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ON CANONICAL TRANSFORMATIONS AND THE COHERENCE OF DICHOTOMIES: JAZZ, JURISPRUDENCE, AND THE UNIVERSITY MISSION

Barbara K. Bucholtz *

The conventional wisdom of the Tower of Babel story is that the collapse was a misfortune. That it was the distraction, or the weight of many languages that precipitated the tower's failed architecture. That one monolithic language would have expedited the building and heaven would have been reached. Whose heaven, she wonders? And what kind? Perhaps the achievement of Paradise was premature, a little hasty if no one could take the time to understand other languages, other views, other narratives. Had they, the heaven they imagined might have been found at their feet. Complicated, demanding, yes, but a view of heaven as life; not heaven as post-life.

*Toni Morrison***

I. INTRODUCTION

What is the "mission," or purpose, of the university? Given the mission's critical role in shaping university life, the question is an important one. Given recent challenges to the mission posed by recent decisions of the Supreme Court of the United States, the

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** Toni Morrison, Nobel Lecture Upon the Award of the Nobel Prize for Literature (Dec. 7, 1993), *available at* http://www.nobel.se/literature/laureates/1993/morrison-lecture.html (last visited Nov. 1, 2002).

question is a timely one. What follows is an exploration of the topic from the perspective of the academic discipline of law. I situate the analysis in the context of an investigation into the creation of different forms of jazz. Hence, my analysis is a disquisition within the genre of law and music, one of the "cultural broker" genres in legal scholarship which attempts to explain the law by seeking out revelatory metaphors in other disciplines. I have chosen the jazz idiom—a uniquely American art form—to describe the mission of the American university and the discipline of American law which it encompasses. Jazz effortlessly illuminates the dialogic negotiations in law and related disciplines within the academy in a way that is consonant with the university mission.[1]

In Part II of this essay, I evaluate the most recent Supreme Court case to consider the university mission, *Board of Regents of the University of Wisconsin System v. Southworth*.[2] The case juxtaposes the mission of the university with the quotidian and vituperative culture wars that have roiled the nation's colleges and universities in recent years.[3] It can, therefore, act as an appropriate *mise en scene* for exploring the dissonance occasioned by competing social, political, and intellectual paradigms within higher education. It will also serve to introduce my thesis that, in a larger sense, dissonance is, if not the mission itself, at least consistent with and endemic to it. *Southworth* engaged these cultural wars in the arena of extracurricular activities. In Part III, I identify the curricular and scholastic versions of the same dissonance with a brief discussion of its most publicized manifestation: the literary theory/English literature debates. In light of the university mission, the various dichotomies between the literary canon and literary innovation seem particularly pernicious because it is almost a truism within the academy that creativity of thought requires individual definition both within and against existing

1. *See generally* Frank Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256 (1989). Michelman asserts, in agreement with the critical legal studies movement, that "law is best understood as a form of politics" and describes it as a dialogic "process of reason not just of will, of persuasion not just of power . . . [with] a critical and always potentially transformative attitude toward . . . [a 'public normative'] history." *Id.* at 256–58. Michelman's article was concerned, of course, with law as an activity operating within the body politic. I would argue that his description applies, with equal validity, to law as an intellectual pursuit within the university.

2. 529 U.S. 217 (2000).

3. *Id.* at 221–22.

canon.[4] Moreover, the dichotomy between the canon and innovation in any academic discipline would appear to be ultimately a false one because each requires the other for sustenance. Each grounds its existence in the other. Jazz is well-suited to illustrate the reciprocal dynamics between tradition and the "other" (between the canon and innovation). Part IV introduces the utility of the jazz metaphor, in this context, with a general discussion about the efficacy of existing law and music scholarship in shedding light on various aspects of law. Part V, then, explicates the jazz metaphor. Part VI applies the metaphor to legal scholarship and attempts to illustrate the chimerical nature of law's current version of the culture wars. Part VII revisits *Southworth* and its antecedents to ask whether these precedents adequately protect the university mission. The essay concludes with a recapitulation of my thesis that the dichotomies within the academy are essential to address new challenges in a changing sociological, political, and scientific environment and to its mission to "'discover, . . . disseminate, and extend knowledge and its application.'"[5] To apotheosize either the "canonists" or the "canonoclasts"[6] would eviscerate the university and subvert its mission. Reification of some ideas to the exclusion of others is anathema to the university ethos. But it is also destructive of both the entrenched schools of

4. For an enlightening book on the nature of the canons, and particularly the legal canons, see LEGAL CANONS (J.M. Balkin and Sanford Levinson eds., 2000) [hereinafter LEGAL CANONS]. In this collection of essays the editors have identified the multiple canons of law and have commissioned authors to discuss specific canons and how they operate in the discipline of law. In constructing this innovative text, the editors postulate the major categories of the legal canon: legal pedagogy (the canon of legal education), cultural literacy (the canon of literacy for citizens in a democracy), and academic theory (the canon that "serve[s] as [a] benchmark for testing academic theories about the law." *Id.* at 5. They explain how each canon is constrained by its anticipated audience and its proposed utility function or purpose. *Id.* at 8. For example, in legal pedagogy, "[w]hat precisely are we law professors preparing our students to do?" *Id.* They demonstrate how each canon is expressed in terms of the materials selected to disseminate its views and the "deep canonicity" or "background structures" of narrative, vocabulary, hypotheticals, models, examples, and approaches through which the canon is explored. *Id.* at 5. Using Balkin's and Levinson's construct as a template, I would argue that my article fits within the third category, "'academic theory canon.'" *See id.* at 7. More particularly, it is a description of the dialectical process that the university mission is designed to protect. In the preface of LEGAL CANONS, Balkin and Levinson express their hope that the text will serve as an invitation for further exploration of the canon. *See id.* at 6. This article may serve as one response to that invitation. Certainly, as Balkin and Levinson illustrate, the subject is rich with possibility.

5. *Southworth*, 529 U.S. at 221 (quoting WIS. STAT. § 36.07(1) (1993) (defining the mission of the University of Wisconsin)).

6. The anti-canonist. A canon iconoclast.

thought: those safely ensconced in an establishment milieu and the renegade theories that periodically challenge them.

II. *BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM V. SOUTHWORTH*

In March 1996, three law students from the University of Wisconsin's Madison campus brought suit against the university in federal court arguing that a mandatory student activity fee program violated their First Amendment rights.[7] The program partially funded some 200 student groups by reimbursing the groups for administrative expenses associated with the dissemination of their ideas.[8] The lawsuit was supported by the Alliance Defense Fund, headquartered in Scottsdale, Arizona.[9] *The New York Times* has described the purpose of that organization as "advis[ing] conservative students on strategies for 'defunding the left.'"[10] The plaintiffs argued that imposition of the mandatory student activity fee compelled them to support the agendas of student organizations that they opposed and, therefore, violated their First Amendment rights of free speech, free association, and free exercise.[11] In an unpublished decision, the United States District Court for the Western District of Wisconsin ruled in favor of the petitioning students on cross-motions for summary judgment.[12] The trial court reasoned that the case was analogous to precedent set by the Supreme Court in *Abood v. Detroit Board of Education*[13] and *Keller v. State Bar of California*[14] because the activity fee program violated students' rights to freedom of speech and association.[15]

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7. Linda Greenhouse, *No Student Veto for Campus Fees*, N.Y. TIMES, Mar. 23, 2000, at A1.

8. *Id.*

9. *Id.*

10. *Id.*

11. Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 227 (2000).

12. *Id.*

13. 431 U.S. 209 (1977).

14. 496 U.S. 1 (1990).

15. *Southworth*, 529 U.S. at 227 (noting that the trial court did not consider the free exercise issue).

In *Abood*, nonunion public school teachers were required to pay a service fee in an amount equivalent to union dues.[16] The teachers argued that imposition of the service fee compelled them to subsidize political views with which they disagreed and, therefore, the fee violated their First Amendment rights of speech and association.[17] The Supreme Court agreed.[18] In *Keller*, the Supreme Court applied the same analysis to a mandatory state bar association assessment and found that while lawyers admitted to practice in California could be required to join a state bar association and to fund activities "germane" to the bar's mission of "regulating the legal profession and improving the quality of legal services," lawyers could not be compelled to subsidize the bar's political agenda.[19] The rule that emerged from *Abood* and *Keller*, and that was applied by the federal district court in *Southworth*, stated that the Constitution protected individuals from subsidizing political speech that they opposed and that was not germane to the organization's mission.[20] On appeal, the Seventh Circuit reversed in part.[21] The court of appeals, over the dissent of three judges, applied the *Abood/Keller* "germane speech" test and found that the mandatory student activity fee program was not germane to the University's mission and, therefore, unconstitutionally infringed on the students' First Amendment interests.[22] The court added that, given the "heightened concern" for free speech rights[23] required by *Rosenberger v. Rector and Visitors of the University of Virginia*[24] it was "imperative that students not be compelled to fund organizations which engage in political and ideological activities."[25]

The Supreme Court granted certiorari to resolve a split of the circuits on the issue[26] and by a vote of 9-0 reversed.[27] Writing for

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16. *Abood*, 431 U.S. at 211.
17. *Id.* at 213.
18. *Id.* at 234–35.
19. *Keller*, 496 U.S. at 13–14.
20. *See Southworth*, 529 U.S. at 226–27; *Keller*, 496 U.S. at 13–14; *Abood*, 431 U.S. at 234.
21. Southword v. Grebe, 151 F.3d 717 (7th Cir. 1998).
22. *Id.* at 732–33.
23. *Id.* at 730 n.11.
24. 515 U.S. 819 (1995).
25. *Grebe*, 151 F.3d at 730 n.11.
26. *See, e.g.*, Rounds v. Or. State Bd. of Higher Educ., 166 F.3d 1032 (9th Cir. 1999) (holding that students' First Amendment rights were not violated by requirement that

the majority, Justice Kennedy agreed that the *Abood/Keller* test accurately stated the students' First Amendment interests in the factual context of *Southworth*, but found the two precedents analytically inapplicable.[28] First, speech germane to the University's mission is virtually limitless:

> The speech the University seeks to encourage in the program before us is distinguished not by discernable limits but by its vast, unexplored bounds. To insist upon asking what speech is germane would be contrary to the very goal the University seeks to pursue. It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning.[29]

In that regard, the Court acknowledged and accepted the State's definition of the University's mission: "'to develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses, and to serve and stimulate society by developing in students heightened intellectual, cultural and humane sensitivities . . . and a sense of purpose.'"[30]

The University argued that the mandatory student activity fee program supported the mission because the fees "enhance the educational experience of its students by promot[ing] extracurricular activities, stimulating advocacy and debate on diverse points of view, enabling participa[tion] in political activity, pro-

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they pay a fee supporting student activities as condition of matriculation); Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992) (holding that using student fees to fund a student newspaper did not violate the student's First Amendment rights); Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983) (holding that the Fourteenth Amendment did not prevent a university from using mandatory student fees to fund a campus newspaper); *see also* Smith v. Regents of the Univ. of Cal., 844 P.2d 500 (Cal. 1993) (holding that compliance with the First Amendment requires limits on the use of student fees, so that students who object to the funding of certain organizations have some sort of remedy); Good v. Associated Students of the Univ. of Wash., 542 P.2d 762 (Wash. 1975) (holding that the First Amendment does not prohibit mandatory student activity fees, though an organization using those fees is restricted by the First Amendment and cannot be a vehicle for any one viewpoint).

