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Gregory B. Sanford

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YOUR OPINION REALLY DOES NOT MATTER:
HOW THE USE OF REFERENDA IN FUNDING
PUBLIC UNIVERSITY STUDENT GROUPS
VIOLATES CONSTITUTIONAL
FREE SPEECH PRINCIPLES

*Gregory B. Sanford**

INTRODUCTION

The public university has long been a bastion of intellectual diversity and philosophical debate, regularly launching new trends and schools of thought of lasting significance. Within the university, student groups play a significant role in shaping, directing, and taking part in this intramural conversation.¹ At the same time, these organizations generate controversy, repeatedly spawning litigation over the contents of their messages.² However, this disagreement demon-

* B.S. Wheaton College, 2000; M.S. Carnegie Mellon University, 2003; Candidate for Juris Doctor, Notre Dame Law School, 2008.

1 One early example of this in the United States, although at a private rather than a public institution, was the Philomathean Society at the University of Pennsylvania. Founded in 1813, the purpose of the society was “the advancement of learning.” Philomathean Society, University of Pennsylvania Archives, <http://www.archives.upenn.edu/histy/features/studtorg/philomathean/philomathean.html> (last visited Jan. 25, 2008).

2 *See, e.g.*, *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000) (suit over a university providing funds to groups whose messages the plaintiffs found objectionable); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 826–27 (1995) (suit over the denial of funding to a student organization on the basis of its Christian editorial viewpoint); *Rounds v. Or. State Bd. of Higher Educ.*, 166 F.3d 1032, 1034 (9th Cir. 1999) (suit to prevent the distribution of funds to student groups with which the plaintiffs disagreed); *Carroll v. Blinken*, 42 F.3d 122, 125 (2d Cir. 1994) (same); *Amidon v. Student Ass’n of the State Univ. of N.Y. at Albany*, 399 F. Supp. 2d 136, 137 (N.D.N.Y. 2005) (student suit over the means of fund distribution by a university); *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 504 (Cal. 1993) (suit over a university’s collection of funds and distribution of those funds to student groups with which the plaintiffs disagreed); *Good v. Associated Students of the Univ. of Wash.*, 542 P.2d 762, 764 (Wash. 1975) (same).

strates that universities create a thoughtful diversity of opinion by welcoming all voices.

Student groups must have money to survive. Schools often require students, as part of their tuition bill, to contribute a certain amount per semester to a pool of money to be divided among the student organizations.³ These funds help organizations convey their messages to the university population through speakers, lectures, rallies, or flyers. However, because groups must compete against each other for a limited pool of money, some inevitably do not receive enough funding for everything they would like to do. In response, universities developed various procedures to distribute these funds fairly and efficiently among organizations. The most common example is the funding committee.⁴ This committee is commonly part of the university's student government body and staffed by elected student leaders.⁵ Each group that wants funding must submit a request to the committee⁶ which, based on the information contained in the applications, allocates the available funds.⁷

The student referendum is another, far more controversial technique used to determine how much funding to allocate to specific student organizations. Referenda are not ubiquitous funding tools among public universities, but a number use them to apportion at least part of the pool of funds to student groups. Universities use referenda in several ways within their allocation process: to determine whether an organization should be eligible for funding,⁸ to determine how much money an organization should receive,⁹ to gauge student

3 The State University of New York at Albany (SUNY-Albany), for example, funds its student organizations through this sort of mandatory fee. See *Amidon*, 399 F. Supp. 2d at 138; State Univ. of N.Y., Student Activity Fees—Mandatory, http://www.suny.edu/sunypp/documents.cfm?doc_id=358 (last visited Jan. 25, 2008).

4 One example of this particular technique is the one used at the Ohio State University. Its allocating body is the Council on Student Affairs. For details on this committee and its procedures, see Ohio State Univ. Student Affairs, Procedures, http://studentaffairs.osu.edu/csa_procedures.asp (last visited Jan. 25, 2008); see also STATE UNIV. OF N.Y. AT ALBANY STUDENT ASS'N CONST. art. IV (describing the SUNY-Albany Student Association's board of finance); STATE UNIV. OF N.Y. STUDENT ASS'N BYLAWS §§ 507, 509 (State Univ. of N.Y. 2007) [hereinafter SUNY STUDENT ASS'N BYLAWS] (describing the Appropriation Committee's hearing procedures and the process of funding new groups).

5 See, e.g., STATE UNIV. OF N.Y. AT ALBANY STUDENT ASS'N CONST. art. IV, § 2.

6 E.g., Ohio State Univ. Student Affairs, *supra* note 4.

7 See, e.g., *id.*

8 E.g., Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000).

9 E.g., *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 399 F. Supp. 2d 136, 147 (N.D.N.Y. 2005).

body interest in particular organizations,¹⁰ and to see whether students want to provide an organization with voluntary contributions¹¹ or a refundable allocation.¹² Each option has advantages, such as being in accord with the will of the student body and providing efficiency for both student groups seeking funds and student governments distributing them.

In public university settings, student group funding must comply with the First Amendment.¹³ Under current Supreme Court jurisprudence, a public university may not consider a student organization's viewpoint in making fund allocation decisions affecting that group.¹⁴ Referenda violate this principle because they entwine student views and the popularity of the speaker into the mandatory fund allocation process. As a result, using referenda to allocate mandatory student activity funds is unconstitutional.

This Note illuminates the unconstitutionality of the referendum as an allocation device. Part I explains the principle of viewpoint neutrality and how the Supreme Court has applied that standard in the student organization funding arena. Part II discusses the six general types of referenda along with specific implementations and demonstrates why each is fundamentally flawed and impermissible. Ultimately this Note concludes that because universities cannot use referenda in a way that both protects students' First Amendment rights and gives due consideration to student organizations' contributions to campus speech, they should eliminate referenda from the funding process.

I. SOUTHWORTH, VIEWPOINT NEUTRALITY, AND THE THREAT OF VIEWPOINT DISCRIMINATION

An examination of the Supreme Court's approach in *Board of Regents of the University of Wisconsin System v. Southworth*¹⁵ and the doctrine of viewpoint neutrality more generally reveals why the use of referenda in public university student organization funding is unconstitutional. Subpart A provides an overview of *Southworth*. Sub-

10 *E.g., id.* at 139.

11 *See, e.g.,* UNIV. SENATE GUIDELINES REGARDING SPECIAL STUDENT ORGS. § II(2) [hereinafter RUTGERS UNIV. SENATE GUIDELINES] (Rutgers Univ. Senate 1997), *available at* <http://senate.rutgers.edu/referend.html>.

12 In this context, each student must pay into the allocation to the group at issue, but can then elect to request a refund from the school or the organization. *See, e.g., id.* § II(1).

13 *See Southworth*, 529 U.S. at 221.

14 *Id.*

15 529 U.S. 217.

part B briefly examines the nature of the viewpoint neutrality doctrine. Finally, subpart C touches on the benefits of viewpoint neutrality in making student group funding choices.

A. *The Standard*

The Supreme Court held in *Southworth* that the First Amendment rights of public university students require that all distributions of mandatory fees to student organizations must be viewpoint-neutral.¹⁶ In *Southworth*, the Court considered the challenge of a group of University of Wisconsin students to mandatory fees used to fund student organizations at their school.¹⁷ The plaintiffs contended that the University violated their First Amendment rights by using mandatory fees to fund student organizations whose messages the students found objectionable and offensive¹⁸—in essence, they claimed, making the organizations' speech attributable to each individual student.¹⁹ Thus, the plaintiffs asserted that the school forced its students to say things they found objectionable.²⁰ The Supreme Court upheld the University's funding system but imposed a viewpoint neutrality requirement.²¹ This provides objecting students "some First Amendment protection"²² by ensuring that all groups have access to available funds without regard to their message.²³ Although a student may disagree with the speech of some groups that receive mandatory fees, other groups with which a student agrees would also have equal opportunities to obtain funds. At the same time, this standard allows universities

16 *Id.* at 221.

17 *Id.*

18 *Id.*

19 *Id.* at 227.

