FIRST AMENDMENT—Right to Free Expression and Free Association—Public Universities That Implement Mandatory Fee Programs to Fund Student Activities Must Distribute the Fund in a Viewpoint-Neutral Manner in Order to Respect the Students' Freedom of Expression and Association—*Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth*—120 S. Ct. 1346 (2000).

The U.S. Supreme Court recently held that the First Amendment requires student fees used to fund extracurricular student speech be disbursed in a viewpoint neutral manner. *See Bd. of Regents of the Univ. of Wisconsin Sys. v. Southworth*, 120 S. Ct. 1346 (2000). In so holding, the Court distinguished the present case from prior decisions declaring unconstitutional the use of membership dues, collected by bar associations and teachers' unions, to fund organizations that express a particular political viewpoint that is unrelated to the function of the bar association or teachers' union. *Id.* at 1354-55. *See also Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); *Keller v. State Bar. of Cal.*, 496 U.S. 1 (1990). The Court stressed that, unlike unions and bar associations, academic settings are created by the State in order "to stimulate the whole universe of speech and ideals." *Id.* at 1355. With this understanding, the Court concluded that, with the exception of the referendum aspect of the fee program which would be remanded for further inquiry, the fee program in general allocated funds to student organizations in accordance with the principal of viewpoint neutrality and thereby passed constitutional muster. *Id.* at 1356. The Court's analysis indicates a new path of First Amendment rights in the realm of higher learning, applying a new, bright-line requirement of viewpoint neutrality by which universities will be able to gauge their extracurricular speech program funding.

Before discussing the Courts decision, it is important to understand the system that the University of Wisconsin uses to allocate funds to its various student organizations. All students at the University's Madison campus are required to pay a mandatory, nonrefundable activity fee. *Id.* at 1350. This activity fee is collected and "deposited into accounts of the State of Wisconsin," then divided into allocable and non-allocable portions. *Id.* The non-allocable portion of the fee amounts to approximately 80% of fees collected and "covers expenses such as student health services, intramural sports, debt service and the upkeep and operations of the student union facilities." *Id.* The procedures related to the non-allocable portion of the activity fee were not at issue in this case. *Id.* at 1351. However, the procedures used in the disbursement of the remaining 20% of the fees, known as allocable funds and disbursed to support "extracurricular endeavors pursued by the University's registered student organizations ("RSO's")," were challenged. *Id.* According to such procedures, an RSO is eligible for funding so long as it was organized by students, is "a not-for-profit group, limit[s] membership primarily to students, and agree[s] to undertake activities

related to student life on-campus." *Id.* As one would expect, the several hundred University's RSO's represent a variety of different viewpoints, ranging from "the Future Financial Gurus of America" to the "College Republicans" and engage in a range of activities, from "displaying posters and circulating newsletters. . .to what can best be described as political lobbying." *Id.*

According to the University disbursement policy, an RSO would seek funding in one of three ways, (1) through the Student Government Activity Fund ("SGAF"), (2) through the General Student Services Fund ("GSSF"), or (3) by student referendum. *Id.* The first method, funding through the SGAF, is conducted by the University's student government—the Associated Students of Madison ("ASM"). *Id.* The ASM issues funds from the SGAF to RSO's for those activities deemed "central to the purpose of the organization", including support for an organization's operations, events and travel expenses. *Id.* The second and less utilized method, funding requests obtained through the GSSF, is administered by the ASM's finance committee and includes the funding of both viewpoint neutral campus services, such as the campus tutoring center and the student radio station, and organizations specifically created to express a political viewpoint. *Id.* RSO's seeking funds through either method are awarded money after the ASM makes a funding decision during "an open session" where students can attend meetings and discuss RSO funding. *Id.* Once funding is approved, ASM "forwards its decision to the chancellor and the board of regents for their review and approval." *Id.* at 1352. As for the third method, even though funding requests are put to a school wide student referendum, ASM approval is still required before funding can go ahead. *Id.* However, regardless of how the funding is approved, the RSO's receive reimbursement of expenses by "submitting receipts or invoices to the University" provided they meet the University's reimbursement guidelines. *Id.* Should a RSO fail to comply with University guidelines, possible repercussions include "probation, suspension or termination of RSO status." *Id.*

Respondents, present and former students of the University's Madison campus, filed suit in the United States District Court for the Western District of Wisconsin in March 1996. Their complaint alleged that "imposition of the segregated fee violated their rights of free speech, free association, and free exercise under the First Amendment." *Id.* Respondents asserted that the University must allow students "the choice not to fund" RSOs whose political or ideological views they do not share. *Id.* The District Court, ruling on cross-motions for summary judgment, found in favor of respondents and granted an injunction denying University funding for "any RSO engaged in political or ideological speech." *Id.* at 1353. In so holding, the District Court relied on two cases that addressed the use of membership fees to fund certain organizations—*Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) and *Keller v. State Bar of California*, 496 U.S. 1 (1990). *Id.* The District Court did not address the free exercise portion of respondent's claim. *Id.*