27. *Southworth*, 529 U.S. at 227. Justice Kennedy, who delivered the opinion of the court, was joined by Justices Rehnquist, O'Connor, Scalia, Thomas and Ginsburg. Justice Souter filed an opinion concurring in judgment in which Justices Breyer and Stevens joined.

28. *Id.* at 231–32.

29. *Id.* at 232.

30. *Id.* at 221 (quoting WIS. STAT. §.36.01(2) (1993)).

mot[ing] student participation in campus administrative activity and providing opportunities to develop social skills . . . ."[31]

The Court did not take issue with the University's position that the student activity fee program advanced its mission because the University's mission "undertakes to stimulate the whole universe of speech and ideas."[32] Given that all speech was arguably "germane speech," one method of protecting dissident students' *Abood/Keller* interests might be to permit each student to select the organizations he or she is willing to support with his or her fees.[33] But this, said the Court, would render the entire program "expensive," "disruptive," and "ineffective."[34] Further, "[t]he First Amendment does not require the University to put the program at risk."[35] Thus, the Court found that the *Abood/Keller* test was unworkable in the university setting because it was incapable of resolving the constitutional conundrum created by the mandatory student activity fee program.[36]

A second factor also distinguished *Southworth* from *Abood* and *Keller*, and thereby rendered the "germane speech" test inapplicable.[37] In *Abood* and *Keller*, teachers and lawyers, respectively, were required directly to support causes they opposed.[38] Herein lies a critical distinction: in *Southworth*, all student fees were pooled in a general fund that supported no political agenda itself but simply acted as a conduit to various student organizations.[39] Hence, the Court decided that the applicable safeguard of the students' *Abood/Keller* interests was found in another precedent, *Rosenberger v. Rector and Visitors of the University of Virginia*.[40]

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31. *Id.* at 223 (internal quotations omitted).

32. *Id.* at 232.

33. *Id.* at 232. Specifically, Justice Kennedy opined:

> The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extra curricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.

Id. at 233.

34. *Id.* at 232.

35. *Id.*

36. *See id.*

37. *See id.* at 233–35.

38. *See* Keller v. State Bar of Cal., 496 U.S. 1, 13 (1990); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977).

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

40. *Id.* at 233; *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S.

Rosenberger posits a "viewpoint neutrality" rule.[41] Application of *Rosenberger* to Wisconsin's student activity fee program required that funds from the pool be allocated under a viewpoint neutrality standard.[42]

At issue in *Rosenberger* was the financial support allocated by a student activity fee program to a student newspaper that advocated a particular religious position.[43] The issue in *Rosenberger* was somewhat different from the issue the Court faced in *Southworth*. In *Rosenberger*, the question was whether use of the student fee program to support the newspaper would create an Establishment Clause problem by ineluctably associating the public university with particular religious doctrine.[44] The Court held that, as long as the student activity fee program was administered in a way that was viewpoint neutral, no Establishment Clause problem was created.[45] "[A]dherence to a rule of viewpoint neutrality in administering its student fee program would prevent 'any mistaken impression that the student newspapers speak for the University.'"[46]

In *Southworth* the Supreme Court found that *Rosenberger*'s viewpoint neutrality test was also the proper standard for protecting the First Amendment rights at issue.[47] Because the parties had stipulated that most aspects of the program were administered in accordance with the viewpoint neutrality standard, the Court did not scrutinize the program's viewpoint neutrality as a factual matter.[48] It simply established viewpoint neutrality as the proper test.[49] Applying the test to the stipulated facts, the Court validated the program.[50]

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819 (1995).

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

42. *Id.*

43. *Rosenberger*, 515 U.S. at 823.

44. *Id.*

45. *Id.* at 845–46.

46. *Southworth*, 529 U.S. at 233 (quoting and explaining the Court's holding in *Rosenberger*, 515 U.S. at 841).

47. *See Southworth*, 529 U.S. at 233–34.

48. *See id.* at 234.

49. *See id.*

50. *See id.* In reversing the holding of the Seventh Circuit Court of Appeals, however, it also remanded the case for development of the record on the administration of one aspect of the program where funding decisions were made by majority vote of the student body and, therefore, arguably "substitute[d] majority determinations for viewpoint neu-

The *Southworth* decision was lauded as a "surprisingly broad and decisive victory for universities"[51] and a "'ringing endorsement of the idea that universities are special places for the free exchange of ideas, no matter how controversial.'"[52] Justice Souter's assessment of *Southworth*, however, was much less sanguine and his incisive concurrence deserves attention.[53] Justice Souter, joined by Justices Stevens and Breyer, noted that the decision, far from vindicating and protecting the university mission, actually diminished its viability by, in effect, reversing the burden of proof and imposing a "cast iron viewpoint neutrality requirement" on the student activity fee program.[54] Because the parties had stipulated to the program's viewpoint neutrality, the Court was required to go no further.[55] Having found viewpoint neutrality sufficient grounds for upholding the student activity fee program under the facts in *Southworth*, the Court was not obliged to, and should not have, found it to be a necessary one.[56]

According to Justice Souter, it would have been one thing (and probably no threat to the university mission) to say that under the facts given in *Southworth*, the plaintiff's First Amendment interests were sufficiently protected by the program because it was viewpoint neutral.[57] But it is quite another thing to say, as the *Southworth* Court did,[58] that viewpoint neutrality is both a necessary condition and is, in general, sufficient.[59] Under the former approach, no particular condition at all is imposed. Justice Souter would simply have held that plaintiffs had not met their burden.[60] Justice Souter may have envisioned the development of a totality

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trality." *Id.* at 235. It ordered reconsideration of the entire record in light of the standard it had enunciated. *Id.* at 235–36. On remand, the Seventh Circuit held that the University's funding standards, coupled with the appeals process, sufficiently limited the discretion of the majority so as to satisfy the requirements of the First Amendment. *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, No. 01-1912, 2002 U.S. App. LEXIS 20738, at *81–82 (7th Cir. Oct. 1, 2002).

51. Greenhouse, *supra* note 7.

52. *Id.* (quoting Katherine Lyall, President of the University of Wisconsin).

53. *See Southworth*, 529 U.S. at 236–43 (Souter, J., concurring).

54. *Id.* at 236 (Souter, J., concurring).

55. *Id.* at 236 n.2 (Souter, J., concurring).

56. *See id.* at 236 (Souter, J., concurring).

57. *Id.* (Souter, J., concurring).

58. *Id.* at 230.

59. *See id.* at 236 (Souter, J., concurring).

60. *See id.* at 236 n.1 (Souter, J., concurring).

of the circumstances/balancing test.[61] However, Justice Souter stated that under the latter (the necessary-and-usually sufficient test), the Court not only imposed a new bright-line rule, but it also, as a result, switched the burden of proof.[62] In so doing, the Court ignored the counsel of Justice Brandeis in *Ashwander v. Tennessee Valley Authority*[63] not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[64] This extension of viewpoint neutrality to the university campus concerned Justice Souter because it "recogniz[ed] a new category of First Amendment interests and a new standard of viewpoint neutrality protection."[65] At the end of his dissent in *Rosenberger*, Justice Souter hesitated to predict what particular damage might result from what he described as a "significant reformulation of our viewpoint discrimination precedents" in the university context.[66] Justice Souter described the actions taken by the Court in *Rosenberger* (and now we can add *Southworth*) as "'steps, which when taken were thought to approach "the verge," [and] have [now] become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop.'"[67] This is the proverbial slippery slope. Of course, Justice Souter's main concern in *Rosenberger* was the Establishment Clause. He argued the majority elided the Establishment Clause in applying viewpoint neutrality to the mandatory student fee program.[68] But *Rosenberger* became the defining rule upon which the *Southworth* Court, in the context of a First Amendment compelled speech challenge, relied.[69] Several of Justice Souter's concerns about imposition of a viewpoint neutrality standard in the context of university programs apply with equal force to *Southworth*.[70] What, then, is the problem with viewpoint

61. *See id.* at 236 (Souter, J., concurring).

62. *See id.* (Souter, J., concurring).

63. 297 U.S. 288 (1936).

64. *Id.* at 347 (Brandeis, J., concurring).

65. *Southworth*, 529 U.S. at 236 (Souter, J., concurring).

66. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 899 (1995) (Souter, J., dissenting).

67. *Id.* (Souter, J., dissenting) (quoting Lemon v. Kurtzman, 403 U.S. 602, 624 (1971)).

68. *Id.* at 892–93 (Souter, J., dissenting).

69. *See Southworth*, 529 U.S. at 243 (Souter, J., concurring).

70. *See id.* (Souter, J., concurring).

neutrality, at least in the special context of the university and its mission?

The biggest threat to the university mission posed by viewpoint neutrality is that it can easily be used to narrow and to exclude viewpoints and debate, even as it appears designed to expand and to include them.[71] As the Court itself recognized, imposition of new restrictions on the operation of university programs, including those which *encourage* diverse speech, could become prohibitively expensive.[72] Furthermore, uncertainties about the contours and reach of the viewpoint neutrality rule might induce universities to eliminate programs rather than risk litigation. Thus, a Court-mandated restriction could have the effect of narrowing university discourse, not broadening it. In that regard, the reported purpose of the *Southworth* plaintiffs was not to broaden extracurricular discourse by demanding a share of the student fees to support their own organization, but rather to defund their ideological opponents.[73] If it were abundantly clear that the viewpoint neutrality rule would always result in broadening debate, then it would be consonant with the university mission.[74] *Southworth* offers no such assurance.

Similarly, if it were clear that viewpoint neutrality is mandated only in the context of extracurricular programs, then it might pose no threat to the university's core academic programs. But the parameters of the mandate are not at all clear. One problem is that the Court extends application of a First Amendment doctrine (viewpoint neutrality), which envisions private speech in a physically identifiable public forum, to speech in an incorporeal forum. When the Court leaps from the *terra firma* of the street corner, public parks, and rooms in buildings to the incorporeal region occupied by a mandatory student fee program, which even the *Rosenberger* Court acknowledged to be more "metaphysical" than a public park,[75] then certain issues arise. Most obvious is the question of where you draw the circle around an incorporeal force

71. *See id.* at 231.
72. *See id.* at 232.
73. *See* Greenhouse, *supra* note 7.
74. *See Southworth,* 529 U.S. at 233–34; *see also id.* at 236 (Souter, J., dissenting).
75. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).

field we must now call a *Southworth* "forum," subject to viewpoint neutrality.[76]

Take, for example, the Court's attempt to draw a distinction between "extracurricular" and "curricular" programs.[77] The Court was quick to reassure us that it "likely" will not include traditional academic programs—scholarship, coursework, and curriculum decisions—within the sweep of viewpoint neutrality.[78] "Where the University speaks, either in its own name . . . or . . . through its diverse faculties the analysis *likely* would be altogether different."[79] Even assuming that viewpoint neutrality will not be applied to curricular programs, what are we to do with hybrid programs?