20 *Id.*

21 *Id.* at 232–33. The Seventh Circuit applied the "germaneness" test of *Abood v. Detroit Board of Education*, 431 U.S. 209, 235–36 (1977), and *Keller v. State Bar of California*, 496 U.S. 1, 13–14 (1990), to the University's funding system. *Southworth v. Grebe*, 151 F.3d 717, 723 (7th Cir. 1998), *rev'd sub nom.* Bd. of Regents of the Univ. of Wis. Sys. v. *Southworth*, 529 U.S. 217, 221 (2000). The germaneness test considers "whether there is some otherwise legitimate governmental interest justifying any compelled funding; and then whether the specifically challenged expenditure is germane to that interest." *Id.* at 724. One commentator has argued that the Supreme Court did not actually reject the germaneness test of *Abood* and *Keller* as it claimed, but rather merely took a more inclusive approach to germaneness than the Seventh Circuit. See Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 216–17 (2002).

22 *Southworth*, 529 U.S. at 231.

23 *Id.* at 233.

enough flexibility to “facilitate a wide range of speech,”²⁴ and to provide students “the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall.”²⁵

During its analysis, the Court briefly took up the question of the University of Wisconsin’s referendum procedure.²⁶ It noted that the procedure appeared to have the potential to “fund[] or defund[]” student organizations.²⁷ While the Court did not decide the constitutionality of referenda in general or even of this referendum procedure specifically,²⁸ the majority noted that any use of referenda must comply with the requirement of viewpoint neutrality.²⁹ Specifically, the opinion stated that “[t]o the extent the referendum substitutes *majority determinations* for viewpoint neutrality it would undermine the constitutional protection the program requires.”³⁰ These observations, however, do not resolve the question of whether the referendum in *Southworth* or those at other public institutions of higher learning are in fact, or could possibly be, viewpoint-neutral.³¹

24 *Id.* at 231.

25 *Id.* at 233.

26 *See id.* at 235–36. Interestingly, although significant scholarly discussion of the *Southworth* opinion has emerged in the years following the decision, the referendum question has received virtually no attention. Many of the law review articles discussing the case mention that there was a referendum procedure and that the Court questioned its constitutionality and a few provide a cursory discussion. *See, e.g.*, Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1425 n.192 (2001); Jon G. Furlow, *The Price of Free Speech: Regents v. Southworth*, 73 WIS. LAW., June 2000, at 14, 58; Wasserman, *supra* note 21, at 214; R. Craig Wood & Alvin J. Schilling, *The Judicial Dilemma Created by Mandatory Student Activity Fees: The Supreme Court Offers a Resolution in Ruling in Wisconsin v. Southworth*, 147 EDUC. L. REP. 413, 428 (2000). None, however, take the next step of analyzing the wider implications of the viewpoint neutrality standard on student organization funding referenda. The reason for this could be an absence of cases challenging a referendum procedure under the *Southworth* guidelines prior to *Amidon v. Student Ass’n of the State University of New York at Albany*, 399 F. Supp. 2d 136 (N.D.N.Y. 2005).

27 *Southworth*, 529 U.S. at 235.

28 *See id.* at 235–36.

29 *See id.* at 235.

30 *Id.* (emphasis added).

31 Some commentators on the *Southworth* case have read the language regarding the referendum procedure to be a declaration that it was unconstitutional. *See, e.g.*, Aaron H. Caplan, *Stretching the Equal Access Act Beyond Equal Access*, 27 SEATTLE U. L. REV. 273, 366–67 (2003); Christine Theroux, *Assessing the Constitutionality of Mandatory Student Activity Fee Systems: All Students Benefit*, 33 CONN. L. REV. 691, 713 n.181 (2001); *see also* Mark W. Cordes, *Prayer in Public Schools After Santa Fe Independent School District*, 90 KY. L.J. 1, 30 (2002) (reading a quotation from *Southworth* in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 304–05 (2000), as declaring the referen-

B. *The Contours of Viewpoint Neutrality*

Southworth declared that mandatory student activity funds are a close analog to “public forum” cases.³² The prototypical public fora are “‘public places’ historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks.”³³ Like the traditional public forum, the university uses student activity fees to “facilitat[e] the free and open exchange of ideas by, and among, its students.”³⁴ Hence, the Court imported a tool—viewpoint neutrality—from that context as a means of evaluating whether students’ First Amendment interests had been respected.³⁵

Viewpoint neutrality is the absence of viewpoint discrimination. Viewpoint discrimination occurs when any consideration—favorable or unfavorable—of a speaker’s viewpoint influences a funding decision.³⁶ Two related public forum doctrine concepts—content neutrality and content discrimination—further illuminate viewpoint neutrality.³⁷

A government restriction of speech is content-neutral if it does not limit what a speaker may say but restricts their speech in some other way.³⁸ Examples include limitations on the “time, place, and manner” of speech, such as a noise ordinance.³⁹ Conversely, a speech restriction becomes unconstitutional content discrimination when it restricts the *subjects* a speaker may address.⁴⁰ One example is a ban on all political advertising on public transportation.⁴¹ It is not easy to

dum to be unconstitutional). However, the Supreme Court specifically stated that because it had received an insufficiently developed factual record on the nature of the referendum procedure it would remand the case for further consideration. *Southworth*, 529 U.S. at 235–36. On remand, the University voluntarily eliminated the referendum procedure prior to adjudication on the merits. *Fry v. Bd. of Regents of the Univ. of Wis. Sys.*, 132 F. Supp. 2d 744, 746 (W.D. Wis. 2000), *aff’d in part, rev’d in part sub nom. Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566 (7th Cir. 2002).

32 See *Southworth*, 529 U.S. at 229–30.

33 *United States v. Grace*, 461 U.S. 171, 177 (1983).

34 *Southworth*, 529 U.S. at 229.

35 See *id.* at 230.

36 Cf. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (discussing how the government violates the First Amendment through viewpoint discrimination).

37 16A AM. JUR. 2D *Constitutional Law* § 519 (2007).

38 See EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 388 (2d ed. 2005).

39 See *id.*; RUSSELL L. WEAVER & DONALD E. LIVELY, *UNDERSTANDING THE FIRST AMENDMENT* § 6, at 107 (2003).

40 See *Rosenberger*, 515 U.S. at 828–29.

41 See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302–04 (1974).

provide a bright-line distinction between content-based and viewpoint-based restrictions on speech because viewpoint discrimination is a subset of content discrimination;⁴² however, the Supreme Court has said that viewpoint discrimination occurs when “the government . . . denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”⁴³ For example, a public school engages in viewpoint discrimination when it generally allows the use of its facilities for clubs but denies access to religious clubs.⁴⁴

While there are no bright-line rules to determine whether the government is “restrict[ing] some viewpoints while leaving others unrestricted,”⁴⁵ the Supreme Court’s decision in *Rosenberger v. Rector & Visitors of University of Virginia*⁴⁶ further illustrates the nature of viewpoint discrimination. In *Rosenberger*, the University of Virginia denied funding to a student newspaper because of its Christian editorial viewpoint.⁴⁷ The University argued that this constituted a content-based restriction because it excluded both religious and antireligious views.⁴⁸ Pointing out that debate, including religious debate, is not bipolar, the Court found the University’s policy to be impermissible viewpoint discrimination because it excluded some viewpoints on religion and not others.⁴⁹ Thus, *Rosenberger* says that when mandatory student fees are involved, a university may not engage in viewpoint discrimination even if it may impose general content-based restrictions.⁵⁰ At the same time, the Court demonstrated that it is willing to look beyond assertions that restrictions are content-based to find that the restriction actually discriminates based on viewpoint.⁵¹

C. *The Benefits of Viewpoint Neutrality*

Why is viewpoint discrimination in handing out money to student organizations at public universities so odious? To have truly “dynamic

42 *Rosenberger*, 515 U.S. at 830–31 (“[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination.”). For example, the content discriminatory regulation in *Lehman* did not engage in viewpoint discrimination. See *Lehman*, 418 U.S. at 304. However, were *Lehman*’s regulation to forbid Green Party advertising it would be discriminating on both content (political speech) and viewpoint (Green Party advocacy).

43 *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

44 See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107–12 (2001).

45 *VOLOKH*, *supra* note 38, at 389.

46 515 U.S. 819.

