Viewpoint Neutrality and Student Organizations
Allocation of Student Activity Fees under the First Amendment

I. Why Do We Care about Viewpoint Neutrality?

A. First Amendment to the United States Constitution

1. First Amendment text:

   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. In general, the First Amendment protects the right to freedom of religion and freedom of expression from government interference. Freedom of expression includes the rights to freedom of speech, press, assembly and to petition the government for a redress of grievances, and the implied rights of association and belief.

3. The Supreme Court interprets the extent of the protection afforded to these rights. The Court has interpreted the due process clause of the Fourteenth Amendment as protecting the rights in the First Amendment from interference by state governments, including state colleges and universities.

B. First Amendment Regulation – Basic Rules

1. The government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972). (ordinance which prohibits picketing near school grounds *except* for labor unions is unconstitutional because it describes permissible expression in terms of subject matter)


5. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983).
II. **How does the First Amendment Apply to Student Governments?**

A. The Supreme Court has long recognized that student government and other campus-related activities implicate First Amendment rights.

1. In *Healy v. James*, 408 U.S. 169 (1972), the Supreme Court held that denying recognition to a local chapter of Students for a Democratic Society violated the students’ speech and association rights. The Court held that the only potential basis, on remand, that the lower courts might find to justify the denial was a determination that the student seeking recognition were determined not to abide by school rules.

2. In *Widmar v. Vincent*, 454 U.S. 263, 268-269 (U.S. 1981), the Court held that a university policy allowing student groups to use campus facilities for meetings created an open public forum; and the university could not prohibit access based on their religious viewpoint.

3. Finally, in *Rosenberger v. Rector and Regents of the Univ. of Virginia*, the Court held that a university created an open forum by establishing a student activity fund supported by a mandatory fee and could not deny funding to a student publication because of its religious purpose.

B. Also, Student Government is likely “State Action” for 14th Amendment.

1. In most cases, the state is sufficiently involved in student government at public colleges and universities to satisfy the state action requirement of the Fourteenth Amendment.
   a. *Gay & Lesbian Stud. Ass'n v. Gohn*, 850 F.2d 361, 365-66 (8th Cir. 1988) (holding that student government was a state actor because, *inter alia*, the University retained final authority over student funding decisions);
   b. *Uzzell v. Friday*, 625 F.2d 1117 (4th Cir. 1980) (holding implicitly that student government is subject to equal protection challenge);
   c. *Sellman v. Baruch Coll.*, 482 F. Supp. 475, 478-79 (S.D.N.Y. 1979) (student government was a state actor, reasoning that it receives state funds, holds meetings on public property, benefits students and the college, and is supervised by public officials.);
   d. *Arrington v. Taylor*, 380 F. Supp. 1348, 1359 (M.D.N.C. 1974) (holding student government to be state action because it occupies and operates on premises owned by the university; is organized as and performs the functions of a governmental body; derives its authority from the university; and receives direct and indirect financial assistance from the university).

2. Thus, courts will hold the university responsible where the student government discriminates illegally, such as by establishing criteria for participation that are not viewpoint neutral or violating equal protection.
3. Note, however, that **student leaders are likely not state actors.**

   a. *Husain v. Springer*, 494 F.3d 108 (2d Cir. 2007) (affirming dismissal of First Amendment claims against student government officers because those officers were not state actors to the extent state law did not compel them to act in a specific manner);

   b. *Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir. 2001) (holding that individual cadets at public military college did not act under color of state law for purposes of § 1983 claim);

4. **Nor student publications.** *Leeds v. Meltz*, 85 F.3d 51, 53-56 (2d Cir. 1996) (holding that student publication's rejection of advertisement did not constitute state action where school provided only limited funding and disclaimed any right to control).

C. **The University of Colorado.**

1. Paragraphs (A) and (C) of Article 7.D.1, *Laws of the Regents*, recognize the student governments at each of the campuses:

   *(A) The student governments exist and derive their power from the authority delegated to them by the Board of Regents.*

   ...  