Many curricular programs have extracurricular aspects which, like the extracurricular program in *Southworth*, are designed to enhance the students' traditional curricular education by exposing them to extracurricular experiences. Consider, for example, the currently popular "summer abroad" programs or legal clinic programs. Certainly they have "extracurricular" aspects. And, to maintain the symmetry with *Rosenberger* and *Southworth*, many of them are funded by mandatory student fees completely separate from the university's operating budget. Are they now subject to viewpoint neutrality? The boundary between curricular and extracurricular fora seems more porous than the Court suggests.

Then, there is the contiguous issue of funding: the Court tries to draw a distinction between government (public university) speech and private (student) speech, a distinction that is premised on the source of the dollars that support the speech.[80] Justice Souter suggested in his *Rosenberger* dissent that he was not persuaded by the Court's attempt to distinguish tax dollar speech (which is constrained by different rules) from student fee speech (now apparently governed by *Southworth*).[81] For example, "[t]he opinion of the Court makes the novel assumption that only direct aid financed with tax revenue is barred, and draws the erroneous

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

77. *See id.* at 233–35.

78. *See id.* at 235.

79. *Id.* (emphasis added).

80. *Id.* at 229.

81. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 863–64 (1995) (Souter, J., dissenting).

conclusion that the involuntary Student Activities Fee is not a tax."[82] Again, the boundary drawn by the Court is surely porous. To what extent, for example, do mandatory student tuition dollars which, along with tax dollars, support the university's curricular and scholarly programs dilute the concept that only tax-dollar-supported programs constitute government speech on the campus? Although the Court suggests that the distinction between tax support and mandatory fee support is critical to its analysis, the distinction is unclear and unconvincing.[83]

Finally, another indeterminacy in the decision is notable. The Court twice reminds us that its holding rests on the stipulation of the parties at the trial level that the mandatory student activity fee program at issue in *Southworth* was, in most respects, viewpoint neutral.[84] One has to wonder what the Court would have done with the record if the issue had been contested. What, precisely, does viewpoint neutrality in university programs require? Must every viewpoint on a subject or within a program be included? How is "viewpoint" to be defined?

It is readily apparent that the reach of *Southworth* is potentially so broad that we could very well find ourselves on Chief Justice Burger's slippery slope.[85] To the extent that its viewpoint neutrality standard abates the free play of competing ideas (the kind of academic freedom envisioned by the traditional university mission), it will prove to be an unfortunate precedent.

Furthermore, while the free exchange of ideas in extracurricular activities may enhance the educational experience envisioned by the university mission, the free play of competing ideas in the curricular and scholarly aspects of university life is its sine qua non. But, given the uncertain reach of *Southworth*, there is always the danger that, in the context of a particularly virulent and protracted intellectual culture war, courts might be persuaded to temper traditional notions of academic freedom with some version of the viewpoint neutrality rule. After *Southworth*, it is important to recognize the very real possibility that the *Southworth* standard might insinuate itself into analyses of purely curricular cul-

82. *Id.* at 864–65 (Souter, J., dissenting) (noting that Justice O'Connor voiced similar concerns about the majority's assumption).

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

84. *Id.* at 234.

85. *See supra* note 67 and accompanying text.

ture war issues. Encroachment of the viewpoint neutrality standard in that arena is inimical to the university mission.

As we know, culture wars are hardly confined to extracurricular programs. They can be at least as strident in the academic core of university life, but the contentious nature of this academic dissonance should not mask the vital role intellectual conflict plays in the fulfillment of the university mission. Neither the apparent civility of the viewpoint neutrality standard, nor its facial benevolence, should blind us to the pernicious effect its application could have on the curricular and scholarly arenas of higher education.

III. LITERARY THEORY

Because the intellectual disjunctives created by the "culture wars" in English literature and literary theory are the most well-publicized of the academic "culture wars," they will serve as accessible examples of the often unpleasant but always indispensable dichotomies of academic life.[86] For more than a decade, that intellectual battle has pitted the canonist establishment (championing the Western canon and traditional literary analysis and interpretation) against various canonoclasts[87] who advocate the use of multiculturalistic texts. Many of these also advocate an approach to literary studies informed by the postmodernist concept of French historian Michael Foucault's overarching, if often unrecognized, ideology of power in all aspects of culture.[88] Weighing in on behalf of the establishment, Allan Bloom, with his famous polemic, *The Closing of the American Mind,*[89] is still considered a preeminent standard-bearer among other academics.[90] At least

86. *See generally* LEGAL CANONS, *supra* note 4. Balkin and Levinson also identify the canonical disputes in liberal arts disciplines as the most well publicized exemplars of the academic culture wars. *Id.* at 4–7, 12–14. They compare canonicity in the discipline of law with canonicity in liberal arts and delineate their similarities and differences. *Id.*

87. *See supra* note 6.

88. *See generally* TERRY EAGLETON, LITERARY THEORY (1983) (arguing for a more expansive academic discourse that includes literature as well as other disciplines).

89. *See generally* ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND (1987) (asserting that efforts to have university life and education successfully mirror American society have been detrimental to the purpose of the university as well as its students).

90. *See, e.g.*, WHAT'S HAPPENED TO THE HUMANITIES (Alvin Kernan ed., 1997). Prominent scholars including Gertrude Himmelfarb, Lynn Hunt, Frank Kermode, and David Bromwich, authored the essays that make up this book. Historians Gertrude Himmelfarb

two notable organizations have advanced the establishment's cause both during Bloom's lifetime and after his death in 1992.[91]

Representative of the canonoclasts' position are the postmodernist "New Historicism" and other literary theories developed by scholars who dispute the claims of Bloom and the establishment.[92] Although these detractors develop a broad spectrum of canonoclastic perspectives, they concur in their opposition to the primacy of the canon.[93] That, at any rate, is how it must appear to an outsider: a protracted and intractable contest between unyielding and intrepid adversaries. The kind of contest that excites the passions of a competitive sports-loving nation and invites an alignment of public loyalties based on political affinities. It also invites the perception that the contest is a zero-sum game between the hegemons and the meritocrats, with each side casting itself in the role of meritocrat.

In fact, a closer look at the dynamics of this prolonged struggle yields insights with more nuances into its nature. First, in important ways, there is no bright-line distinction or line of demarcation to be made between the ostensibly opposing sides. Indeed, commentators have observed that, at least in one important respect, the combatants have reached common ground: the patrons of the canon do not contest multicultural studies as long as they are "accompanied by rigor," and canonoclasts applaud rigor as

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and Donald Kagan would be included in a short list of famous scholars who champion the establishment.

91. A preeminent example is the American Council of Trustees and Alumni ("ACTA"). *See* Web site of the Am. Council of Trustees and Alumni, *at* http://www.goacta.org (last visited Nov. 1, 2002). The current Vice President's wife, Lynne Cheney, and the former Vice Presidential candidate Joseph Lieberman are founding members. Emily Eakin, *More Ado (Yawn) About Great Books*, N.Y. TIMES, Apr. 8, 2001, § 4A, at 24. The other important organizational advocate that should be mentioned is the National Association of Scholars ("NAS"), founded in 1987. *See* Web site of the National Ass'n of Scholars, *at* http://www.nas.org (last visited Nov. 1, 2002). NAS is "advised by a group of disaffected traditionalists, including the Columbia historian Jacques Barzun, Harvard biologist E.O. Wilson, and neoconservative Irving Kristol. The association bills itself as 'the only academic organization dedicated to the restoration of intellectual substance, individual merit and academic freedom in the university.'" Eakin, *supra*.

92. Scholarly rejoinders to Bloom's dogma include LAWRENCE W. LEVINE, THE OPENING OF THE AMERICAN MIND (1996), and BILL READINGS, THE UNIVERSITY IN RUINS (1996).

93. *Compare* LEVINE, *supra* note 92, *with* READINGS, *supra* note 92 (both arguing that the existing canons have become outmoded by failing to accurately reflect cultural change).

long as it is "accompanied by diversity."[94] It could be argued that a creative rapprochement is in the works. Further, there is substantial evidence that the canon is being infused with diversity—that the voice of the "other" is becoming part of the establishment. A study commissioned by the establishment—the National Association of Scholars—found that Toni Morrison is considered to be the sixth most important author in the history of the English language.[95] Conversely, several British and Irish authors who were comfortably ensconced in the pantheon some thirty years ago have notably slipped in the rankings of the literati.[96] Former "outsider" voices, including that of Zora Neale Hurston, have replaced them.[97] Whatever the merits of this hierarchical ranking, the changes it chronicles are at least some evidence that, even in the minds of the establishment, dissidents have successfully stormed the bastions of the canon and entered its exclusive domain.

Additional evidence that the battle is more interesting and subtly textured than often reported is to be found in the skirmishes that occur within each camp. For example, within the ranks of the canonoclasts, a less-than-friendly repartee has erupted among competing feminist theorists. In 1979, *The Madwoman in the Attic: The Woman Writer and the Nineteenth-Century Literary Imagination*[98] was published, and it represented at that time the

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94. Edward Rothstein, *As Culture Wars Go On, Battle Lines Blur a Bit*, N.Y. TIMES, May 27, 1997, at C37. That common ground is perhaps best expressed in an essay by James Miller, director of liberal studies at the New School. *See* James Miller, *The Academy Writes Back: Why We Can't Close the Book on Allan Bloom*, LINGUA FRANCA, Mar. 1997, at 59, 62. Here, Miller argues that, while Bloom is undoubtedly an elitist, his ultimate thesis argues for a kind of openness in university life that encourages not just a variety of experiences but develops and refines "one's capacity to judge this variety of experiences, and so to acquire the ability to live 'the examined life.'" *Id.* In the end, says Miller, Bloom's is "an argument for higher education as an open-ended conversation among those who have learned to think differently about matters of general concern." *Id.* That interpretation of Bloom's thesis tracks perfectly with the avowed purpose of the new literary theorists to inculcate the skills of critical thinking. *See generally* Eakin, *supra* note 91.