47 *Id.* at 827.

48 *Id.* at 831–32.

49 *Id.*

50 *Id.* at 829–30.

51 See *id.* at 830–32.

discussions of philosophical, religious, scientific, social, and political subjects . . . outside the lecture hall,”⁵² the exchange must represent the full marketplace of ideas. Viewpoint-based restrictions narrow discussion within the forum. They have been referred to as “attempt[s] to control thoughts . . . by regulating speech,”⁵³ means “to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion,”⁵⁴ and a tool to “distort the marketplace of ideas.”⁵⁵ Censorship, regardless of the motivation, indisputably narrows the scope of discussions.

A narrow discussion cannot create the dynamic environment universities claim to be their ideal. The most restrictive type of discussion narrowing would be silence for all sides within a particular arena of debate. This content-based restriction provides no room for anyone to convince others of the correctness of his point of view, leaving the status quo in place and placing an additional burden on minority viewpoints.⁵⁶ Preventing all speech does not promote dynamic discussion because it permits no discussion at all.

A viewpoint-based restriction limits discussion in an almost identical way. Unlike a content-based restriction, this type of limitation does not silence all speech, rather it burdens the viewpoint it excludes. In effect, because some speech is absent, the remaining debate flows in favor of the contrary positions.⁵⁷ Moreover, if the goal of the forum is “discussion[.]” of any sort,⁵⁸ the removal of viewpoints results in less discussion, which is contrary to the forum’s goal.⁵⁹

Rationalizations for such discrimination fail on their merits. For example, one could argue that concerns for a speaker’s safety justify a

52 Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233 (2000).

53 Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 203 (1994).

54 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

55 Chemerinsky, *supra* note 53, at 204.

56 See Helgi Walker, *Communications Media and the First Amendment: A Viewpoint-Neutral FCC Is Not Too Much to Ask For*, 53 FED. COMM. L.J. 5, 9 (2000); see also R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 343 (2006) (“[O]ne cannot say that viewpoint-based prohibitions are generally worse than prohibitions of any discussion, from any perspective, of an entire topic. In some meaningful respects, the former may be better . . .”).

57 See Chemerinsky, *supra* note 53, at 203.

58 Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 233 (2000).

59 The regulation forbidding political advertising on public transportation from *Lehman* is an example of a regulation that is content discrimination but not viewpoint discrimination. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302–04 (1974).

restriction on his speech.⁶⁰ A violent response to speech is certainly undesirable, but paternalistic protection of a speaker is not a valid First Amendment reason to restrict speech.⁶¹ Moreover, there is arguably significant benefit in moral and intellectual conflict.⁶² The failure of these rationalizations argues against viewpoint-based restrictions.

Dynamic, vibrant discussions among student organizations in a university context require a viewpoint-neutral funding standard. Contrary policies shape discussion against those who are unpopular at any moment and generally stifle intellectual interaction.⁶³ These concerns permeate *Southworth's* imposition of viewpoint neutrality on the funding of student organizations.

Having established this analytical baseline, this Note evaluates the generic classes of funding referenda. This evaluation will consider both the constitutionality of those systems in light of *Southworth*,⁶⁴ and the practical value of and possible difficulties in instituting such systems.

II. CONSTITUTIONAL FLAWS IN THE SIX ARCHETYPICAL FUNDING REFERENDUM MODELS

There are six general variations on how public universities use funding referenda. This Part will discuss each type of referendum and its constitutional and practical infirmities. Subpart A discusses binding referenda—referenda where the student vote makes a conclusive determination of whether a group will receive funds. Subpart B explores the constitutionality of using referendum results as one factor among many in the funding decisions. Subpart C considers two uses of referenda disconnected from the mandatory fee at issue in *Southworth*: the refundable fee and the optional fee. Finally, Subpart D discusses generic referendum procedures that lack specific controls on their use within the funding context.

60 Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech*, 15 CARDOZO ARTS & ENT. L.J. 315, 341 (1997).

61 *Id.*

62 See Jeremy Waldron, *Mill and the Value of Moral Distress*, 35 POL. STUD. 410, 414–17 (1987) (discussing the benefits of the concept of “ethical confrontation” presented in John Stuart Mill’s essay *On Liberty*).

63 See generally Nadine Strossen, *Civil Liberties*, 4 GEO. MASON U. CIV. RTS. L.J. 253, 267 (1994) (discussing the dangers of governmental censorship of speech).

64 Bd. of Regents of the Univ. of Wis. Sys. v. *Southworth*, 529 U.S. 217, 235 (2000).

A. *Binding Referenda*

The binding referendum is, conceptually, the simplest type of funding referendum. Similar to how the American democratic process employs referenda,⁶⁵ the binding referendum allows a vote of the student body to serve as the final decisionmaker in the student organization funding process.⁶⁶ There are two general ways public universities have used binding referenda: to determine whether groups are eligible for funding,⁶⁷ and to determine how much funding to allocate to a group.⁶⁸ Both approaches violate students' First Amendment rights by engaging in viewpoint discrimination.

1. Binding Referenda Used to Determine Funding Eligibility

Given the Court's guidance in *Southworth*, the binding referendum that can be used to "fund[] or defund[]" a student organization is most plainly unconstitutional.⁶⁹ This type of referendum puts a question to the student body as to whether a particular group should be eligible to receive funding from the university's mandatory student activity fee.⁷⁰ It thus fails the viewpoint neutrality test and defeats the primary purpose of the forum by narrowing the range of participating speech.⁷¹

The Supreme Court confronted precisely this type of referendum in *Southworth*—where "by majority vote of the student body a given [student organization could] be funded or defunded."⁷² Without deciding the procedure's constitutionality, the Court strongly ques-

65 One example of this general referendum was the 2006 referendum vote to amend Michigan's constitution to bar affirmative action in public education, employment, or contracting. Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 8, 2006, at P16.

66 See *Southworth*, 529 U.S. at 231 ("[B]y majority vote of the student body a given RSO may be funded or defunded.").

67 See *infra* text accompanying notes 69–83.

68 See *infra* text accompanying notes 84–106.

69 See *Southworth*, 529 U.S. at 235–36.

70 *Id.* at 235.

71 See *id.* at 231.

72 *Id.* The presence of this procedure at the University of Wisconsin was not unique. A similar procedure was (arguably) available at SUNY-Albany prior to a rewriting of the SA's Constitution and Bylaws. See *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 399 F. Supp. 2d 136, 148 n.10 (N.D.N.Y. 2005). In both cases, there were alternate routes to funding (which may or may not have been viewpoint-neutral) but at least one group made use of the referenda process to obtain its funding. See *Southworth*, 529 U.S. at 224; *Amidon*, 399 F. Supp. 2d at 139.

tioned whether it could withstand constitutional scrutiny.⁷³ Further, it provided guidance on how to determine the referendum's constitutionality: "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires."⁷⁴ The strong reservations expressed by the Court about this procedure reflect the significant constitutional arguments against this referendum.

"Access to a public forum . . . does not depend upon majoritarian consent."⁷⁵ A referendum is by definition a majoritarian device,⁷⁶ and, even though "the student activities fund is not a public forum in the traditional sense of the term,"⁷⁷ it is closely analogous thereto.⁷⁸ Therefore, as the Court in *Southworth* suspected, the use of a binding referendum to fund or defund student organizations must be unconstitutional.⁷⁹ As one commentator noted, "Since the point of viewpoint neutrality [is] to provide First Amendment *protection* to objecting students, it is easy to understand why a referendum allowing voting on funding is suspect. Minority viewpoints could, through funding restrictions, be swept away at the voting booth by majority rule."⁸⁰

A simple hypothetical derived from *Rosenberger* demonstrates the incompatibility of viewpoint neutrality with majority votes. Suppose that after the Supreme Court's decision invalidating the restriction on religious speech,⁸¹ the University of Virginia removed its prohibition on religious editorial viewpoints and separately instituted a binding student referendum to determine whether organizations should receive funding. It would then follow that the student body could

73 See *Southworth*, 529 U.S. at 235–36; see also *supra* note 31 (discussing some confusion among commentators on the significance of the Court's statements regarding the referendum).

74 *Southworth*, 529 U.S. at 235.