   *(C) There are four campus student governments known as University of Colorado Student Union, Associated Students of the University of Colorado at Denver, University of Colorado at Colorado Springs Student Government Association, and Health Sciences Center Student Senate. The Board of Regents recognizes these organizations as the student representative bodies at each campus.*

2. Paragraph (B) of Article 7.D.1 establishes the Intercampus Student Forum as the formal avenue for students to communicate with the Regents and administration about student issues.

   **Note:** This is the only articulation in Regent Law or Policy of a shared governance role afforded to students. Beyond recognition and representation through the Intercampus Student Forum, there is no delegation of specific authority to student governments pursuant to paragraph (A) in Regent Law or Policy.

3. Regent Policy 7.B provides that “student governments on each campus are to be responsible to the chancellor of that campus[,]” subject to appeals to the president and Regents.
4. To that end, paragraph (D) of Article 7.B.1 requires the student government constitution to be approved by the campus chancellor before being submitted to the student body for approval. The second sentence in paragraph (D), Article 7.B.1 describes the chancellor’s role in approving the constitution:

*The chancellor’s approval shall not be interpreted as being a chancellor’s preference either way on the subject matter of the student vote, but shall only be the chancellor’s agreement that the chancellor will support the outcome of the vote, whatever it may be.*

5. Chancellor approval may be viewed as signifying only that the constitution comports with university and campus policies and is an appropriate structure. Moreover, the Laws and Policies described above leave supervision of the student governments to the discretion of the chancellors as the chief executive and academic officers of their respective campuses. The chancellor is not required to approve a constitution that does not comport with university or campus policies and the chancellor remains free to circumscribe the activities and powers of the student government.

6. As noted above, the University will likely be held responsible for the unconstitutional actions of the student government. However, to provide some insulation for the university from the acts of student governments, it is a good practice for the chancellors execute a signing statement or charter to describe the expectations of the student government and what approval of the constitution means. Such a statement should include:

   a. A description of any right to appeal to the chancellor and limits thereupon.

   b. Whether and how the chancellor intends to enforce those provisions and principles in the student government constitution that are necessary to comport with campus or university policy or state or federal law.

   c. Any reservation of right to suspend the student government constitution when necessary to serve the best interests of the campus.
III. What is a Public Forum?

A. Traditional and Designated Public Fora

1. In ancient Rome, the forum was a public space in the middle of a city which served as the center of political, social and civil life.

2. The Supreme Court has recognized that “streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.” *Hague v. CIO*, 307 U.S. 496, 515 (1939).

3. Such “places which by long tradition ... have been devoted to assembly and debate” are open and protected by virtue of their physical or spatial character. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).


5. A content-based restriction on speech in a public or designated public forum is subject to strict scrutiny, requiring the state to show a compelling interest in the restriction that is drawn narrowly to meet that interest. *Perry*, 460 U.S. at 45. A content-neutral time, place, and manner restriction is permissible so long as it is “narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication.” *Id.*

B. Non Public Forum

1. The non-public forum is “[a]ny public property that is not by tradition or designation a forum for public communication.” *Faith Ctr.*, 480 F.3d at 907.

2. We subject speech restrictions in a non-public forum to less-exacting judicial scrutiny: “[A]s long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view,” the government may preserve the forum for its intended purposes. *Perry*, 460 U.S. at 46, 103 S.Ct. 948.
C. Limited Public Forum

1. The limited public forum “refer[s] to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.” Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir.2001); see also Rosenberger, 515 U.S. at 829 (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”).

2. Once the government has created a limited public forum, “[it] must respect the lawful boundaries it has itself set.” Rosenberger, 515 U.S. at 829. Specifically, the government “may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum [nor] discriminate against speech on the basis of . . . viewpoint.” Id.