Another example is cited in Robert Alter's review of STEPHEN GREENBLATT, HAMLET IN PURGATORY (2001). Robert Alter, *Just Passing Through*, N.Y. TIMES BOOK REVIEW, May 20, 1997, at 45. According to Alter, Greenblatt puts to one side new historicism's Foucaultian methods of literary interpretation and investigates the imaginative power of the doctrine of purgatory and the insightful use Shakespeare makes of it in exploring the human condition. *Id.*

95. Eakin, *supra* note 91.

96. *Id.*

97. *Id.*

98. SANDRA M. GILBERT & SUSAN GUBAR, THE MADWOMAN IN THE ATTIC: THE WOMAN

cutting edge of feminist literary theory.[99] It is currently being "interrogated" and found wanting.[100] Its authors, Professors Sandra Gilbert and Susan Gubar, also include in their *oeuvre* the influential *Norton Anthology of Literature by Women: The Tradition in English*,[101] published in 1985. But their works are now criticized by a new breed of feminist theorists who charge Gilbert and Gubar with being "essentialists."[102] In the case of Gilbert and Gubar, their essentialism was asserting the equality of women as a gender-based attack on paternalism and male biases.[103] That view forged the first exegesis of feminist criticism. But by an ironic twist worthy of the best postmodernism, an essentialist has now come to mean someone who does not recognize critical differences between divergent groups, like men and women.[104] Commentators note that Gilbert and Gubar fell victim to that denunciation.[105]

What this internecine struggle suggests is that the literary culture war is not a marathon battle between two intransigent adversaries. Rather, it more accurately describes an ongoing process that explores new intellectual territory and reassesses the existing intellectual terrain on both sides of the theoretical divide. That exploration and reassessment is a dialogic negotiation that leads to the goals envisioned by the university mission: the expansion of human understanding in all its vicissitudes.

Another aspect of the literary culture wars that illustrates its dialogic nature is that of the increasingly influential presence of a new literary voice which Pico Iyer calls "tropical classical" in his recently published book, eponymously titled *Tropical Classical:*

WRITER AND THE NINETHEENTH-CENTURY LITERARY IMAGINATION (1979).

99. K. Anthony Appiah, *Battle of the Bien-Pensant*, N.Y. REV., Apr. 27, 2000, at 42 (reviewing SUSAN GUBAR, CRITICAL CONDITION: FEMINISM AT THE TURN OF THE CENTURY (2000)).

100. *See id.*

101. THE NORTON ANTHOLOGY OF LITERATURE BY WOMEN: THE TRADITION IN ENGLISH (Sandra M. Gilbert & Susan Gubar, eds., 1985).

102. Appiah, *supra* note 99, at 48 (explaining that "essentialism" is the postmodern version of apostasy, and that essentialists are apostates of the lowest order who commit the fallacy of positing that any standard is stable).

103. *Id.* at 42 ("'Essentialism' began as a word for criticizing anyone who assumed that all X's shared the same characteristics.").

104. *Id.*

105. *Id.* ("Now you could be an essentialist both for saying that people were different and for saying that they were the same.").

Essays from Several Directions.[106] His purpose is to point out the merits of a new literary genre which encompasses writers who have mastered the canon from an outsider's position.[107] They are "writers from the former colonies who are using the words they've learned at their masters' feet to turn their masters' literature on its head . . . [by demonstrating] the ways in which two colliding worlds fail to understand each other."[108] This new genre is one illustration of how canonoclism emerges from its training in the canon only to turn back on the canon, reflecting established viewpoints through new and different prisms and thereby expanding the canon's own awareness of itself and the expanding human understanding it occupies.

Finally, the notion of the canon as a stable classification must be challenged by the weight of historical evidence. Increasingly, combatants on both sides of the literary culture wars acknowledge what history teaches: "'[t]he canon was never at any point fixed but was always the result of a process . . . .'"[109] Historical parallels with the contemporary culture wars abound. Professor Joan DeJean reports in her *Ancients Against Moderns: Culture Wars and the Making of a Fin de Siecle*[110] the French counterpart of our current literary battles that took place during the 1690s.[111] There, too, the establishment sought "to preserve the hegemony

106. PICO IYER, TROPICAL CLASSICAL: ESSAYS FROM SEVERAL DIRECTIONS (1997). An excellent example of the genre is to be found in CAMARA LAYE, LE REGARD DU ROI (The Radiance of the King) which was first published in the U.S. in 1971 and was recently published in a new edition by *The New York Review*. In her review of the novel, Toni Morrison explains how Laye uses the double-vision he acquired as a citizen of Guinea who was educated first in Guinea, then France. Toni Morrison, *On 'The Radiance of the King,'* N.Y. REV., Aug. 9, 2001, at 18. In the novel, Laye explores the metamorphosis in viewpoint and sensibility of an itinerant Westerner in Africa which requires "the crumbling of [Western European] cultural armor " in order to become aware of Africa from an African viewpoint. *Id.*

107. *See generally* IYER, *supra* note 106.

108. Richard Bernstein, *Seeing Double: Literature's New Cultural Optics*, N.Y. TIMES, May 2, 1997, at C37.

109. Eakin, *supra* note 91, at 25 (quoting John Guillory, an English professor at New York University and the author of CULTURAL CAPITAL, THE PROBLEM OF LITERARY CANON FORMATION (1993)).

110. JOAN DEJEAN, ANCIENTS AGAINST MODERNS: CULTURE WARS AND THE MAKING OF A FIN DE SIECLE (1997). Professor DeJean specializes in seventeenth century French literature at the University of Pennsylvania. Mark Cohen, *The Final Days*, LINGUA FRANCA, May 1997, at 25 (reviewing Professor DeJean's book).

111. *See generally* DEJEAN, *supra* note 110.

of classical culture by restricting the canon to the works of antiquity" against a modernist offensive.[112]

In the United States, the literary establishment (our version of the *Anciens*), has been lamenting incursions by outsiders since at least the 1920s. T.S. Eliot once deplored the crisis of the canon stating that "'[t]he Classics have . . . lost their place as a pillar of the social and political system.'"[113] Indeed, a 1991 survey of English department curricula conducted under the auspices of the Modern Language Association describes a nineteenth century culture war in which the moderns sought to replace some ancient Greek and Roman texts with Dante, Machiavelli, and Shakespeare, much to the chagrin, and even outrage, of the establishment.[114] The survey also reports that similar curricular struggles took place in the 1920s and 1930s. During those decades, a fundamental issue was whether any American literature was sufficiently worthy to enter the canon.[115] It was in the 1930s that Robert Maynard Hutchins introduced his mandatory "Great Books" curriculum as a return to the canon and a reaction against the Harvard elective system.[116]

Thus, a closer look at this most famous version of the past decades' academic culture wars reveals certain themes that amount to a leitmotif—what we have here is not a permanent schism, but the process by which human knowledge and understanding is refined and expanded, whatever else its bellicose visage seems to convey. And that process, unpleasant and contentious as it often seems, is the vehicle through which the university mission is realized. Therefore, it at least demands our reluctant approval.

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112. Cohen, *supra* note 110.

113. T.S. ELIOT, *Euripides and Professor Murray*, *in* SELECTED ESSAYS 46, 47 (1950). The target of Eliot's outrage in that essay was Gilbert Murray's translation of the *Medea*. *See id.* The essay is cited in Daniel Mendelsohn, *Breaking Out*, N.Y. REV., Mar. 29, 2001, at 38. There, Mendelson presents the following broad historical perspective: the Establishment has "complained about the decline of the classics since Aristophanes' *Frogs*, in which the theater god Dionsus, dismayed by the sorry state of the Athenian theater, descends to the Underworld to fetch back Aeschylus and Euripides from the dead." *Id.* at 38.

114. *See* Eakin, *supra* note 91.

115. *See id.*

116. Miller, *supra* note 94, at 60. The Harvard elective system, which replaced a mandatory classical curriculum, was initiated by the then-President of Harvard, Charles William Eliot, in 1869. For a chronological overview of U.S. literary culture wars, see LAWRENCE W. LEVINE, THE OPENING OF THE AMERICAN MIND: CANONS, CULTURE AND HISTORY (1996), *reviewed by* Miller, *supra* note 94.

The salutary nature of the process we have come to call the academic culture wars might be more easily appreciated if viewed through the intermediary of metaphor. Metaphor has increasingly proved its utility in unpacking legal concepts and processes[117] and its singular importance in the process of human thought, generally, has been acknowledged by cognitive theorists.[118]

IV. UTILITY OF THE JAZZ METAPHOR

Within legal scholarship, music has proven to be a most effective metaphor in explicating certain aspects of law.[119] An early example is to be found in Jerome Frank's, *Words and Music: Some Remarks on Statutory Interpretation*,[120] an article in which Frank employed the metaphor of musical interpretation by performers to explain the "art" of statutory interpretation.[121] Positing the composer of music as analogous to the legislature, Frank argued that, just as the "wise composer expects the performer to

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117. *See* Bernard J. Hibbits, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 229–35 (1994).

118. *See* Barbara K. Bucholtz, *Cognitive Theory and the Competitive Sport of Legal Analysis* (unpublished manuscript, on file with the author).

119. One hypothesis for the fact that music is only infrequently pressed into service to explain aspects of law can be found in the perception that a great divide separates the concerns of any of the arts from those of the law. Justice Oliver Wendell Holmes, a spokesman for that position, believed that law and the arts are

> radically distinct and their separation would not allow people versed in the law to appreciate beauty or even the masterpieces of art. Lawyers live by the text and love the past, they hate novelty and misunderstand new languages. The law is able to appreciate new art only after it becomes a matter of convention, use, and habit, in other words, when art becomes like law. Great art, on the other hand, precisely because it breaks away from conventions and rules and expresses creative freedom and imagination, is the antithesis of the rule of law.

LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW 1 (Costas Douzinas & Lydia Neal eds., 1999) (citing Bleistein v. Donaldson, 188 U.S. 239, 251 (1903)).

While not entirely without merit, Holmes's perspective is fatally overbroad and oversimplifies the positions of both the arts and the law. As an example, Charles Rosen has eloquently pointed out that the battle between the moderns and the composers of what we have come to call "traditional classical music" continues unabated. Charles Rosen, *Who's Afraid of the Avant-Garde*, N.Y. REV., May 14, 1998, at 20. Few would argue, then, that the same kind of culture wars, just reviewed in the disciplines of English literature and literary theory, are waged with equal vigor in other disciplines such as music.

120. Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259 (1947).

121. *Id.*

read his score 'with an insight which transcends' its 'literal meaning,'" the legislature expects the judiciary to take similar interpretive liberties when a literal rendering of a statute would "yield a grotesque caricature of the legislature's purpose."[122] In an insightful and thoroughly engaging essay, Professors Sanford Levinson and J.M. Balkin develop that premise and apply it to critique the "original intent" school of constitutional interpretation by juxtaposing it with a strikingly similar school in music: the "authentic performance" or the "early music" movement.[123] That essay is ostensibly a book review of *Authenticity and Early Music*,[124] a collection of essays which serve as a representative compendium of the various aspects of the "authenticity" debate in music.[125] In the review, Levinson and Balkin use the authentic performance movement as a point of reference for shedding light on the analogous "originalist" movement in law.[126] As Levinson and Balkin explain, the authenticity movement, in fact, is comprised of many aspects.[127] Foremost is its enthusiasm for rediscovering compositions in the Western canon that had been previously lost or neglected.[128] But a hotly disputed feature of the movement has been its insistence that the music should be played as it was played in the era of its composition.[129] The more extreme devotees of authenticity have demanded that the composition be played precisely according to its original musical score, by the same period instruments, in an ensemble comprised of the same number of instruments, according to the same pitch as originally conceived by the composer and so forth.[130] Not so surprisingly, several detractors of this extreme position have questioned its wisdom and viability. Levinson and Balkin give us a succinct re-

122. *Id.* at 1262 (quoting ERNST KRENEK, MUSIC HERE AND NOW (1939)).