75 *Id.*

76 Some universities do not require a majority vote in their referenda, requiring either a supermajority, as was previously the case at SUNY-Albany, or some submajority percentage, as is used at Rutgers. See STATE UNIV. OF N.Y. AT ALBANY STUDENT ASS'N CONST. OF 2003 § 705.1(b) (superseded); RUTGERS UNIV. SENATE GUIDELINES, *supra* note 11, § II(1)(B). Regardless of the percentage used, the result is the importation of the speech's popularity into a process that must be viewpoint-neutral.

77 *Southworth*, 529 U.S. at 230.

78 *Id.* at 229–30.

79 *Id.* at 235.

80 Furlow, *supra* note 26, at 58; see also *Southworth*, 529 U.S. at 235 ("Access to a public forum . . . does not depend upon majoritarian consent.").

81 *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995).

effectively reinstate the prohibited restriction by voting against funding for organizations with religious viewpoints—discriminating based on viewpoint. Even if the students did not reinstate the viewpoint-based prohibition, the referendum still faces the insurmountable problem that it can never practically prevent students from casting their vote based solely on a group's message.

Fundamentally, a referendum system that allows funding or defunding of organizations based exclusively on a referendum vote cannot meet the viewpoint neutrality requirement of *Southworth*.⁸² Its majoritarian approach to distributing mandatory fees provides no First Amendment protection to objecting students.⁸³ Though this might have been a viable option for public universities prior to *Southworth*, that decision clearly demonstrates that such a referendum violates students' constitutional rights.

2. Binding Referenda to Determine Level of Funding

The second form of binding referendum determines the level of funding a group receives but cannot prevent an organization from receiving funding. By definition, there must be at least one alternate funding procedure employed along with this form of referendum to ensure that a student body vote cannot be the *sole* basis of a complete denial of funding to a particular organization.⁸⁴ Another essential element of this type of referendum procedure is that it allocates funds from the same mandatory fee pool as those distributed by any alternative procedures. In spite of these differences, this form of referendum is as decidedly unconstitutional as using a referendum to fund or defund student organizations.

This type of referendum was in use at the State University of New York at Albany (SUNY-Albany) prior to changes in the SUNY-Albany Student Association (SA) Bylaws and New York state statutes.⁸⁵ The effect of the old regulation is still visible in the SA's bylaws, which require that "all designated funds . . . be brought up in a referendum

82 See *Southworth*, 529 U.S. at 221.

83 *Id.* at 235–36.

84 An example of this sort of alternate procedure is the funding committee. See *supra* note 4 and accompanying text.

85 See *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 399 F. Supp. 2d 136, 137 n.1 (N.D.N.Y. 2005); STATE UNIV. OF N.Y. AT ALBANY STUDENT ASS'N CONST. OF 2003 §§ 705, 816 (superseded); see also N.Y. COMP. CODES R. & REGS. tit. 8, § 302.14(c)(1)(i) (changing the referenda within the SUNY system to advisory only); STATE UNIV. OF N.Y. STUDENT ASS'N BYLAWS § 517 (State Univ. of N.Y. 2003) (implementing the change from binding referenda to advisory only).

at least every four (4) years.”⁸⁶ These “designated funds” are the budgets of specific student organizations, which were allocated through binding referenda.⁸⁷ Before the advisory referendum change, the vote was “binding upon a sixty percent affirmative vote of votes cast.”⁸⁸ The only difference between this system and the University of Wisconsin’s is that the student vote cannot make an organization ineligible for funding, though the student may vote to “fund” the organization with no money. This variation from a referendum used to completely fund or defund organizations is minute, but its defenders claim that it is significant enough to make this form of referendum constitutional.⁸⁹ They justify this claim by arguing that *Southworth* was only concerned with access to money and the amount allocated is not subject to constitutional restriction.⁹⁰

Despite these claims, this sort of referendum also fails to protect students’ First Amendment rights. Funding is not a binary proposition; the *Southworth* Court intended viewpoint neutrality to protect groups from discrimination in *how much* funding they received, not just in their ability to receive any funds at all. Second, the potentially viewpoint-neutral justification offered in defense of this system is an invalid interpretation of the referendum’s results.

The Court specifically held that viewpoint neutrality is the operative First Amendment protection in the “allocation of funding support.”⁹¹ “Allocation” can mean several things, but in this case, it goes beyond mere access to encompass the level of funding received by an organization.⁹² If “allocation” means only access to the process, the Court’s decision does not provide meaningful protection to students’

86 SUNY STUDENT ASS’N BYLAWS, *supra* note 4, § 515.3 (on file with author). Details on how organizations could get their budgets onto the ballot can be found at *id.* § 517.4.

87 One example, NYPIRG, is written directly into this provision. *Id.* § 515.3.

88 STATE UNIV. OF N.Y. AT ALBANY STUDENT ASS’N CONST. OF 2003 § 705.1(b) (superseded).

89 *Southworth* FAQs—The Center for Campus Free Speech, http://www.campus.speech.org/resources/southworth_faqs (last visited Jan. 25, 2008) [hereinafter *Southworth* FAQs].

90 *Id.*

91 Bd. of Regents of the Univ. of Wis. Sys. v. *Southworth*, 529 U.S. 217, 233 (2000).

92 The district court in *Amidon* also understood this to be the nature of the forum at issue:

The fact that the referendum is used to consider the amount of funding as opposed to whether to fund or defund a group does not save it. . . . As majoritarian views are not to be considered in determining entrance into a public forum, neither can they be used for considering the scope of a participants’ activity therein.

First Amendment rights. The importance of viewpoint neutrality in determining the amount of funding cannot be understated. The power of a group's speech is tied directly to the funds it receives.⁹³ Funding is, in essence, a megaphone: the more a group receives, the larger its megaphone.⁹⁴ When the amount of a group's allocation is not protected, the majority cannot silence an unpopular viewpoint, but the referendum can reduce a group's message to a mere whisper and stifle the diverse forum that justifies the mandatory fee.⁹⁵ This would defeat *Southworth's* attempt to craft a standard that allows a university to "facilitate a wide range of speech."⁹⁶ The correct definition of "allocation" therefore must include the amount of funding received by an organization.

This definition of "allocation" renders the binding referendum to determine the level of funding unconstitutional. If a referendum determines a group's funding, a majority could muffle a group's speech by providing only a minimum amount of funding. Alternatively, because the student activity fee pool is finite,⁹⁷ allocating funds to some groups by referendum reduces the overall resource pool available to other groups. Since referenda are viewpoint-based tools and affect all allocations, whether through the referendum or not, this funding system is neither viewpoint-neutral nor constitutional.

One oft-repeated argument in favor of this type of referendum is that it is a measure of student participation rather than viewpoint-based favoritism;⁹⁸ however, the results of this referendum cannot accurately gauge participation, and, even if they could, they would still constitute a viewpoint-based decision.⁹⁹ A system that uses participation as a measure to allocate funding will necessarily amplify popular

Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany, 399 F. Supp. 2d 136, 150 (N.D.N.Y. 2005).

93 See *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam) (discussing the necessity of money for effective communication).

94 See *id.* (explaining how almost every communication tool requires a monetary expenditure).

95 See *Amidon*, 399 F. Supp. 2d at 150 (finding that the use of a referendum to determine the amount of funding an organization receives "is akin to allowing citizens to express their views on how long a particular group's parade should be, or how many leaflets a particular group should be allowed to distribute," which is constitutionally unacceptable).

96 *Southworth*, 529 U.S. at 231.

97 See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (noting that the University was making arguments based on the scarcity of funds for student organizations).

98 See, e.g., *id.*; *Southworth* FAQs, *supra* note 89.

99 *Amidon*, 399 F. Supp. 2d at 149.

viewpoints at the expense of unpopular ones, because popular viewpoints attract more participants than unpopular ones.¹⁰⁰ Thus, although it is possible to objectively measure participation, its implications are inherently viewpoint-based.¹⁰¹ This view falsely assumes that those who vote in favor of a particular allocation are going to participate in that group's activities.¹⁰² First, a more accurate gauge of those involved in a student group—the group's membership rolls and participation records—is readily available. Second, referendum questions in the funding context ask whether a group should receive a certain level of funding, not whether a student will participate in its activities.¹⁰³ Finally, even if the question asked if the student would participate, a student's vote does not guarantee action consistent with that vote, making this count unreliable. Thus, the referendum fails to supply the information attributed to it. Even when based on accurate information, participation and viewpoint are tied inextricably together.¹⁰⁴ Thus, because participation is not a viewpoint-neutral factor, its use is constitutionally deficient under *Southworth*.

