SUPREME COURT OF THE UNITED STATES

No. 98–1189

BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM, PETITIONER *v.* SCOTT HAROLD SOUTHWORTH ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[March 22, 2000]

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE BREYER join, concurring in the judgment.

The majority today validates the University's student activity fee after recognizing a new category of First Amendment interests and a new standard of viewpoint neutrality protection. I agree that the University's scheme is permissible, but do not believe that the Court should take the occasion to impose a cast-iron viewpoint neutrality requirement to uphold it. See *ante*, at 14. Instead, I would hold that the First Amendment interest claimed by the student respondents (hereinafter Southworth) here is simply insufficient to merit protection by anything more than the viewpoint neutrality already accorded by the University, and I would go no further.[1]

The parties have stipulated that the grant scheme is administered on a viewpoint neutral basis, and like the majority I take the case on that assumption. The question before us is thus properly cast not as whether viewpoint neutrality is required, but whether Southworth has a

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[1] I limit my examination of the case solely to the general disbursement scheme; I agree with the majority that the referendum issue was not adequately addressed in the District Court and the Courts of Appeals, see *ante*, at 16, and I would say nothing more on that subject.

claim to relief from this specific viewpoint neutral scheme.[2] Two sources of law might be considered in answering this question.

The first comprises First Amendment and related cases grouped under the umbrella of academic freedom.[3] Such law might be implicated by the University's proffered rationale, that the grant scheme funded by the student activity fee is an integral element in the discharge of its educational mission. App. 253 (excerpt from Dean of Students Office Student Organization Handbook noting that the activities of student groups constitute a "'second curriculum'"); *id.*, at 41, 42–44 (statement of Associate Dean of Students of the UW-Madison noting academic importance of funding scheme); see also *ante*, at 13–14. Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach. In *Regents of Univ. of Mich.* v. *Ewing*, 474 U. S. 214 (1985), we recognized these related conceptions: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsis-

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[2] Under its own reasoning, the majority need not reach the question whether viewpoint neutrality is required to decide this case. The University program required viewpoint neutrality, and both parties have stipulated that the funds are disbursed accordingly. Stipulation 12, App. 14–15. If viewpoint neutrality is a sufficient condition, the majority could uphold the scheme here on that limited ground without deciding whether it is a necessary one.

[3] We have long recognized the constitutional importance of academic freedom. See *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957) (plurality opinion); *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960); *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967).

tently, on autonomous decisionmaking by the academy itself." *Id.*, at 226, n. 12 (citations omitted). Some of the opinions in our books emphasize broad conceptions of academic freedom that if accepted by the Court might seem to clothe the University with an immunity to any challenge to regulations made or obligations imposed in the discharge of its educational mission. So, in *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957), Justice Frankfurter, concurring in the result and joined by Justice Harlan, explained the importance of a university's ability to define its own mission by quoting from a statement on the open universities in South Africa:

> "'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university— to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Id.*, at 263 (citations omitted).

These broad statements on academic freedom do not dispose of the case here, however. *Ewing* addressed not the relationship between academic freedom and First Amendment burdens imposed by a university, but a due process challenge to a university's academic decisions, while as to them the case stopped short of recognizing absolute autonomy. *Ewing*, *supra*, at 226, and n. 12. And Justice Frankfurter's discussion in *Sweezy*, though not rejected, was not adopted by the full Court, *Sweezy*, *supra*, at 263 (opinion concurring in result). Our other cases on academic freedom thus far have dealt with more limited subjects, and do not compel the conclusion that the objecting university student is without a First Amendment

claim here.[4] While we have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching (as the majority recognizes, *ante*, at 13), we have never held that universities lie entirely beyond the reach of students' First Amendment rights.[5] Thus our prior cases do not go so far as to control the result in this one, and going beyond those cases would be out of order, simply because the University has not litigated on grounds of academic freedom. As to that freedom and university autonomy, then, it is enough to say that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees. *Sweezy*, *supra*, at 262–264 (Frankfurter, J., concurring in result); *Ewing*, *supra*, at 226, n. 12.

The second avenue for addressing Southworth's claim to a pro rata refund or the total abolition of the student activity fee is to see how closely the circumstances here resemble instances of governmental speech mandates

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[4] Our university cases have dealt with restrictions imposed from outside the academy on individual teachers' speech or associations, *Keyishian* v. *Board of Regents*, *supra*, at 591–592; *Shelton* v. *Tucker*, *supra*, at 487; *Sweezy* v. *New Hampshire*, *supra*, at 236; *Wieman* v. *Updegraff*, *supra*, at 184–185, and cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260, 262 (1988); *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675, 677 (1986); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 504 (1969), whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education.

[5] Indeed, acceptance of the most general statement of academic freedom (as in the South African manifesto quoted by Justice Frankfurter) might be thought even to sanction student speech codes in public universities.

found to require relief. As a threshold matter, it is plain that this case falls far afield of those involving compelled or controlled speech, apart from subsidy schemes. Indirectly transmitting a fraction of a student activity fee to an organization with an offensive message is in no sense equivalent to restricting or modifying the message a student wishes to express. Cf. *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 572–574 (1995). Nor does it require an individual to bear an offensive statement personally, as in *Wooley* v. *Maynard*, 430 U. S. 705, 707 (1977), let alone to affirm a moral or political commitment, as in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 626–629 (1943). In each of these cases, the government was imposing far more directly and offensively on an objecting individual than collecting the fee that indirectly funds the jumble of other speakers' messages in this case.