123. Sanford Levinson and J.M. Balkin, *Law, Music, and other Performing Arts*, 139 U. PA. L. REV. 1597 (1991).

124. AUTHENTICITY AND EARLY MUSIC: A SYMPOSIUM (Nicholas Kenyon ed., 1988).

125. *See id.*

126. Levinson & Balkin, *supra* note 123, at 1601.

127. *Id.* Levinson and Balkin write that "[t]he movement itself has diverse features, including the rediscovery of forgotten music, especially that of the pre-Baroque period, and the careful reconstruction and renovation of period instruments." *Id.*

128. *Id.*

129. Levinson and Balkin further indicate that "the more controversial aspect of the [Authentic Performance] Movement is the claim of its followers that music should be played according to the "authentic" performance practice of the era in which it was composed." *Id.*

130. *Id.* at 1615–21.

capitulation of those critiques, but they give us much more.[131] They suggest a way of understanding certain motivations that inspired the authenticity movement and its counterpart in law, the originalist movement.[132] In sum, they show that both movements can be viewed as responses to the sense of fragmentation, loss, and resulting anxieties occasioned by "'the constant change and innovation of the modern world.'"[133] Hence, both the authentic performance movement, insisting as it does on an exact replication of the original performance of a piece, as conceived and commanded by the composer and the original intent movement, insisting as it does on a strict adherence to what is perceived to be the intent of the framers of the Constitution, are attempts to "'invent[ ] tradition,'" artificially imposing a sense of continuity and stability.[134] They represent "an 'attempt to structure at least some parts of social life within [the modern world] as unchanging and invariant.'"[135] While this brief summary of the article hardly does justice to its breadth and nuances, it does serve to illustrate the uses to which music metaphors can be put in order to glean insights into the discipline of law. And, as if to confirm that disciplinary border-crossings are two-way streets, Richard Taruskin, who is quoted by Levinson and Balkin as a critic of the authentic performance movement,[136] returns the favor by relying on insights of Levinson, Balkin, and law scholar Pierre Schlag, in drawing upon the law metaphor to explain his own criticism of music's authenticity movement.[137]

Interestingly, as Levinson and Balkin point out, in spite of the fact that Judge Richard Posner has debunked the utility of disciplinary border-crossings—at least when the border separates the disciplines of law and literature[138]—Posner, too, has found the

131. *Id.* at 1622–27.

132. *Id.*

133. *Id.* at 1627 (quoting Eric Hobsbawn, *Inventing Traditions*, *in* THE INVENTION OF TRADITION 1–14 (E. Hobsbawn & T. Ranger eds., 1983)).

134. *Id.* (quoting Hobsbawn, *supra* note 133).

135. *Id.*

136. *Id.* at 1625.

137. RICHARD TARUSKIN, TEXT AND ACT: ESSAYS ON MUSIC AND PERFORMANCE 32–37 (1995).

138. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988). Levinson and Balkin quote Posner as follows: "[T]here are . . . too many differences between works of literature and enactments of legislatures . . . to permit much fruitful analogizing of legislative to literary interpretation." Levinson & Balkin, *supra* note 123, at 1603.

music metaphor effective in developing his own scholarly arguments on at least two occasions.[139] First, in *Bork and Beethoven*, Posner views the law's originalist movement from the perspective of its analogous authentic performance movement in music.[140] Then, in *The Problems of Jurisprudence*, Posner queries: "When a performing musician 'interprets' a work of music, is he expressing the composer's, or even the composition's, 'meaning,' or is he not rather expressing *himself* within the interstices of the score?"[141]

In the examples above, scholars and jurists have found music a useful metaphor for unpacking the dynamic of legal interpretation from text to performance (or application). In this essay, I employ it for a somewhat different purpose: to explain the intellectual process through which a university mission is realized. I do so by narrowing the metaphor to the jazz idiom, in spite of Levinson and Balkin's advisory that jazz, bearing in mind its "deliberately improvisatory form," might prove a problematic metaphor.[142] Certainly, given their focus on the interpretation of text and of composed music, the jazz metaphor would be unwieldy for their purposes.

In a recent article, however, Peter Margulies employs the jazz metaphor to striking effect.[143] Margulies's thesis is that outsider scholars in law often suffer under the same kind of opprobrium that their innovative counterparts in jazz experience when they attempt to express their "double consciousness"[144] of insider and outsider status within the culture.[145] Margulies analogizes the criticism that Duke Ellington endured because he integrated classical musical "form with 'social and cultural content'" that reflected "the achievements, aspirations, and frustrations of African-Americans."[146] His compositional double-vision, which consisted of integrating the Western musical canon's form with an

139. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

140. Posner, *Bork and Beethoven*, *supra* note 139, at 1366.

141. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 139, at 271.

142. Levinson & Balkin, *supra* note 123, at 1623.

143. *See* Peter Margulies, *Doubting Doubleness, and All That Jazz: Establishment Critiques of Outsider Innovations in Music and Legal Thought*, 51 U. MIAMI L. REV. 1155 (1997).

144. *Id.* at 1158.

145. *Id.* at 1158 n.8.

146. *Id.* at 1156.

aesthetic of outsider representations of the canon, cost him the Pulitzer Prize in 1965 because it "defied the critical consensus about the aesthetics of form in European art music."[147] Similarly, says Margulies, legal scholars who seek to infuse tonal patterns that reflect the African-American experience[148] in the traditional law review article genre (by expressing their analysis in subjective narratives), have met with disfavor by a legal establishment that spans the jurisprudential spectrum.[149] It is instructive that the "double-voiced" rhetorical strategy of these scholarly narratives in law is often called "signifying" in African-American discourse.[150] "Signifying" has been roundly criticized by the establishment in music and literary theory as well as in law, the three disciplines discussed in this article. It should also be noted that Margulies, like Levinson and Balkin, attributes the vexation of the establishment principally to the anxiety-inducing fragmentation of the modern age.[151] Margulies intimates that, as a result of these sensibilities, the establishment across the disciplinary divides insists on rigid categories.[152] An example of this can be seen by contrasting the traditional form of law scholarship and non-scholarly forms like narratives that illuminate outsider perspectives on law.[153] This suggests that the establishment seeks stability and reassurances about meaning by imposing categorical separations between form and experience.[154]

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147. *Id.*

148. *Id.*

149. *Id.* at 1159. Mark Tushnet criticized Professor Patricia Williams's use of the double-voiced, unresolved narratives in legal scholarship. *Id.* Other scholars criticizing the use of such narratives in legal scholarship include Daniel Farber and Suzanna Sherry. *Id.* at 1157.

150. *Id.* at 1170 n.77 (citing Ralph Ellison, *Homage to Duke Ellington on His Birthday*, *in* THE DUKE ELLINGTON READER 394, 398–99 (Mark Tucker ed., 1993)).

151. *Compare id.* at 1161, *with* Levinson & Balkin, *supra* note 123, at 1630.

152. Margulies, *supra* note 143, at 1161–62.

153. *See id.* at 1161.

154. *Id.* Margulies explains it this way:

> In turning away from the representation of experience, modernism also turns away from aesthetic strategies which promote representation. For example, perspective in painting produces the illusion of depth—the representation of three dimensions on the two-dimensional canvas. Emphasizing the flatness of painting by dispensing with perspective is an archetypal modernist move. Similarly Western music uses a variety of resources for representational purposes, including tonal centers, or keys; diatonic scales and chords, or harmonies, based on those tonal centers; and fixed tempos, involving regular beats and rhythmic accents. For modernists, such devices only represent ornament and illusion. Uncovering music's intrinsic impulses requires dispensing with

By contrast, the double-voiced texture of "signifying," in law scholarship and in the arts, finds stability and meaning precisely in a dialogue which integrates form and experience.[155] "Signifying" has been explained as a

> mediating strategy for discourse [that] implies its interaction with *things signified*, its position between or among texts .... Signifyin[g] represents, then, an engagement with preceding texts so as to "create a space" for one's own. This clearing of new space takes place by means of "riffing upon [the] tropes" of the received tradition ... in which these texts occur.[156]

The outsider finds a place within the discipline by identifying, quoting, and reshaping the received tradition through an exposition of the outsider's experience within it. Margulies shows how Ellington employed "signifying" in his *Black, Brown and Beige* composition to integrate the Western canonical form with "the achievements, aspirations and frustrations of African-Americans."[157] He then illustrates how Professor Patricia Williams employs the same strategy in her unresolved narratives to reshape legal theory and doctrinal analysis by making a place for the alienation experienced by the other.[158] In so doing, Margulies believes that Professor Williams has defied the canon by explaining it to itself in a different way—by inviting or compelling the canon to see itself differently.[159] Thus, Margulies effectively employs the jazz idiom to explicate his theory about the exclusionary bias of the high modernism establishment against double-voiced strategies in law and in music which attempt to "reconcile alienation with the yearnings for redemption resonating both in marginalized communities and in all humanity."[160] Margulies concludes, "Ellington and Williams blur the boundaries of elite and

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> tonal centers, dismantling diatonic harmony, and disrupting regular tempi, thus making clear that music is a sequence of sounds and timbres with no necessary connection to mood, image, or narrative.

Id. at 1162 (citations omitted).

155. *Id.* at 1162–63

156. Gary Tomlinson, *Cultural Dialogics and Jazz: A White Historian Signifies*, *in* DISCIPLINING MUSIC: MUSICOLOGY AND ITS CANONS 65 (Katherine Bergeron & Philip V. Bohlman eds., 1992) (quoting HENRY LOUIS GATES, JR., THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM 124 (1988)).

157. Margulies, *supra* note 143, at 1156; *see also* DUKE ELLINGTON, *Black, Brown and Beige*, THE DUKE ELLINGTON CARNEGIE HALL CONCERTS (Prestige 1943).

158. Margulies, *supra* note 143, at 1157.

159. *See id.* at 1190–94.

160. *Id.* at 1194.

vernacular by deconstructing and reconstructing blues harmony and tonality, or rights talk and narrative, to achieve a richer expression of identity."[161]

I employ the jazz idiom metaphor in a different, and somewhat broader, context. From this perspective, the antipathy of the establishment toward the persistence of the double-voiced strategy in jazz and in law scholarship (and literary theory as well) is but a contemporary instance of the intellectual dialogue through which knowledge and understanding are refined and expanded the process that the university mission is dedicated to preserve. Whereas Margulies juxtaposed the outsider status of jazz with the insider/canonical status of Western European music to develop his jazz metaphor,[162] I develop a jazz metaphor within the idiom itself. For my purposes in explaining the dialogic process that the university mission is ultimately dedicated to nurture, jazz is the ideal metaphor; not only because jazz, emanating from a double-voiced or "signifying" tradition, is by its very nature dialogic, but also because, ironically, it has recurringly developed its own versions of the canon. Thus, jazz exhibits with its repeated patterns of the insider/outsider, establishment/canonoclasts dialectic, the same dialogic dynamic that is at the heart of the scholarly process.