Referenda that grant or deny funding to organizations are unconstitutional. Referenda that determine how much funding a group receives are also unconstitutional. Both allocate funds in a way that reflects the popularity of an organization's viewpoint. Because *Southworth* requires that these decisions be viewpoint-neutral, these systems are unconstitutional.¹⁰⁵ Moreover, these referenda reduce the overall diversity of discussion while increasing the influence of the most pop-

100 For a discussion of factors that provide advantages to currently and historically popular viewpoints, see *Southworth v. Board of Regents of the University of Wisconsin System*, 307 F.3d 566, 593–95 (7th Cir. 2002).

101 See *id.* at 594–95 (discussing how levels of student participation may sometimes be considered but may also be indicators of the popularity of speech and thus not viewpoint-neutral).

102 *Amidon*, 399 F. Supp. 2d at 150.

103 The disconnect from rates of participation is apparent from a question proposed for use at SUNY-Albany:

Do you wish to support a chapter of the Collegiate Action Leadership League of New York at \$5.00 per semester creating a viewpoint neutral vehicle for the avocation [sic] of affordable and accessible higher education, preserving the environment, protecting the rights of all citizens, and promoting a free enterprise economy on campus?

Brief for Appellant New York Public Interest Research Group at 17, *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 508 F.3d 94 (2d Cir. 2007) (No. 05-6623). The trial judge explicitly recognized this disconnect and rejected the related arguments. *Amidon*, 399 F. Supp. 2d at 150.

104 See *Amidon*, 399 F. Supp. 2d at 149.

105 *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

ular views. Because universities institute these funding systems to “facilitat[e] the free and open exchange of ideas by, and among, its students,”¹⁰⁶ using referenda to allocate funds defeats the very purpose for which the forum was created. Thus, allowing referenda to play a controlling role in funding is not appropriate at any level.

B. *Influencing Funding Level Through Advisory Referenda*

Advisory referendum procedures are also constitutionally unacceptable. There, a resource-allocating body considers the results of a student vote in concert with other factors to evaluate the merits of an organization’s funding request.¹⁰⁷ The decisionmaker is not required to follow the results of the referendum, but may consider them within the framework established by the university. Constitutionally, this referendum procedure is no kinder to students’ First Amendment rights than are binding referenda¹⁰⁸ because it introduces a viewpoint-based factor into a decision that constitutionally must be viewpoint-neutral.¹⁰⁹

SUNY-Albany implemented this form of referendum in 2005.¹¹⁰ There, final funding decisions on all organizations’ funding requests are made by the Student Association (SA) Senate.¹¹¹ The SA’s bylaws require decisions to be viewpoint-neutral.¹¹² The advisory referendum policy allows the SA Senate to “use advisory referenda . . . to garner student input with respect to particular funding decisions,”¹¹³ but forbids the SA from using the results to “determine whether a group will or will not be funded.”¹¹⁴ The SA Senate has other criteria

106 *Id.* at 229.

107 For some examples of these factors, see SUNY STUDENT ASS’N BYLAWS, *supra* note 4, § 517.5.

108 *See supra* Part II.A.

109 *Southworth*, 529 U.S. at 221.

110 As discussed, prior to 2005, SUNY-Albany’s referendum process did in fact make binding funding allocations. *See supra* notes 85–86 and accompanying text.

111 For a more detailed explanation of how the funding application process works at SUNY-Albany, see Brief for Appellee at 2–3, *Amidon v. Student Ass’n of the State Univ. of N.Y. at Albany*, 508 F.3d 94 (2d Cir. 2007) (No. 05-6623).

112 SUNY STUDENT ASS’N BYLAWS, *supra* note 4, § 513.1; *see also id.* § 513.2 (providing the working definition of “viewpoint neutrality”).

113 *Id.* § 517.1.

114 *Id.*

with which to evaluate organizations' requests,¹¹⁵ but is not given any standard for weighing the referendum results against them.¹¹⁶

Advisory referenda are different from binding ones because their results are not the only factor in funding allocations.¹¹⁷ By decoupling the process from direct majoritarian controls, viewpoint is only one factor among many in the decisionmaking process.¹¹⁸ The student body is unable to withdraw funding from unpopular messages by referendum vote and cannot directly reduce the allocable pool by substantially committing funds to popular messages. Regardless, this advisory procedure provides inadequate protection for students' First Amendment rights.

As *Southworth* established, a university's process must allocate mandatory student activity funds among student organizations in a viewpoint-neutral manner.¹¹⁹ The allocation method described above utilizes a balancing approach considering multiple factors.¹²⁰ In order to achieve a constitutional allocation, all of the factors considered must be viewpoint-neutral.¹²¹ The results of a referendum, however, represent the opinion of the student body. Because the university cannot control the basis of students' votes, it must assume that they will vote based on an organization's viewpoint. The referendum's viewpoint neutrality cannot be guaranteed. Whether a referendum question is phrased in terms of "value provided," "student interest," or any other subjective measure, the result inevitably is a reflection of the viewpoint of the speaker. Therefore, using the results of a referendum introduces a viewpoint-based factor into the allocation process.

115 Prior to the litigation in *Amidon*, these additional funding criteria were unwritten but have since been incorporated into the SA's bylaws. *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 399 F. Supp. 2d 136, 148 (N.D.N.Y. 2005).

116 SUNY STUDENT ASS'N BYLAWS, *supra* note 4, § 517.1.

117 Advisory referenda are complementary to other decisionmaking factors. In order to consider the referenda's effects in isolation, this discussion assumes that any other factors considered are viewpoint-neutral. This assumption allows an isolated consideration of the advisory referendum's effect. If this is not the case, the other factors present separate constitutional problems outside the scope of this Note.

118 See *Amidon*, 399 F. Supp. 2d at 150; Brief for Appellant New York Public Interest Research Group at 32–33, *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 508 F.3d 94 (2d Cir. 2007) (No. 05-6623).

119 See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 233 (2000) ("[T]he principal standard of protection for objecting students . . . is the requirement of viewpoint neutrality in the allocation of funding support.").

120 See *supra* text accompanying notes 110–16.

121 For more discussion of content- and viewpoint-based restrictions, see *supra* text accompanying notes 38–51.

Once the university introduces a single viewpoint-based factor into its funding process, and regardless of the eventual funding decision, it irrevocably compromises the viewpoint neutrality of the system. As *Southworth* explained, “To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires.”¹²² When making a decision, the introduction of a viewpoint-based factor means that the final decision is based on viewpoint and thus is constitutionally defective. If the viewpoint-based referendum results have *any* influence (no matter how small) on the outcome, then the organization’s viewpoint affected its allocation and the decision violates students’ First Amendment rights. As the Supreme Court explained, “[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections,’ [referenda] are insufficient safeguards of diverse student speech.”¹²³ The advisory nature of the referendum tries to address the concerns articulated in *Southworth*¹²⁴ but cannot keep the result of the decision viewpoint-neutral. Thus, as soon as (and to the extent that) the decisionmaker considers the results of a referendum in how the final funding decision is made the process becomes unconstitutionally viewpoint-based. The fact that advisory referenda result in viewpoint-based decisions makes them unconstitutional.

C. *Referenda Decoupled from the Mandatory-Fee System*

Given the problematic nature of combining mandatory student activity fees and any kind of student referendum, schools might move in a different direction to create a constitutional system. The surest route to constitutional compliance is to stop distributing money to student organizations. A second, less drastic option is to eliminate the use of referenda, so long as the remaining or replacement program is viewpoint-neutral.

The question raised by this Note, however, is whether there is any way to use referenda within a program of funding student organizations while still adhering to *Southworth*. The target of the change, therefore, must be the mandatory nature of the contribution by students. In *Southworth*, the Court left open the possibility that a university might implement an optional or refund system to protect

122 *Southworth*, 529 U.S. at 235.

