, A Bill for Establishing Religious Freedom, in 2 THE PAPERS OF THOMAS JEFFERSON 545 (1950).

[FN27]. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[FN28]. Woolley v. Maynard, 430 U.S. 705 (1977). But cf. Glickman v. Wileman Bros., 521 U.S. 457 (1997).

[FN29]. See, e.g., Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Lehnert v. Ferris Faculty Ass'n., 500 U.S. 507 (1991).

[FN30]. Keller v. State Bar of Cal., 496 U.S. 1 (1990).

[FN31]. 151 F.3d 717 (7th Cir. 1998).

[FN32]. Id. at 718.

[FN33]. Southworth v. Grebe, 157 F.3d 1124, 1125 (7th Cir. 1998), petition for cert. filed (U.S. Jan. 25, 1999) (No. 98-1189).

[FN34]. Id.

[FN35]. Id.

[FN36]. See Thoe, *supra* note 8, at 1448-49 ("While a content-based restriction to preserve the nature of the forum would be permissible, a viewpoint-based distinction would not. It is arguable that the [district court's] Southworth remedy, under Rosenberger analysis, is an impermissible viewpoint-based exclusion.").

[FN37]. Galda v. Bloustein, 772 F.2d 1060 (3d Cir. 1985).

[FN38]. Southworth v. Grebe, 151 F.3d 717, 733 (7th Cir. 1998) (quoting Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435, 443-45 (1984)).

[FN39]. Smith v. Regents of Univ of Cal., 844 P.2d 500 (Cal. 1993).

[FN40]. Id. at 512.

[FN41]. Id.

[FN42]. Associated Students of the Univ. of Cal. at Riverside v. Regents, 1999 U.S. Dist. LEXIS 161 (N.D. Cal. 1999). See also Jeffrey Selingo, Federal Judge Says U. of California May Not Ban Use of Student Fees for Lobbying, CHRON. HIGHER EDUC., Jan. 13, 1999 (daily ed.)

[FN43]. Riverside, 1999 U.S. Dist. LEXIS at *10.

[FN44]. Note especially the views of the court of appeals in Smith v. Regents of University of California, 65 Cal. Rptr. 2d 813 (Cal. Ct. App. 1997), recognizing inter alia that "participation in the ASUC Senate teaches specific leadership and advocacy skills ... and provides a campus forum for vigorous discussion on matters of campus and public concern." That latter finding by the trial court "adds an extra constitutional dimension ... for any effort to limit the topics for debate within the ASUC Senate forum would infringe upon academic freedom." Id. at 817-18.

[FN45]. See, e.g., Wells, supra note 23, at 370 ("Lack of [mandatory fee] funding will reduce the diversity of views expressed, the total quality of speech that can be funded, and the opportunity for students to participate in student organization speech activities. Moreover, a university's goal to instill in students an active capacity for tolerance is undermined when it creates a system where private biases are allowed to determine who in the forum shall be given the added advantage of monetary support.").

[FN46]. Southworth v. Grebe, 157 F.3d 1124, 1125 (7th Cir. 1998) (Rovner, J., dissenting), petition for cert. filed (U.S. Jan. 25, 1999) (No. 98-1189).

[FN47]. Id. at 1129 ("Just as these plaintiffs have a 'hit list' of organizations to which they object, other students will have their own lists [G]rafting dissenters' rights onto a neutral forum for the expression of a full panoply of viewpoints will most likely eliminate the forum altogether.").

[FN48]. Rounds v. Oregon State Bd. of Higher Educ., No. 97-35189, 1999 U.S. App. LEXIS 2703 (9th Cir. 1999).

[FN49]. Herein lies a possible paradox for the eighteen specific groups challenged in the Southworth case. Their classification as "political and ideological" has the imprimatur of the federal courts. It might thus require a specific request to the district court in order to declassify any of these listed organizations, should the need to do so arise. It is, however, only the status of these groups that would in any way inhibit Regent flexibility in future determinations.

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