Next, I agree with the majority that the *Abood* and *Keller* line of cases does not control the remedy here, the situation of the students being significantly different from that of union or bar association members. *Ante*, at 11; see *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977); *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990). First, the relationship between the fee payer and the ultimately objectionable expression is far more attenuated. In the union and bar association cases, an individual was required to join or at least drop money in the coffers of the very organization promoting messages subject to objection. *Abood*, *supra*, at 211–213, 215; *Keller*, *supra*, at 13–14. The connection between the forced contributor and the ultimate message was as direct as the unmediated contribution to the organization doing the speaking. The student contributor, however, has to fund only a distributing agency having itself no social, political, or ideological character and itself

engaging (as all parties agree) in no expression of any distinct message.[6] App. 14–15, 34, 39, 41. Indeed, the disbursements, varying from year to year, are as likely as not to fund an organization that disputes the very message an individual student finds exceptionable. *Id.*, at 39. Thus, the clear connection between fee payer and offensive speech that loomed large in our decisions in the union and bar cases is simply not evident here.

Second, Southworth's objection has less force than it might otherwise carry because the challenged fees support a government program that aims to broaden public discourse. As I noted in *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 873–874, and n. 3, 889–891 (1995) (dissenting opinion), the university fee at issue is a tax.[7] The state university compels it; it is paid into state accounts; and it is disbursed under the ultimate authority of the State. Wis. Stat. §36.09(5) (1993–1994); App. 9, 18–19. Although the facts here may not fit neatly under our holdings on government speech, (and the university has expressly renounced any such claim),[8] *ante*, at 10, our

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[6] I have noted in other contexts that the act of funding itself may have a communicative element, see *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 892–893, n.11 (1995) (dissenting opinion); *National Endowment for Arts* v. *Finley*, 524 U. S. 569, 611, n. 6 (1998) (dissenting opinion), but there is no allegation that such general expression is objectionable here, nor is it clear that such a claim necessarily raises substantial First Amendment concerns in light of the speech promoting and educational aspects of this expression. Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 92–93 (1976) *(per curiam)*. See also *infra*, at 7–9.

[7] True, one does not have to go to college, but one does not have to own real estate or receive a dividend.

[8] Unlike the majority, I would not hold that the mere fact that the University disclaims speech as its own expression takes it out of the scope of our jurisprudence on government directed speech. We have never generally questioned the university's "spacious discretion" to allocate public funds. See *Rosenberger*, *supra*, at 892 (SOUTER, J., dissenting) (citing *Rust* v. *Sullivan*, 500 U. S. 173 (1991), and *Regan* v.

cases do suggest that under the First Amendment the government may properly use its tax revenue to promote general discourse.[9] In *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, we rejected a challenge to a congressional program providing viewpoint neutral subsidies to all Presidential candidates based in part on this reasoning:

> "[The program] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [the program] furthers, not abridges, pertinent First Amendment values." *Id.*, at 92–93.

And we have recognized the same principle outside of the sphere of government spending as well. In *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), we rejected a shopping mall owner's blanket claim that "a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." *Id.*, at 85 (footnote omitted). We then upheld the right of individuals to exercise state-protected rights of expression on a shopping mall owner's property, noting among other things that there was no danger that such a requirement would "'dampe[n] the vigor and limi[t] the variety of public debate.'" *Id.*, at 87, 88 (quoting *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 257 (1974) (alteration in original)). The same consideration goes against the fee payer's speech objection to the scheme here.

Taxation With Representation of Wash., 461 U. S. 540 (1983)).

[9] Of course, I believe that even a government program that promotes a broad range of expression is subject to the specific prohibition on government funding to promote religion, imposed by the Establishment Clause. See *Rosenberger*, *supra*, at 882 (SOUTER, J., dissenting).

Third, our prior compelled speech and compelled funding cases are distinguishable on the basis of the legitimacy of governmental interest. No one disputes the University's assertion that some educational value is derived from the activities supported by the fee, *ante*, at 13–14; *supra*, at 2, whereas there was no governmental interest in mandating union or bar association support beyond supporting the collective bargaining and professional regulatory functions of those organizations, see *Abood*, 431 U. S., at 223–224; *Keller*, 496 U. S., at 13–14. Nor was there any legitimate governmental interest in requiring the publication or affirmation of propositions with which the bearer or speaker did not agree.[10] *Wooley*, 430 U. S., at 716–717; *Barnette*, 319 U. S., at 640–642.

Finally, the weakness of Southworth's claim is underscored by its setting within a university, whose students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach. No one disputes that some fraction of students' tuition payments may be used for course offerings that are ideologically offensive to some students, and for paying professors who say things in the university forum that are radically at odds with the politics of particular students. Least of all does anyone claim that the University is somehow required to offer a spectrum of courses to satisfy a viewpoint neutrality requirement. See *Rosenberger*, *supra*, at 892–893, and n. 11–12 (SOUTER, J., dissenting). The University need not provide junior years abroad in North Korea as well as France, instruct in the theory of

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[10] The legitimacy of the governmental objective here distinguishes the case in my view from one brought by a university student who objected to supporting religious evangelism. See *Rosenberger*, *supra*, at 868–871 (SOUTER, J., dissenting).

plutocracy as well as democracy, or teach Nietzsche as well as St. Thomas. Since uses of tuition payments (not optional for anyone who wishes to stay in college) may fund offensive speech far more obviously than the student activity fee does, it is difficult to see how the activity fee could present a stronger argument for a refund.

In sum, I see no basis to provide relief from the scheme being administered, would go no further, and respectfully concur in the judgment.