123 *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305 (2000) (internal citations omitted) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

124 *Southworth*, 529 U.S. at 235.

students' First Amendment rights.¹²⁵ However, upon further examination, it is hardly certain that either of these systems would survive the Court's scrutiny when actually implemented and paired with a referendum.¹²⁶ Moreover, both create significant risks that some groups will be underfunded.¹²⁷ Thus, even if these systems *could* be constitutionally implemented, it would almost certainly be best for universities to simply forgo referenda in fund allocation altogether.

1. Refundable Fee Referenda

Southworth suggests that a refund system may be constitutional in funding student groups.¹²⁸ However, when used in conjunction with a referendum, it is highly questionable whether it would remain so.¹²⁹ This form of referendum determines how much to allocate to a particular group, but unlike the systems previously discussed, students then have the option to request and obtain a refund of their portion of the allocated funds. The refundable amount could be an allocation from the standard student activity fee or a fee in addition to what each student is already paying.

Rutgers, The State University of New Jersey, offers this procedure to its student organizations.¹³⁰ Its system begins when a student organization petitions the University Senate for a recommendation to the President.¹³¹ When the organization receives the necessary approval, the University holds a referendum which requires an affirmative vote from at least twenty-five percent of eligible voters plus one for passage.¹³² If a question passes, the fee is

listed as a separate item on the term bill for payment by those students attending the division(s). A form to request a refund shall be included along with the term bill, which shall be sent [by] the indi-

125 *Id.* at 232. Although the Court presented these optional systems as viable constitutional alternatives, it did so outside of the referendum context in which we consider it here. *Id.*

126 Note also that the decision's comments in this regard were dicta as they played no role in the eventual judgment requiring viewpoint neutrality and the Court chose not to impose them as a constitutional requirement. *See id.*

127 Justice Kennedy was hardly unaware of this risk in writing the *Southworth* opinion and took the time to point out that such a system could "be so disruptive and expensive that the program to support extracurricular speech would be ineffective." *Id.*

128 *Id.*

129 *Id.* Note that this comment in *Southworth* was made in the context of the *whole* funding system and not the referendum specifically.

130 RUTGERS UNIV. SENATE GUIDELINES, *supra* note 11, § II(1).

131 *Id.* § II(1)(A).

132 *Id.* § II(1)(B).

vidual student to the organization. After verifying with the University that the student has actually paid the fee, the organization shall send a full refund to the student.¹³³

This procedure also imposes requirements on the organizations such as defraying the administrative costs associated with the referendum and refund.¹³⁴ Furthermore, an organization's budget must be approved by referendum at least every three years in order to continue to be eligible for this refundable fee.¹³⁵

Ultimately, while this system has fewer constitutional problems than a mandatory fee system, it still violates students' First Amendment rights. Its primary constitutional advantage is that after the viewpoint-based decision is made through the referendum, students may avoid having their money used for purposes they find offensive. But insurmountable constitutional obstacles remain.

Two Supreme Court cases that are particularly relevant to this sort of referendum concerned refundable union dues put to impermissible purposes.¹³⁶ In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*,¹³⁷ the Court rejected the "pure rebate approach," finding it constitutionally inadequate.¹³⁸ The Union's procedure offered refunds of expenditures for "ideological causes not germane to its duties as collective-bargaining agent."¹³⁹ The Court had previously

133 *Id.* § II(1)(C).

134 *Id.* § II(1)(D).

135 *Id.* § II(1)(E).

136 The relevance of union dues to the present context is rooted in *Southworth*. There, the lower courts partially rested their decisions on the reasoning of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which also serves as a starting point for some of the cases that will be discussed in this section. See Bd. of Regents of the Univ. of Wis. Sys. v. *Southworth*, 529 U.S. 217, 227 (2000). Though rejecting *Abood's* rationale, the Supreme Court recognized that the rights at issue in both cases were the same. *Id.* at 230. The cases discussed in this section deal not with the issue of germaneness, which was rejected in the university context in *Southworth, id.*, but with refund systems for impermissibly collected funds, and thus are instructive in this discussion.

137 466 U.S. 435 (1984).

138 See *id.* at 443. In this case, the Court interpreted 45 U.S.C. § 152, as allowing a "union and an employer to require all employees . . . to join the union as a condition of continued employment." *Id.* at 438. "In *Machinists v. Street*, 367 U.S. 740 (1961), the Court held that 'the Act does not authorize a union to spend an objecting employee's money to support political causes.'" *Ellis*, 466 U.S. at 438 (quoting Int'l Ass'n of Machinists v. *Street*, 367 U.S. 740, 768-69 (1961)). Again, despite the slightly different factual background, the constitutional violation was the same as that in *Southworth*.

139 *Ellis*, 466 U.S. at 447 (describing the constitutional limits on collecting funds from dissenting employees in *Abood*).

held in *Abood v. Detroit Board of Education*¹⁴⁰ that a union could not constitutionally finance such expenditures with mandatory fees from dissenting employees.¹⁴¹ In *Ellis*, the Union's use of the "pure rebate" procedure resulted in the return of the exact amount of the objector's dues allocated for the improper purpose.¹⁴² The Court found this clearly inadequate.¹⁴³ As implemented, this refund system constituted an "involuntary loan for purposes to which the [individual] objects."¹⁴⁴ Given the abundance of "readily available alternatives," the "rebate scheme reduce[d] but [did] not eliminate the statutory violation."¹⁴⁵

*Chicago Teachers Union v. Hudson*¹⁴⁶ expanded the Court's explanation of constitutionally problematic elements of refund systems in the context of union dues.¹⁴⁷ There the Court found three constitutional defects: objectors' contributions might be temporarily used for impermissible purposes; the Union had provided inadequate information about the basis of the refund calculation; and arbitration of the refund was not provided with reasonable promptness.¹⁴⁸ Even once the Union had "created an escrow of 100% of the contributions exacted from the respondents" to prevent the funds from being used for impermissible purposes, the Court still found it insufficient because it failed to remedy the second and third constitutional flaws.¹⁴⁹ Citing contemporary commentary with approval, the Court noted "first amendment due process cases have shown that first amendment rights are fragile and can be destroyed by insensitive procedures."¹⁵⁰

Ellis' and *Hudson's* concerns are implicated in this case because a referendum is indisputably a viewpoint-based mechanism. Thus, since the referendum is still being used, any refund procedure must be con-

140 431 U.S. 209.

141 *Id.* at 237.

142 *See Ellis*, 466 U.S. at 444.

143 *Id.* at 443.

144 *Id.* at 444.

145 *Id.* Although this quote frames the issue in statutory terms, shortly before the Court had noted that it had not previously "pass[ed] on the statutory or constitutional adequacy" of the pure rebate approach but that it now was finding this technique "inadequate." *Id.* at 443 (emphasis added).

146 475 U.S. 292 (1985).

147 *See id.* at 294.

148 *Id.* at 304-07.

149 *Id.* at 309.

150 *Id.* at 303 n.12 (quoting Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 551 (1970)).

stitutionally adequate in order to obviate the constitutional offense inherent in the referendum.

First, the refund must be available in practice. With the short length of a university semester, the possibility exists that though theoretically offered to students, the time frame for a refund request makes an actual refund all but impossible. If this were to occur, then the procedure would not be a refundable procedure at all, but the program would have ventured back into the unconstitutional realm of the binding referendum.¹⁵¹

Second, the amount of money returned to students affects the constitutionality of the referendum.¹⁵² Initially, as *Hudson* makes clear, the students must have sufficient information to determine that their refund actually reflects their pro rata share of the objectionable subsidy.¹⁵³ Generally, given the nature of the forum and the procedure, determination of the amount spent on an objectionable activity is simple: the student need simply look at the referendum question or a tuition bill.¹⁵⁴ Rutgers does not require the exact amount of funding be included in the ballot question,¹⁵⁵ but it does require the fee to be included as a separate item on each student's tuition bill.¹⁵⁶ However, if the bill's layout obfuscated the amount of each individual student's contribution, that would violate *Hudson's* requirements of sufficient information on the offensive allocation and arbitration on the refund amount.¹⁵⁷

Additionally, the collection of student money pending a request for refund implicates the *Ellis* requirement of paying interest on those funds.¹⁵⁸ In *Ellis* the Supreme Court made clear that without interest on the amount initially paid, a refund system is unconstitutional.¹⁵⁹ The Court also held, however, that return of interest alone was not sufficient to remedy the refund's constitutional harm.¹⁶⁰ Thus, when a university employs a refundable fee system, it must return to students the amount initially paid plus appropriate interest. Though for

151 See *supra* text accompanying notes 65–106.

152 Although only a small amount of money is at stake for each student, the Supreme Court has made clear the amount at stake for an individual does not diminish the importance of his constitutional rights. *Hudson*, 475 U.S. at 305.