V. THE JAZZ METAPHOR EXPLICATED

"Like the canon of European music [and of law and literary theory], the jazz canon is a strategy for exclusion."[163] It is "a closed and elite collection of 'classic' works that together define what is and isn't jazz."[164] And, like the canons of literary and legal theory, the jazz canon is periodically challenged by, and ultimately forced to include, the outsider.

Many Americans are generally aware that the jazz canon has expanded over time to include diverse expressions of the idiom.[165] While the moment of the birth of jazz is somewhat shrouded in the mists of history, most jazz scholars identify its precursors as

161. *Id.*
162. *See id.*
163. Tomlinson, *supra* note 156, at 76.
164. *Id.*
165. TED GIOIA, THE HISTORY OF JAZZ 7 (1997).

including "ring shout" (a West African ritual dance ceremony),[166] ragtime,[167] and blues.[168] Nineteenth century African-American musical terms would certainly include "slave chants, railroad gang songs, field hollers [spirituals] and . . . church music."[169] The richly diverse roots of jazz express the very antithesis of the canon. They converged into what is generally viewed as the first version of jazz—Dixieland or New Orleans jazz. But what began as a convergence of diverse influences ultimately replicated a familiar historical pattern whereby the canon initially excluded the other only to be expanded ultimately by it.

Generally speaking, the various other voices that sequentially challenged the canon and then expanded it include (after its seminal expression in Dixieland jazz) swing, bebop, modern, cool, West Coast, soul-funk, hard-bop, modal, free jazz, and fusion.[170] As each of these canonoclasts challenged the existing tradition, they were met with strenuous objection by the establishment and its constituents.[171] So, for example, when Miles Davis introduced jazz-rock fusion in the late 1960s and early 1970s, "the coercive power of the institutionalized jazz canon" rose up to oppose it and even the most highly respected jazz experts revealed a "stark inability to hear Davis's fusion music except against the background of what jazz was before it . . . . [T]hey hear[d] only a departure from the canonized jazz tradition of their own making," and, therefore, condemned it.[172] Specifically, Davis's fusion was chastised for having "dissipated" the solo and for lacking "'linear development' and melodic 'coherence.'"[173] Frequently the critics condemned fusion as being commercialized,[174] charging Davis with the transgression of compromising the purity of "genuine black expression."[175] It is apparent that the *cogniscenti* in the jazz tradition bear a striking resemblance to their counterparts who act as guardians of the canon across the disciplinary landscape and who generally resist outsider incursions into the canon by

166. *Id.* at 4.
167. *Id.* at 20.
168. *Id.* at 19.
169. GROVER SALES, JAZZ: AMERICAN'S CLASSICAL MUSIC 49–50 (1992).
170. *Id.* at 223–25.
171. *See, e.g.*, Tomlinson, *supra* note 156, at 81.
172. *See id.*
173. *Id.*
174. *Id.* at 82.
175. *Id.* at 83.

deploying elitist and formalistic standards against the innovations of the other.[176] Decades later, now that Davis's fusion has been accepted into the pantheon of the canon, *cogniscenti* laud fusion as the embodiment of "signifying"—the very essence of the African-American strategy of fusing classical form and an experiential vernacular.[177] They praise Davis as a classic dialogician.[178]

> Miles's special capacity and ability is to hold up and balance two musical (social) conceptions and express them as (two parts of) a single aesthetic . . . . Miles understood enough about the entire American aesthetic so that he could make the *cool* statements on a level that was truly *popular* and which had the accents of African-America included not as contrasting anxiety or tension but as an equal sensuousness![179]

In this manner, innovation becomes part of the canon, thereby expanding and refining our understanding and appreciation of the reach and depth of the jazz idiom. A similar process was experienced by fusion's early predecessor, swing, which was condemned at its inception in the 1920s by the existing canon of Dixieland as "counterfeit" and "commercially degraded."[180] An analogous schism erupted in the 1940s when Charlie Parker, Dizzy Gillespie, Theolonius Monk, and others (who are now comfortably ensconced in the "Pantheon" of jazz greats) introduced bebop and claimed a place in the jazz idiom.[181] In the 1940s the schism cast bop as "art music" which was pitted against the more easily accessible Dixieland and swing.[182] "Specifically, the discourse [about this canonclastic jazz form] was developed around binary oppositions such as art versus commerce, nature versus culture, technique versus affect, European versus native, authenticity versus artificiality, and, of course, black versus white."[183] Most of which, as we have seen, have their analogues in the canonical wars that roil the universities on an ongoing basis; the literary theory debates, the original intent disputes, the altercations over form in legal scholarship and so forth. As each culture

176. *Id.* at 75–76.
177. *Id.* at 78–79.
178. *Id.* at 84–85.
179. *Id.* (citations omitted).
180. KRIN GABBARD, JAMMIN' AT THE MARGINS: JAZZ AND THE AMERICAN CINEMA 103 (1996).
181. *Id.*
182. *Id.*
183. *Id.* at 104.

war subsided in jazz, the dust settled only to reveal an expanded and refined the canon. As Professor Frank Michelman has explained in another context, the value of an expanded understanding achieved through a dialogic process is that it is transformative rather than dichotomous.[184] It is not a zero-sum game. With respect to the culture wars over the jazz canon, it has been stated that

> [f]rom today's perspective, neither camp vanquished the other. Dixieland never really went away—it is still being played by men in straw hats and arm garters in virtually every major city throughout the world. Record companies . . . regularly add new discs to their catalogs of traditional and New Orleans-style jazz, much of it played with great finesse and authority. The bebop of the post war era [along with the swing that proceeded it and the fusion that followed it] . . . has . . . become the conventionalized, canonical style of a group of earnest young musicians . . . .[185]

One perspective that has enhanced the dialogic process of competing sounds in the jazz tradition is "[t]he idea that jazz was undergoing an *organic* growth process . . . . [T]his notion of an organic, evolutionary history of the music has become an essential article of faith in the claim that jazz is art."[186]

One attribute that clearly distinguishes jazz from the Western European tradition in music, literature, and law is that improvisation—not composition—famously dominates the creative process in jazz while the latter are heavily composed.[187] There are notable exceptions, of course. Both Mozart and Bach were distinguished keyboard improvisation artists while Duke Ellington and Jelly Roll Morton were famous for their compositions.[188] Nevertheless, it makes sense to ask whether the distinctive role that improvisation plays in the evolution of the jazz canon so distinguishes it from the evolution of the canon in other disciplines that no meaningful comparisons can be drawn between jazz and law or literary theory. In short, does improvisation render the jazz metaphor unworkable? A monumental and path-breaking

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184. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503–07, 1528–32 (1988) (positing a dialogic jurisgenerative process whereby inclusion of the outsider increases the political freedom of the insiders).

185. GABBARD, *supra* note 180, at 105.

186. *Id.*

187. SALES, *supra* note 169, at 11.

188. *Id.*

book about the creative process in jazz suggests that it does not.[189] Paul Berliner's *Thinking in Jazz* is an 800-page study that meticulously records the rigorous training whereby a jazz artist prepares to improvise.[190] A review of its major findings may prove instructive. Berliner begins by defining improvisation according to its common understanding among jazz artists; that it represents the outer reaches of a spectrum of interpretation of existing musical forms within the tradition.[191] At the near end of the interpretative spectrum, jazz artists (like theorists in the discipline of law) draw upon a number of techniques to give individual voice to their own interpretation of existing melodies (theories or doctrines) by "embellishing" them.[192] At the far end of the spectrum, jazz transforms existing melody "into patterns bearing little or no resemblance to the original model or us[es] models altogether alternative to the melody as the basis for inventing new [forms]."[193] Obviously, "improv" can also produce an entirely new song or even a new genre (like canonoclasts in law or any other academic discipline) by gradually reaching beyond existing boundaries and current understandings of the idiom.[194] What Berliner's study makes evident is that "improv" (like canoclasm in the academic dialogic) presupposes intensive training in the canon. Improvisation, and even its less canonoclastic counterpart—interpretive "embellishments" of extant compositions—assume and demand a mastery of the existing canon.[195] The training procedures and approaches by which the mastery is achieved are various, but certainly include techniques that have analogues in the pedagogy of other disciplines: direct training through apprenticeships or formal course work and indirect training through interaction with performers and colleagues, along with a generalized shaping of jazz consciousness by the surrounding cultural milieu.[196] Thus, instruction in the jazz idiom finds easy parallels with the devel-

189. *See* PAUL F. BERLINER, THINKING IN JAZZ: THE INFINITE ART OF IMPROVISATION (Phillip V. Bohlman & Bruno Nettl eds., 1994).

190. *See id.*

191. *Id.* at 67–71.

192. *See id.* at 67–69. A partial list of these techniques includes key transposition, melody intensification through altering "accentuation, vibrato, dynamics, rhythmic phrasing, and articulation," and coloring melody with various tonal effects like slurring. *Id.* at 67.

193. *Id.* at 70.

194. *See id.*

195. *See id.* at 64.

196. *Id.* at 37, 41–42. These are typically identified in the genre as "hanging out" and participation in "jam sessions." *Id.*

opment of knowledge and expertise in most academic disciplines.[197] The basics of jazz training are a continuum from "'imitation to assimilation to innovation.'"[198] It is instructive that there is a gradual progression from mastering the canon to breaking away from it—a progression that is grounded in a depth and breadth of canonical expertise that the term "improvisation" itself does not convey. Jazz, like its academic counterparts, presupposes a great deal of training within the canon before any viable canonoclasm is possible.[199]

Another characteristic of jazz helps illuminate the dialogic process in other disciplines. The dialogic process expressed in the actual performance of jazz demands a highly developed ability to listen.[200] Like many other aspects of the complex idiom of jazz, jazz artists find it difficult to articulate this refined listening skill with any degree of precision.[201] But the skill permits them to reach a heightened awareness of others and to have assurance that they, in turn, are heard.[202] This allows them to engage the double-voiced consciousness required in the dialogic music of jazz improvisation performance, where the canon is simultaneously challenged and renewed.[203] The following statements from jazz artists and scholars may serve to help us grasp this extremely complex art of reciprocal listening:

> Within horizontal space, musicians seek to create a complementary level of rhythmic activity by improvising patterns whose rhythmic density is appropriate for the room that others leave for them. In vertical space, they try to improvise in a melodic range that does not obscure the performances of others.[204]

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197. *Id.* at 55–56. There is one important distinction: even at this crucial but elementary level of mastering a musical instrument and coming to terms with the complex musical language of the genre, jazz students are primarily on their own. *Id.* at 51. "The jazz community's traditional educational system places its emphasis on learning rather than on teaching, shifting to students the responsibility for determining what they need to learn, how they will go about learning, and from whom." *Id.*

198. *Id.* at 120.