3. A forum need not be a physical space. The government may establish a medium for expression that “is a forum more in a metaphysical than in a spatial or geographic sense.” See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); see also Cornelius, 473 U.S. at 800-02, 105 S.Ct. 3439 (rejecting contention “that a First Amendment forum necessarily consists of tangible government property” in applying forum analysis to a charitable contribution program); Perry, 460 U.S. at 46-47 (applying forum analysis to a school mail system).

4. Student governments and their activities—particularly the allocation of student fees—will be treated as limited metaphysical fora.

   a. See Flint v. Dennison, 488 F.3d 816 (9th Cir. 2007). Student government election is a limited public forum within which campaign expenditure limits that would otherwise be impermissible under First Amendment campaign finance case law were reasonable and content neutral. “When the government opens a forum, such as a student election, the government retains the ability, within constitutional bounds, to limit the use of that forum to its intended purposes.” Id. at 827.

   b. Husain v. Springer, 494 F.3d 108 (2d Cir. 2007) Student newspaper held to constitute a limited public forum. University administration had no right or duty to control viewpoints expressed in student paper. Therefore, administration’s nullification of student election based on perceived taint by newspaper endorsement of candidates was unconstitutional.

IV. What is Viewpoint Neutrality?

A. Viewpoint Neutrality - Generally

1. Viewpoint neutrality is the requirement that the government not favor one speaker’s message over another’s regarding the same topic.” *Flint, supra.*, at 488 F.3d at 833.

2. Viewpoint discrimination occurs when the government denies a speaker access to a forum “solely to suppress the point of view he espouses on an otherwise includable subject.” *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (emphasis in original)).

3. Viewpoint is discerned by reference to opinion or ideology. Should be distinguished from *content-based* restrictions, which may be ok. For example:

   - Decision to only display *period art* in public library = *content-based*
   - Decision not to display “*unpatriotic art*” = *viewpoint-based*

B. Viewpoint Neutrality and Religion

1. “As we have noted, discrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. See, *e.g.*, *R.A.V.*, *supra*, at 391, 112 S.Ct., at 2146. And, it must be acknowledged, the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake. By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.”

2. “If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.
C. Viewpoint Neutrality and Student Funding Processes – Unbridled Discretion

1. The Supreme Court has explained that “[w]hen a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others” and must allocate those funds in a viewpoint neutral way. *Board of Regents of University of Wisconsin System v. Southworth*, 529 U.S. 217, 233 (2000) (*Southworth I*).

2. This “requirement of viewpoint neutrality includes as a corollary a prohibition on unbridled discretion.” *Southworth v. Univ. Wisconsin*, 307 F.3d 566, 579-80 (7th Cir. 2002) (*Southworth II*). In other words, “[t]he requirement of viewpoint neutrality includes a mandate that a decisionmaker not possess unbridled discretion.” *Id.* at 595.

3. Illustrating the propriety of applying the unbridled discretion standard to such a mandatory fee system, the *Southworth II* court explained that “if the student government lacks specific and concrete standards to guide its funding decisions, it could use its unbridled discretion to discriminate on the basis of viewpoint,” and “that viewpoint discrimination would go unnoticed because without standards there is no way of proving that the decision was unconstitutionally motivated.” *Southworth II*, 307 F.3d at 580.

4. A student funding process that lacks “written, definite, and objective criteria to guide the” decision-makers may be subject to a facial challenge. See, e.g., *Christian Legal Society v. Eck*, 2009 WL 1439709 (D.Mont. May 19, 2009) (CLS lawsuit included a facial challenge to student bar association funding process, alleging that organizational documents did not contain adequate “safeguards to prevent viewpoint discrimination.”)

5. Viewpoint neutrality does not mean that all groups must receive the same amount of money or that every viewpoint funded requires a counter-viewpoint.