153 *Id.* at 306.

154 For an example of this sort of question, in the advisory referenda context, see *supra* note 103.

155 RUTGERS UNIV. SENATE GUIDELINES, *supra* note 11, § IV(D).

156 *Id.* § II(1)(C).

157 See *Hudson*, 475 U.S. at 306–07.

158 *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444 (1984).

159 *Id.* at 442, 444.

160 *Id.* at 444.

each student this will likely be a miniscule sum,¹⁶¹ the school is not relieved of its duty to remedy the damages caused by of this loan.¹⁶²

A third constitutional blemish on this system is the use of the contributed money between initial payment and completion of the refund. If the money is available for the purposes to which the student objects, the university has instituted a compulsory loan which the Supreme Court has clearly held to be unconstitutional.¹⁶³ The process at Rutgers distributes collected money to organizations which then process refund requests and return the money to students.¹⁶⁴ This is precisely the constitutional violation identified by the Court in *Ellis*.¹⁶⁵ In rejecting this temporary loan, the Court noted the plethora of constitutionally superior and readily available alternatives, such as an advance reduction of the fee.¹⁶⁶ The Court also mentioned the use of interest-bearing escrow accounts in a way that implies their constitutional acceptability.¹⁶⁷ However, the justifications for an escrow option in the union context do not transfer to the university context: the union scenario involves a single fee used for multiple purposes, some permissible and some impermissible (and thus refundable).¹⁶⁸ In the context of a university such as Rutgers, on the other hand, the refundable fee is fully separate from other mandatory (and constitutional) fees. As a result, the use of an escrow account constitutes an involuntary loan that, even if not available for impermissible purposes, is still unjustifiable in light of the readily available alternative of an advance reduction.

Finally, even if a constitutional referendum-and-refund procedure were possible, several practical issues would eliminate its value in advancing the cause of diverse speech on campus. First, because of

161 A university is probably unlikely to use anything other than a secure, low-return investment device; therefore, the interest returned to students will be very small.

162 See *Hudson*, 475 U.S. at 305 (stating that "[t]he amount at stake for each individual dissenter does not diminish" concerns about subsidization of speech to which the individual objects).

163 See *Ellis*, 466 U.S. at 444.

164 RUTGERS UNIV. SENATE GUIDELINES, *supra* note 11, § II(1)(C).

165 *Ellis*, 466 U.S. at 444.

166 *Id.*

167 *Id.* Following *Ellis* and *Hudson* a circuit split developed among the courts of appeals on whether advance reduction of dues was the only constitutional alternative in the union context. Most circuits find both escrow accounts and advance reduction constitutional. See, e.g., *Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335, 339 (2d Cir. 1987). The Sixth-Circuit, on the other hand, requires advance reduction of dues. See *Tierney v. City of Toledo*, 824 F.2d 1497, 1504-05 (6th Cir. 1987).

168 *Ellis*, 466 U.S. at 439-40.

the brevity of semesters, timing is a major problem. Organizations need access to the funds, but would not be able to use them while awaiting refund requests. Since students need sufficient time to request a refund, groups utilizing this procedure will be unfunded for a substantial portion of each semester. Second, without widespread and consistent use, an escrow program is likely to be cost-prohibitive. If the university made a student organization bear that cost, it would drain the organization's funding and further reduce the effectiveness of its services. These concerns demonstrate that groups funded through a referendum-initiated refundable fee would not contribute to a university's goal of diversity of speech and active discussion and debate of issues.

Despite the language of *Southworth*,¹⁶⁹ it is clear from the Court's other decisions that the use of a referendum to institute a refundable fee to bankroll student organizations is unconstitutional. The fact that students can request a refund implicates a different set of constitutional protections than those attendant to binding and advisory referenda, but these issues cannot be addressed through a refund procedure. The constitutional requirements that a school return the fee with interest and that it not use it for impermissible purposes places this system on shaky ground. Further, because such a view-point-based system can be implemented more easily through an advance reduction in a student's payment, a refund system has no constitutional justification.

2. Referenda and Optional Fees

The optional payment scheme mentioned in *Southworth*¹⁷⁰ is another step away from the problems of other referenda but remains constitutionally problematic. Like a refund-based system, this procedure utilizes a referendum to allocate resources.¹⁷¹ Unlike the refund-based system a student may simply opt not to contribute in the first instance.¹⁷² Rutgers also offers this referendum option to its student organizations.¹⁷³ As in Rutgers' refund-based system,¹⁷⁴ to gain

169 Bd. of Regents of the Univ. of Wis. Sys. v. *Southworth*, 529 U.S. 217, 232 (2000).

170 *Id.* ("If a university decided that its students' First Amendment interests were better protected by some type of optional or refund system it would be free to [implement such a system].").

171 *See supra* Part II.C.1.

172 *See, e.g.*, RUTGERS UNIV. SENATE GUIDELINES, *supra* note 11, § II(2) (implementing this type of optional payment system).

173 *Id.* § II(2).

174 *See supra* text accompanying notes 130–35.

access to the optional payment referendum, an organization must receive the recommendation of and approval from the University Senate and President.¹⁷⁵ Similarly, the guidelines require an organization to obtain affirmative votes from at least twenty-five percent plus one of the eligible voters.¹⁷⁶ After an affirmative vote, the organization is listed on students' bills with a notice that the payment need not be made and with notice of a right to a refund if the fee is paid.¹⁷⁷

By premising this system on voluntary payment, the most significant constitutional clash is avoided. Regardless of the viewpoint-based nature of the referendum's decision, no student need contribute to a cause he finds offensive or objectionable. In a sense, this is a mere plea for donations by an organization.¹⁷⁸ The student has not made a "loan" to the organization, so there can be no temporary misuse of the funds.¹⁷⁹ Moreover, because there is no up front payment, there is no question about how much must be returned¹⁸⁰ or whether the funds were allocated in a viewpoint-neutral manner.¹⁸¹ From a practical perspective, no administrative expenditures are required to deal with refund requests and organizations' budgets are determinable earlier in a semester.

In spite of all of these advantages, constitutional concerns still linger with respect to this system. They stem from the fact that the referendum is a viewpoint-based device, although *Southworth's* concerns about forum access being limited by vote have less force because in this situation the contributions are not compulsory.¹⁸² Initially, the issue of practical availability raises potential systemic defects: if it is not practically possible to opt out of the payment, then *Southworth's* concerns about majority rule return to the fore. This may occur if the fee that the student may decline to pay is combined with amounts that the student must pay so that students have no practical way to discern what must be paid and what might not. The same problem would arise if there were so many individual line items on a student's bill that the optional ones were not readily identifiable or if the items were not

175 RUTGERS UNIV. SENATE GUIDELINES, *supra* note 11, § II(2)(A).

176 *Id.* § II(2)(B).

177 *Id.* § II(2)(C).

178 The obvious difference between this and standard pleas for funding is that in this case, the "plea" is officially sanctioned by the university and even potentially added as a line item to the student's tuition bill. *See, e.g., id.* § II(2)(C).

179 *See supra* text accompanying notes 163–69.

180 *See supra* text accompanying notes 152–62.

181 *See supra* text accompanying notes 75–80.

182 *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

clearly marked as nonmandatory fees. For universities trying to increase funding to organizations, there would be incentives to construct a system to induce students to make the optional payment. The system at Rutgers attempts to assuage these concerns by mandating that the optional status of the payment be clearly marked,¹⁸³ but as part of a larger bill students still face the risk that this "clear" marking will not provide sufficient notice of their right to opt-out.