199. *See id.* at 51–59.

200. *See id.* at 92–94.

201. *See, e.g., id.* at 93 ("It takes a lot of knowledge and experience to be able to [learn], but it becomes so easy to hear pieces in their component parts if you actually do the work yourself.").

202. *See, e.g., id.* at 94 (illustrating how Doc Cheatham was able to hear the music and make himself heard).

203. *See id.* at 363–64.

204. *Id.* at 354.

> Besides shifting complementary positions among streams of patterns representing even-numbered subdivisions or multiples of the beat, performers also respond to one another by inventing asymmetrical counterposing patterns and interjecting fills between the discrete phrases of other artists.[205]
>
> Within the music's ever-changing texture, new phrases that insinuate themselves above, beside, or below other phrases ultimately provide rich ideas that any of the players can seize and combine within their own. Musicians periodically depart from an independent course to echo fragmentary patterns just heard from another. Alternatively, they can reinforce a recurring phrase or any constant element within another member's performance by repeating it together with the inventor, perhaps with rhythmic embellishments.[206]
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> "You can play in a way that either states the time or implies it . . . . My preference is to have someone state the time when the others aren't, so that what the others are doing works against the time. Then you have polytime, and it becomes much more exciting, much more creative."[207]
>
> "Usually everyone takes their cue from the soloist, but anyone could initiate something and we would all follow suit."[208]
>
> [Players] must take in the immediate inventions around them while leading their own performances toward emerging musical images, retaining, for the sake of continuity, the features of a quickly receding trail of sound. They constantly interpret one another's ideas, anticipating them on the basis of the music's predetermined harmonic events.[209]
>
> Among all the challenges a group faces, one that is extremely subtle yet fundamental to its travels is a feature of group interaction that requires the negotiation of a shared sense of the beat, known, in its most successful realization, as striking a groove.[210]

While jazz offers a rich metaphor in many respects for the dialogic process in the academy, it is perhaps this concept of "the groove" in jazz performance that offers the most sophisticated insight into the process and an ideal paradigm for performing within the dialogic process in all disciplines. "The groove" describes an ongoing interchange or conversation between and among performers of the canon and multiple canonoclastic, inno-

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205. *Id.*
206. *Id.* at 355.
207. *Id.* at 353 (quoting musician Walter Bishop, Jr.).
208. *Id.* at 348 (quoting musician Kenny Barron).
209. *Id.* at 349.
210. *Id.*

vative performers.[211] The essence of the paradigm is found in the understanding that the canon is revitalized and sustained only by giving space to canonoclastic voice. A contiguous point also needs to be made: the value of canonoclasm should not undermine our appreciation of the value of the canon. As cognitive theorists can tell us, the human mind requires agreed upon, even culturally constrained, implied structures of categories and classes to make sense of experience, to provide a framework for exploring the possibilities of other interpretations and other aspects of experience, and to shape and foster cultural continuity.

The canon, in any discipline, is our received wisdom.[212] The canon is where we begin. Respect for the canon is deeply embedded in the jazz tradition as it is in the various disciplines within the academy. Much innovation in jazz and in the academy does not challenge or transcend the limits of the canon but seeks to develop or view its possibilities in different ways.[213] Within the jazz tradition, innovation does not necessarily challenge the canon from the outside. It can also operate within the canon. This kind of innovation is expressed, as noted above,[214] in the idiosyncratic "embellishments" jazz artists invent to "exploit" the limits of the canon in "richly inventive and strikingly original ways."[215] Embellishments of the existing canon are common in the scholarship of academic disciplines as well.

"Jazz is paradox . . . . [It is] both conservative and radical, reactionary and revolutionary at the same time."[216] It is also a rich metaphor for the discipline of law. Margulies employs the meta-

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211. *Id.*

212. *See* LEONARD B. MEYER, *Melodic Processes and the Perception of Music, in* THE SPHERES OF MUSIC: A GATHERING OF ESSAYS 157–59 (2000); *see also* Barbara K. Bucholtz, *supra* note 118.

213. *See* LEONARD B. MEYER, *Exploiting Limits: Creation, Archetypes and Style Change, in* THE SPHERES OF MUSIC: A GATHERING OF ESSAYS 190–91 (2000). Meyer states that

> Beethoven overturned no fundamental syntactic rules. Rather, he was an incomparable strategist who *exploited* limits—the rules, forms, and conventions that he inherited from predecessors such as Haydn and Mozart, Handel and Bach—in richly inventive and strikingly original ways. In so doing, Beethoven extended the means of the Classic style. But extending is not transcending—it is not abrogating rules and overturning conventions.

Id. at 190.

214. *See supra* notes 187–99 and accompanying text.

215. *See* MEYER, *supra* note 213, at 190–91.

216. WRITING JAZZ, at xiii (David Metzer ed., 1999).

phor to show how the music establishment debunked Ellington's "signifying" strategies in much the same way that the academic establishment in law has critiqued Patricia Williams's use of the strategy in her legal scholarship.[217] I use the metaphor somewhat differently, to explicate the dialogic process in the academy using law scholarship and particularly the scholarship of jurisprudence, as an example.

VI. APPLYING THE JAZZ METAPHOR TO LEGAL SCHOLARSHIP

To the outside observer, the recurring culture wars in jurisprudence—like those over literary theory and English literature—must appear a rancorous, winner-take-all sporting frenzy. Facially, and in the short-term, there is some merit in the observation. But in the long haul and at a more fundamental level, the culture wars in jurisprudence are more closely related to the internecine struggles within and outside of the jazz canon.

For the past three decades, the jurisprudential community has been engaged in a highly contentious struggle for paradigm dominance.[218] Because an adequate description of each theoretical school engaged in the struggle would lead us unnecessarily far afield from our purposes here, a brief identification of the players will have to suffice. They include the legal liberal school,[219] law and economics theorists,[220] critical legal studies[221] (and sibling

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217. *See supra* notes 143–61 and accompanying text.

218. *See, e.g.*, GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995).

219. *See generally* BRUCE ACKERMAN, WE THE PEOPLE (1991); RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); JOHN RAWLS, POLITICAL LIBERALISM (1993); JOHN RAWLS, A THEORY OF JUSTICE (1971); Owen M. Friss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Owen M. Friss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

220. *See generally* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); RICHARD POSNER, THE ECONOMICS OF JUSTICE (1981). The following sources can be referred to for critiques of law and economics theory: Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769 (1979); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Mark Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics,"* 33 J. LEGAL EDUC. 274 (1983); Duncan Kennedy, *A Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); and Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

221. *See generally* PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998); IAN WARD, KANTIANISM, POSTMODERNISM AND CRITICAL LEGAL THOUGHT (1997).

theoretical schools like critical race theory[222] and feminist jurisprudence[223]), recent configurations of natural law/natural rights theory,[224] legal positivism, and legal formalism.[225] The jazz idiom offers a fresh way of viewing law's version of the Thirty Years War in at least three respects. First, each of these jurisprudential schools is either a creative embellishment of or an innovative challenge to antecedent schools of jurisprudence.[226] Hence, they

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222. *See generally* DERRICK BELL, *The Unspoken Limit on Affirmative Action: The Chronicle of the DeVine Gift*, *in* AND WE ARE NOT SAVED 140 (1987); RANDALL KENNEDY, RACE, CRIME, & THE LAW (1997); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989), *cited in* Steven L. Winter, *Fast Food and False Friends in the Shopping Mall of Ideas*, 64 U. COLO. L. REV. 965 (1993); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

223. *See generally* DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW (1991); STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM (2000); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995); Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387 (1997); Linda J. Lacey, *Introducing Feminist Jurisprudence: An Analysis of Oklahoma's Seduction Statute*, 25 TULSA L.J. 775 (1990); Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1985); Ann C. Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

224. *See generally* ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993); Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J. L. & PUB. POL'Y 655 (1997); Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992).

225. *See generally* Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145–61 (Sanford Levinson ed., 1995); Frederick Schauer, *Constitutional Positivism*, 25 CONN. L. REV. 797 (1993); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J. L. & PUB. POL'Y 645 (1991); Frederick Schauer, *The Second Best First Amendment*, 31 WM. & MARY L. REV. 1 (1999). Today, the leading legal proponent of legal formalism is Justice Antonin Scalia. For an exposition of his "plain meaning" interpretation, see Abner S. Greene, *The Work of Knowledge*, 72 NOTRE DAME L. REV. 1479 (1997).

226. Here, I refer to the major schools of American jurisprudence, each of which claimed normative status during a particular period in American history, challenging the pre-existing Establishment and eventually joining the ranks of the canon. Roughly, very roughly, these include natural law theory during the seventeenth and eighteenth centuries, see, e.g., HUGO GROTIUS, 2 DE JURE BELLI AC PACIS LIBRI TRES 12 (Francis W. Kesey trans., Clarendon Press 1925) (1690), *cited in* Barnett, *supra* note 224, at 657; legal positivism and legal formalism during the latter part of the nineteenth century and the early part of the twentieth century, see, e.g., H.L.A. HART, THE CONCEPT OF LAW (1961); pragmatism, see, e.g., John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 22–26 (1924); legal realism in the mid-twentieth century, see, e.g., Karl M. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), and legal liberalism in the

are canonoclasts which, at some point in American legal history, stormed the citadel of the establishment canon. By way of example, indulge this image: law and economic theorists embellished realism by repeating the tropes created by earlier progressives and realists, like Judge Learned Hand[227] and Judge Benjamin Cardozo.[228] Then they developed the embellishment by incorporating classical economic theory into legal analysis. The paradigmatic use of economic theory initially posed a canonoclastic challenge to the legal liberal establishment.[229] But, ultimately, law and economic theory was folded into the canon and joined the pantheon. Second, jurisprudential challengers—like their canonoclastic counterparts in jazz—are always met with strenuous resistance by the establishment. Third, if the past is prelude, then future challengers, like their predecessors, will be folded into the canon in a process which might be characterized as requiring canonoclasts to relinquish normative claims by accepting descriptive status. That is, like their counterparts in jazz, at the end of the process, innovation in legal theory expands the canon rather than replacing it. To extend the example of law and economic theory, liberal theory was not supplanted by law and economic theory any more than liberalism's predecessors—realism, positivism/formalism, or natural law—were ultimately supplanted by their challengers. As evidence, recall how commonplace it is that both the majority and minority in a Supreme Court decision leap effortlessly from jurisprudential school to jurisprudential school in support of their respective positions.[230] Like dixieland, fusion,

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latter half of the twentieth century, see *supra* note 219.

227. *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (declaring that the duty of a barge owner in the instant case "as in other situations to provide against resulting injuries is a function of three variables: (1) the probability that she [the barge] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions."). Judge Hand's measure has the unmistakable contours of what we have come to call a "cost-benefit analysis."