The Seventh Circuit "affirmed in part, reversed in part and vacated in part." *Id.* Applying a three-part compelled speech test announced in *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), the Seventh Circuit concluded "the program was not germane to the University's mission, did not further a vital policy of the University and imposed too much of a burden on respondents' free speech rights." *Id.* The court stated that students' interest in First Amendment rights were of "'heightened concern' following [the] decision in *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995)" and further enjoined the University from requiring students to pay that portion of the activity fee that constituted the allocable funds. *Id.*

The United States Supreme Court granted the University's petition for certiorari in order to clarify the confusion that the present issue has created among the circuit courts. *Id.* at 1353. In reversing the lower court judgment, the Court distinguished this case from three prior holdings, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), *Keller v. State Bar. of Cal.*, 496 U.S. 1 (1990), and *Lehnert. Id.* at 1354-56. It concluded that viewpoint neutrality is the yardstick by which fee allocation should be measured. *Id.* at 1356. Provided that funds are disbursed in a viewpoint neutral fashion, the Court asserted, the program will survive a First Amendment challenge. *Id.* Applying this view, the Court held in favor of the University's two viewpoint neutral disbursement programs but remanded as to the student referendum program since the record contained only limited information about that method. *Id.* at 1357.

First, Justice Kennedy, writing for the majority, recognized that the speech at issue here was not the speech of the University. *Id.* at 1354. Rather, the University specifically disclaimed the challenged speech and thus the Court could not look to precedent addressing government speech regulation. *Id. But see Rust v. Sullivan*, 500 U.S. 173 (1991); *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983). Instead, the majority applied the standards found in the context of past public forum cases and distinguished its holdings in *Abood* and *Keller. Id.*

The majority declared that the situations in *Abood* and *Keller* were distinct from the claim brought by respondents. *Id.* In *Abood*, the Court found that "nonunion public school teachers" could not be forced to pay an "additional service fee outside of union dues" that was spent for campaign contributions and "political views unrelated to its [the union's] duties as exclusive bargaining representative." *Id.* 1354-55 (citations omitted). In *Keller*, the Court held that "lawyers admitted to practice in California. . .could not be required to fund the bar association's own political expression." *Id.* at 1355. However, the Court asserted that in the academic setting, particularly public university, the University's goal to "facilitate a wide range of speech" must be balanced with individual First Amendment rights. *Id.* Consequently, the Court determined that the specific holdings of *Abood* and *Keller* did not apply in this case. *Id.*

Further, the majority found that the Seventh Circuit application of *Lehnert*

was also in error. *Id.* As Justice Kennedy stated, the germaneness test announced in *Lehnert* is "all the more unmanageable in the public university setting." *Id.* The Court stressed that while the underlying concern of germaneness was applicable to the teachers' union and the bar association, to apply such a standard in the realm of academia would be directly contradictory to the essence of higher education. *Id.* In the Court's view, bar associations and teachers' unions are organizations formed around a particular objective, whereas the goal of a university is to provide a setting "to stimulate the whole universe of speech and ideas." *Id.* Justice Kennedy declared, "[i]t is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning." *Id.* The Court further acknowledged that the distribution of fees, even in a viewpoint neutral fashion, would inevitably subsidize speech that someone would find offensive or objectionable. *Id.* However, the Court "decline[d] to impose a system" that would require segregation of fees. *Id.* at 1356.

Justice Kennedy noted that requiring "some type of optional or refund system" to allow those students who find some speech objectionable might further complicate the situation in terms of cost and disruption. *Id.* The implementation of such a system, the majority stated, is not a First Amendment requirement. *Id.*

The majority concluded that the University still maintained a duty to provide "some protection to its students' First Amendment interests." *Id.* To support this conclusion, Justice Kennedy reiterated the Court's holding in *Rosenberger*. *Id.* The Court explained that *Rosenberger* signifies that the viewpoint neutrality principle is the applicable standard "in the allocation of funding support." *Id.* In *Rosenberger*, the Court rejected the argument that a "student newspaper advancing religious viewpoints violat[ed] the Establishment Clause." *Id.* Justice Kennedy stated that the unanswered question in *Rosenberger* was precisely the issue here—"whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first place." *Id.* Drawing on the holding in *Rosenberger*, the majority decided that payment of a requisite student fee must be viewpoint neutral in order to pass constitutional muster. *Id.*

From this determination, the Court held that since two of the University's three funding disbursement system programs were stipulated as viewpoint neutral aspects, students' First Amendment rights were adequately protected. *Id.* However, due to the lack of information regarding the student referendum allocation method, the Court remanded for further consideration and judgment in light of the standards set forth in this decision. *Id.* at 1357.

Justice Souter, joined by Justice Stevens and Justice Breyer, wrote a concurring opinion shying away from the majority's requirement of viewpoint neutrality. *Id.* (Souter, J., concurring). Instead, Justice Souter wrote that the case should have been decided on narrower grounds and not employed as a vehicle for adding the viewpoint neutrality requirement to First Amendment doctrine. *Id.* at 1357-1358 (Souter, J., concurring).