Hudson and *Ellis* offer another perspective from which to analyze this funding methodology. In both of these cases the Court noted that an optional payment system would be a feasible option, explicitly approving of such a procedure in the union context.¹⁸⁴ But any university funding program must also meet the requirements articulated by the Court in those cases. Specifically, under *Hudson's* reasoning, a university would be required to provide sufficient information to students about how it is allocating their payments.¹⁸⁵ "Basic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to gauge the propriety" of student fees.¹⁸⁶ There must be enough transparency in the funding process for students to be able to see that the optional payment represents the totality of funding directed to the objectionable organization based on the referendum.

Apart from constitutional issues, this system also contains a substantial practical risk of underfunding. Like the refund, lack of student participation is a concern. Without some sort of compulsion, the only encouragement students have toward contributing is their own passion for the message. Conversely, if a student is directly opposed to the message—or is simply ambivalent and miserly—they are more likely to opt out of this contribution opportunity. Since students are generally strapped for cash, it is unlikely that they would voluntarily contribute to many groups using this system. Thus, unless an organization is wildly popular within a campus community, they face substantial risk of being underfunded.

183 RUTGERS UNIV. SENATE GUIDELINES, *supra* note 11, § II(2)(C).

184 See *Chi. Teachers Union v. Hudson*, 475 U.S. 292, 306–07 (1985) (discussing how the union's advance reduction procedure was constitutionally flawed because insufficient information was provided to objectors regarding nature of fund expenditure); *Ellis v. Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444 (1984) (noting the advance reduction of dues as an acceptable alternative to the union's dues refund system); see also *Bhd. of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 118–24 (1963) (discussing the plaintiffs' right to relief from the union's dues system).

185 *Hudson*, 475 U.S. at 306–07.

186 *Id.* at 306.

In light of these constitutional and practical problems, a university must question whether it can preserve the necessary First Amendment protections for its students when offering an optional payment system. Even if a school were to afford appropriate constitutional protections, it would be putting the “wide range of speech” it desires in the forum at risk of contraction through lack of student participation.¹⁸⁷ Although the First Amendment does not require all groups receive unlimited funding, public institutions put student organizations’ speech (and their First Amendment rights) at risk of insufficient funding with this sort of referendum.

D. Ambiguous Referendum Procedures

Ambiguously defined referendum procedures and referenda used by public universities to make nonallocative decisions present a further risk to students’ First Amendment rights. For example, SUNY-Albany uses referenda to determine whether the student activity fee will be mandatory or voluntary.¹⁸⁸ The University of North Carolina uses referenda to set the amount of student activity fees.¹⁸⁹ However, many institutions, such as the University of Nevada, have open-ended referendum procedures that allow “[a]ny item of enactment [to] be put to a vote of the student.”¹⁹⁰ Other schools have similarly ambiguous definitions of permissible referenda use.¹⁹¹ This open-endedness allows the use of the referendum to influence the funding of student organizations. Using a referendum in this way is inevitably viewpoint-based,¹⁹² and as has been noted, the constitutionality of a student

187 *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 231 (2000).

188 *Amidon v. Student Ass’n of the State Univ. of N.Y. at Albany*, 399 F. Supp. 2d 136, 138 & n.2 (N.D.N.Y. 2005).

189 CODE OF PERMANENT LAWS OF THE STUDENT GOV’T OF THE UNIV. OF N.C. AT CHAPEL HILL tit. I, art. I, § 4(A) (2007), available at <http://congress.unc.edu/code/Title%20I.pdf>.

190 CONST. OF THE ASSOCIATED STUDENTS OF THE UNIV. OF NEV. art. V, § 2(a), available at https://asun.unr.edu/Docs/OrganizationalDocument/ASUN_Constitution_2007.pdf.

191 See, e.g., ASSOCIATED STUDENTS UNIV. OF IDAHO CONST. art. X, available at <http://www.asui.uidaho.edu/userFiles/File/ASUIConstitution.pdf> (placing no limits on the permissible subjects for referenda); CONST. & BYLAWS OF THE UNIV. OF R.I. STUDENT SENATE art. VII, pt. 12, available at http://www.uri.edu/student_organizations/senate/files/amendedbylaws2.03.doc (enabling the use of referenda to allow students to vote on any issue); UNIV. OF VT. STUDENT GOV’T ASS’N CONST. art. VIII, available at <http://www.uvm.edu/~sgaclubs/constitution.php> (allowing students to use referenda to bypass the student senate and vote directly on an issue).

192 See *supra* text accompanying note 79.

organization funding system hinges on its viewpoint neutrality.¹⁹³ As such, a student vote to influence allocation of funds would immediately compromise the program's validity.

Compounding this threat to students' First Amendment rights is the number of different places the referendum might be situated within the funding process. Because there are no restrictions on the procedure, any of the unconstitutional applications described in this Part might come into play.¹⁹⁴ Furthermore, without defined limitations, a creatively drafted referendum question might be able to hide its importation of viewpoint-based considerations into the funding process. Regardless of whether the constitutional deficiency is obvious or cloaked, the use of a referendum to influence student organization funding decisions is unconstitutional.¹⁹⁵

This type of referendum "system" does necessarily affect student organization funding but students can use it for that purpose—making this tool at best a dormant threat. If no policies are in place to restrain its unconstitutional application, students' First Amendment rights are continuously at risk. In this sort of system, a university must add explicit definitional language to exclude the potential for majoritarian determinations in student organization funding. If it does not, the risks to students' rights are at least as substantial as in any of the systems with explicit referendum-based funding procedures. Given the large number of institutions that allow this sort of ambiguous referendum,¹⁹⁶ this category may present the most widespread threat to students' rights.

CONCLUSION

The use of referenda in funding student organizations at public universities is flagrantly unconstitutional. Eliminating the distribution of funds to student organizations through mandatory and voluntary contributions does not correct the constitutional problems. Universities have an interest in preserving students' ability to "engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall."¹⁹⁷ The solution is to proscribe any use of referenda in allocating funding to student organizations. This includes both

193 *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000).

194 *See supra* Part II.A–C.

195 *Southworth*, 529 U.S. at 221.

196 *See supra* note 191 and accompanying text.

197 *Southworth*, 529 U.S. at 233.

eliminating referendum procedures specifically designed to allocate funding and limiting open-ended referendum procedures to prevent misuse.

This approach does not harm either the university or the student groups. Each university that implemented one of the referendum-based funding devices discussed in Part II also provided an alternative, non-referendum-based procedure to student organizations seeking funding.¹⁹⁸ Furthermore, *Southworth's* questions about the constitutionality of referendum-based funding¹⁹⁹ make it particularly improbable that a university would base its funding entirely on referenda. Since universities do not depend heavily on referenda to fund student groups and have alternative procedures available, abandoning constitutionally dubious and duplicative funding methodologies in no way impairs the flow of funds to student organizations.²⁰⁰ It would, however, remove the constitutional offenses discussed in this Note.

The purpose of funding student organizations is to foster "vibrant campus debate among students."²⁰¹ For a university to set a goal of lively discussion and then trample the First Amendment rights of its students is self-contradictory. If universities are serious about creating vibrant intellectual conversation through student organizations and if they are to comply with the Supreme Court's mandates from *Southworth*, they must eliminate the use of referenda in influencing funding allocations.

198 See *id.* at 224; *Amidon v. Student Ass'n of the State Univ. of N.Y. at Albany*, 399 F. Supp. 2d 136, 138–39 (N.D.N.Y. 2005); CONST. OF THE RUTGERS UNIV. STUDENT ASSEMBLY art. V, available at <http://www.rcgaallocations.rutgers.edu/documents/constitution.pdf>; University of Nevada, 2006–2007 Funding Policies, ASUN Clubs and Organizations Board, <http://asun.unr.edu/Docs/Form/C%20&%20O%20Funding%20Request%202006.pdf> (last visited Nov. 10, 2007).

199 *Southworth*, 529 U.S. at 235.

200 See *Amidon*, 399 F. Supp. 2d at 151.

201 *Southworth*, 529 U.S. at 234.