D. The Special Problem of Referenda

1. A mandatory fee adopted through a referenda process was challenged as compelled association in *Southworth*. The fees at issue there, however, were distributed through the student government funding process. Therefore, the relevant holdings were: (1) a university may charge mandatory fees so long as the organizations are funded in a viewpoint neutral fashion; (2) the university policy was sufficiently viewpoint neutral to protect the rights of objecting students, (3) an optional refund system is not a constitutional requirement for a general fee distributed through a viewpoint neutral process; and (4) there is no distinction between campus activities and off-campus activities of funded organizations.

2. More recently, the Second Circuit held in *Amidon v. Student Association of the State University of New York at Albany*, 508 F.3d 94, 95 (2d Cir.2007), that a university's student association “violated the First Amendment by using an advisory student referendum to determine how to allocate funds from a mandatory student activity fee among student organizations.” According to the *Amidon* court, use of a student referendum reflecting the student body's majority opinion has “no place in the funding allocation process, which requires that ‘minority views [be] treated with the same respect as majority views.’ ” *Amidon*, 508 F.3d at 102 (quoting *Southworth I*, 529 U.S. at 235, 120 S.Ct. 1346).
E. Guidance from Southworth II

1. Wisconsin established elaborate new funding procedures. They were challenged and carefully reviewed by the Seventh Circuit in Southworth II.

2. The procedures were generally held to be viewpoint neutral. The following elements of the process were held up by the court approvingly:

   a. University had an expressed policy prohibiting viewpoint discrimination and requiring conformity with constitutional requirements

   b. University sought to assure compliance with this policy by requiring student leaders to take an oath that they will abide by the principle of viewpoint neutrality

   c. Funding process set forth specific, narrowly drawn and clear criteria to guide the student government in their funding decisions and included

      • detailed procedural requirements for the hearings
      • public hearings with notice
      • hearings were recorded
      • minutes and funding documents were published or disclosed

   d. Process included specific deadlines for funding decisions, created a very comprehensive appeals process, and established prompt deadlines for the appeals

   e. The appeals procedures require the student government to compare the grant amounts for similarly situated organizations.

3. However, the court also found the following criteria to be impermissible:

   a. Length of time an organization has been in existence and the amount of funding received in prior years. This institutionalizes existing discrimination and discriminates against less traditional viewpoints

   b. Consideration of the number of students benefitting from the speech. Because the First Amendment requires “that minority views are treated with the same respect as are majority views,” Southworth, 529 U.S. at 235, the University cannot use the popularity of the speech as a factor in determining funding.
STUDENT FUNDING PROCESS - BLACK LETTER RULES

- A public university may collect a mandatory fee to fund a wide-variety of student groups that address any issue or activity, so long as the organizations are funded in a viewpoint neutral fashion.

- Universities will likely be held liable for the unconstitutional conduct of student organizations responsible for distributing fees.

- **Viewpoint neutrality** is the requirement that the government not favor one speaker’s message over another’s regarding the same topic.
  
  o Viewpoint discrimination occurs when a university actor denies a speaker (including a student organization) access to a forum (including access to funding or recognition) because it disagrees with the speakers point of view
  
  o Viewpoint is discerned by reference to opinion or ideology. It is distinguishable from content-based restrictions, which may be permissible under certain circumstances.
  
  o Viewpoint neutrality **does not mean** that all groups must receive the same amount of money or that every viewpoint funded requires a counter-viewpoint.

- As long as the fee allocation process is viewpoint neutral **on its face and as applied**, an optional refund system is not a constitutional requirement.

- Mandatory or advisory referenda to fund specific groups are not viewpoint neutral.

- A viewpoint neutral funding process must include specific, written, objective criteria and must contain sufficient procedural safeguards to ensure neutrality and to guard against exercise of unbridled discretion.

- There is no distinction between on and off campus speech. However, the university remains free to enact viewpoint neutral rules restricting off-campus travel or other expenditures.

- Do not consider length of time organizations have been in existence, prior years’ funding or number of students benefitted.