Deeming the view adopted by the Court as "cast-iron," Justice Souter considered two potential avenues by which the University's program would be upheld provided it satisfied viewpoint neutrality. *Id.* First, Justice Souter discussed a group of cases in First Amendment jurisprudence, termed cases involving the "umbrella of academic freedom," that stand for the proposition that academic institutions should be able to decide for themselves how and what to teach their students. *Id.* at 1358 (Souter, J. concurring). The concurrence argues that because these cases afford universities broad protections against judicial or legislative infringement on their right to devise their own curriculum, extending that right by making viewpoint neutrality a constitutional requirement would basically make universities immune from any suit by students' wishing to protect their First Amendment freedoms. *Id.* at 1359 (Souter, J. concurring). For Justice Souter, the majority would have been better off simply reemphasizing the University's "discretion to shape its educational mission" as noted by Justice Frankfurter's concurrence in *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985). *Id.*

Secondly, Justice Souter opined that payment of a student activity fee is too far removed from other speech cases that directly impose a viewpoint or statement upon the individual. *Southworth,* 120 S. Ct. at 1359 (Souter, J. concurring). The concurrence stressed that the total fee paid by an individual student is disbursed into an inordinate amount of organizations, each expressing a different message. *Id.* According to the concurrence, such a scheme is not akin to government restrictions placed directly on a student's freedom of expression. *Id.*

However, the justice did agree with the majority's conclusion that *Abood* and *Keller* were not controlling precedent and that the academic setting required a different approach than the one articulated in those cases. *Id.* at 1359-60 (Souter, J. concurring). First, Justice Souter noted that the relationship between the payor and payee in *Abood* and *Keller* was much more direct, but in this case the funds are allocated by a "distributing agency having itself no social, political or ideological character"(ASM). *Id.* at 1360 (Souter, J. concurring). Also, the concurrence reasoned, because these amounts vary from year to year the fees are "as likely as not to fund an organization that disputes the very message an individual student finds exceptionable". *Id.*

The justice further stated that the respondents' claims were weakened by the fact that the fees paid were to "broaden public discourse" as oppose to narrowing funds to particular organizations. *Id.* For Justice Souter, the fee paid is akin to a tax and, characterized as such, arguably falls within the parameters of government speech. *Id.* Under this scenario, Justice Souter stated that the "tax" was being properly allocated since it was being used to fund "general discourse." *Id.* The justice asserted that legitimacy of governmental interest and the university setting taken together further distinguish this case from the line of precedent dealing with compelled speech and compelled funding. *Id.* at 1361(Souter, J. concurring). Accordingly, Justice Souter concluded that the current administra-

tion of the University's funding program does not violate the First Amendment, but the justice refused to sign on to any majority opinion that he would not make viewpoint neutrality a constitutional requirement. *Id.*

ANALYSIS

During a term that dealt with challenges to Boy Scout leaders and Miranda rights, the Court chose to add a new element to First Amendment jurisprudence with a case that practically laid the principle of viewpoint neutrality at its feet. The situation in *Southworth* was a fact-sensitive one, involving a case where both parties had stipulated to viewpoint neutrality in the area of the University of Wisconsin's two disbursement programs and convinced the Court that so long as the program is viewpoint neutral, it will pass constitutional muster.

The Court used this case to create a link between earlier references to viewpoint neutrality in past public forum cases to the area of student fee disbursement. While the phrase "viewpoint neutral" has been a familiar one in the First Amendment context, it still lacks precision. This imprecision keeps the viewpoint neutral standard from being a clear marker by which potential claimants and defendants may hope to evaluate their future conduct. While the Court declared that use of viewpoint neutrality will provide a "sufficient protection of students First Amendment rights, the Court was able to do so in the context of a case where two of three challenged measures were already stipulated to be viewpoint neutral. The Court practically had its work done for it. The referendum disbursement method, lacking description in the record, was remanded and rather than putting it through the viewpoint neutral analysis, the University is likely to scrap the program all together since the other two methods were found constitutional. Had the Court been faced with the specifics of the referendum program, the majority might have been inclined to instead make viewpoint neutrality one of several factors already in operation in the First Amendment arena.

In a concurrence that carries a tone more like a dissent, Justice Souter wrote that the two disbursement programs would be upheld, even without the application of the viewpoint neutrality principle. Justice Souter reasoned that the programs were constitutional either because the University is an academic forum that should be afforded particular deference or because the student fees as taxes were constitutional since they funded the general discourse. Had the majority adopted this approach, the Court would have instead based its determination on factors already discussed in past speech funding cases, rather than extended a principle that may turn out to cause more harm than good. By making viewpoint neutrality a constitutional mandate, the Court has used a case with very narrow, specific facts to implement a new constitutional litmus test that, at least according to Justice Souter, does not belong in speech funding cases.

Aimee Hamoy