228. *See, e.g.*, Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921) (deciding that where the breach was not material to the construction contract and its terms were substantially performed, then the owner's remedies are more properly measured under a diminution of value test, rather than under a cost of replacement). Judge Cardozo's rule is, of course, premised on consideration of economic waste.

229. *See* Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1195–96 (1989). For an example of the jazz establishment's hostile critique of Miles Davis's innovative fusion, see *supra* notes 172–76 and accompanying text. For the legal establishment's hostile reception to legal realism, see Schlag, *supra*, at 1196 n.2. For the legal establishment's reaction to legal liberalism and law and economic theory, see *supra* notes 227-29.

230. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970). In *Goldberg v. Kelly*, both Justice

and bop, jurisprudential canonoclasts influence rather than replace members of the pantheon. The law's understanding of its jurisprudential foundations is expanded and the canon is transformed in accord with the university mission of expanding human understanding and knowledge. This evolutionary development of jurisprudential forms acts as a performance art in jurisprudential scholarship, both in its text and in its abundant footnotes.[231] Like jazz performance, canonoclastic jurisprudential scholarship quotes, references, riffs, gestures toward, and teases the boundaries of the canon. In this manner the canon is preserved, revitalized, revisioned and transformed:

> Every so often in the history of jurisprudence, a new idea, perspective, or conceptual structure appears on the academic scene purporting to cast doubt on the legitimacy of the way the legal profession has come to understand law and adjudication. Sometimes the emergence of a new jurisprudential perspective or theory gives rise to a new intellectual or political movement resulting in paradigmatic shifts and real revolution in legal theory and practice. More often than not, it is quickly absorbed by the prevailing legal paradigm, resulting in modification, perhaps revision, but not in revolution. Invariably, resolution will depend upon the degree of discontent, ferment, and commitment spurred by both critics and advocates of the prevailing paradigm.[232]

Within the discipline of law as in that of literary theory, contentious culture wars serve the university mission. They are, in fact, the very process by which the mission is realized.[233] In that

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Brennan, writing for the majority, and Justice Black, in his dissent, deploy jurisprudential arguments from natural law, legal positivism/formalism, and legal realism in support of their respective positions. *See id.* at 264–65; *id.* at 275–77 (Black, J., dissenting); *see also* Craig v. Boren, 429 U.S. 190 (1976) (including a similar jurisprudential *pas de deux*).

231. *See* Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 599 (1989).

232. *Id.*

233. For an excellent discussion casting this dynamic as one in which jurisprudential schools adopt new "valences" over time to fit new contexts and new situations, see J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993). Balkin's argument brings to mind Justice Rehnquist's comment, in an entirely different context, that the combatants tend to "dance the quadrille." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 539–40 (1978). In describing the position taken by the parties in that case with respect to the licensing procedure for nuclear reactors, Justice Rehnquist opined that "it appears here . . . that in this Court the parties changed positions as nimbly as if dancing a quadrille." *Id.* (citation omitted). Balkin, for example, writes:

> Some applaud the "natural law" innovations of the Warren Court while criticizing those of the *Lochner* Court; others celebrate Justice Holmes' positivism

sense, they are analogous to the organic development of the jazz idiom.

Since disciplinary culture wars are the process by which the university mission is accomplished, the question becomes whether the *Southworth* case, which dealt with the university culture wars in an extracurricular setting, adequately acknowledges and protects the mission.[234] It would appear that it does not.

VII. PROTECTING THE UNIVERSITY MISSION UNDER CURRENT PRECEDENTS

Recall that the *Southworth* majority ruled that the University of Wisconsin's student activity fee program must be viewpoint neutral to pass constitutional muster—that is to say—to withstand, the First Amendment challenges raised by the student petitioners.[235] And, in *Southworth*, the viewpoint neutrality rule was applied to an extracurricular program—a mandatory student fee program for extracurricular student projects.[236] However, in spite of reassuring dicta to the contrary (that the same rule "likely" would not apply to curricular and other academic programs), a close reading of the case reveals that no bright-line analytical distinction was drawn between the two realms of intellectual discourse and activity.[237] To summarize the analysis of the case found in Part I of this article, the *Southworth* viewpoint neutrality test is pernicious because it threatens the university mission to protect the dialogic process across the entire spectrum of university programs in the following respects: (1) its scope is indeterminate, given the incorporeal nature of the various fora of academic debate and given the uncertain and porous boundaries

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> while simultaneously denouncing that of Chief Justice Rehnquist. Formalism sometimes looks good to us, yet at other points in history the rejection of formalism looks even better. Chief Justice Marshall's judicial activism of the 1820s is revered by liberals, while Justice Peckham's deformations of the 1900s are condemned; Justice Brennan's judicial creativity in the 1960s is extolled, while that of Justice Scalia in the 1980s is disparaged.

Id. at 869.

234. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 220–23 (2000).

235. *Id.* at 221.

236. *Id.* at 233–34.

237. *See supra* text accompanying notes 75–79.

the *Southworth* Court drew between curricular and extracurricular speech, and between tax-supported and fee-supported speech; (2) its applicability is uncertain given the evidentiary stipulation upon which its holding rests; and (3) it has the capacity to narrow debate and eliminate programs or fora for discourse by imposing untenable financial and administrative constraints on open discourse.[238]

In that respect, it is important (as Part II notes) that the purported goal of the *Southworth* plaintiffs was to "defund" their opponents' policy positions, not to "fund" their own policy positions.[239] The relevancy lies in the fact that the plaintiffs originally argued their case under *Abood* and *Keller*.[240] The Supreme Court found *Rosenberger* and its viewpoint neutrality analysis more appropriate to *Southworth,* but it agreed with the students that their First Amendment rights were properly characterized as *Abood/Keller* rights.[241] But are they? *Abood / Keller* First Amendment rights are "exclusionary" rights—the rights not to support "offensive" speech.[242] The crux of the *Abood* and *Keller* arguments in *Southworth* was to prevent the imposition of fees to fund programs which: (1) supported ideas offensive to plaintiffs; and (2) went beyond the mission of the organization imposing the fees.[243] But *Southworth* First Amendment rights should be "inclusionary" rights. In that precise sense, casting the plaintiffs' First Amendment rights as *Abood / Keller* rights appears to be distinctly inappropriate because, as Parts III–VI of this article explain, the university mission is, implicitly, to protect speech (at least some of which is offensive to some members of the university community) and to compel those of us who may be offended to listen attentively to, and associate collegially with, those whose ideas may offend us. It is the dialogic negotiation between and among speech that is offensive (to someone) that expands knowledge. Thus, *Southworth* is a dangerous precedent. It may seriously impede the university mission because, as we have seen, often contentious dialogues, popularly labeled "culture wars," are the very conduit through which the university mission is achieved.

238. *See supra* Part II.
239. *Southworth*, 529 U.S. at 227.
240. *Id.*
241. *Id.* at 231.
242. *See supra* notes 16–20 and accompanying text.
243. *See supra* notes 11–20 and accompanying text.

Through that process dichotomies may eventually cohere, and the canons will be expanded to include insights and understandings of the canonoclasts. Given the university mission, students' First Amendment rights are more properly characterized as rights to be heard and to be included, rather than the rights to silence, "defund," or exclude. First Amendment rights under *Southworth* are not analogous to *Abood/Keller* rights, and to describe them that way invites a dangerous reading of viewpoint neutrality.

Several final questions should be explored: Is there any doctrinal counterpoise to *Southworth*? Has the Supreme Court previously developed any rule or doctrine that would safeguard the university mission from the threat that *Southworth* poses? Does existing Supreme Court case law sufficiently protect the dialogic negotiations or "culture wars" in the classroom and in scholarship from constitutional challenges articulated under the rubric of First Amendment rights? A review of the higher education academic freedom case law to which the *Southworth* Court referred suggests there is none.[244]

These higher education, academic freedom cases are long on expansive paeans to academic freedom, but short on doctrine that would serve to protect dialogic negotiations within the academy from some version of the *Southworth* viewpoint neutrality rule.[245] For example, in *Regents of University of Michigan v. Ewing*,[246] the Court broadly stated "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself."[247] However, the *Ewing* Court's holding concerned only a narrow due process question with regard to university policy.[248] In *Sweezy v. New Hamp-*

244. *See, e.g.*, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995).

245. *See supra* Part II.

246. 474 U.S. 214 (1985).

247. *Id.* at 226 n.12 (citations omitted).

248. *Southworth*, 529 U.S. at 237–38 (Souter, J., concurring). In this section, I mention only those precedents cited by the *Southworth* Court. Other Supreme Court cases have touched on academic freedom issues in higher education. *See, e.g.*, Central State Univ. v. Am. Ass'n of Univ. Professors, Cent. St. Univ. Chapter, 526 U.S. 124 (1999) (holding that statutorily-imposed faculty workload standards at public universities did not violate the Equal Protection Clause under a rational-basis analysis); Univ. of Pa. v. EEOC, 493 U.S. 182 (1990) (finding that neither the common law nor the First Amendment right of academic freedom of a university allowed a university to refrain from disclosing confidential peer review materials relevant to allegations of racial and gender discrimination in the

shire,[249] Justice Frankfurter's concurring opinion contained an expansive statement about the university mission.[250] *Sweezy*'s majority opinion, however, dealt with the constitutional limits imposed upon a state legislature's investigation into the content of a professor's lecture.[251] In *Sweezy*, the inquiry was initiated by the New Hampshire Attorney General pursuant to the State's "[s]ubversive organizations" laws, which made members of "subversive organizations" or other "subversive persons" ineligible for employment by the State (including its public universities).[252] The Court decided the investigation deprived Professor Sweezy of his Fourteenth Amendment due process rights.[253] Similarly, *Shelton v. Tucker*[254] dealt with a Fourteenth Amendment challenge to an Arkansas law requiring professors to disclose their membership in or contributions to organizations.[255] The Court struck down the statute on the basis that it was facially overbroad.[256] Again, the Court's narrow holding rested on broad language extolling the virtues of academic freedom.[257] Two other precedents, *Keyishian*

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tenure process); Minn. St. Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 288 (1984) (holding that "assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting," a state law requiring professional public employees to "meet and confer" with public employers only through professional employees' exclusive bargaining representative does not violate free speech rights of professors); Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736 (1976) (holding that a state statute authorizing the payment of monies to private colleges and universities did not violate the Establishment Clause); Tilton v. Richardson, 403 U.S. 672 (1971) (determining that the congressional objective for the Higher Education Facilities Act of 1963 was appropriately secular, but its provision requiring only a twenty-year period of nonsectarian use of buildings constructed by funds made available by the Act violates the Constitution). None of these cases, however, address the problems created by the *Southworth* decision.

249. 354 U.S. 234 (1957).

250. *Id.* at 262 (Frankfurter, J., concurring).

> In a university knowledge is its own end, not merely a means to an end . . . . A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—"to follow the argument where it leads." This implies the right to examine, question, modify or reject traditional ideas and beliefs.
>
> . . . .
>
> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.

Id. at 262–63 (citation omitted).

251. *Id.* at 254–55.

252. *Id.* at 236.

253. *Id.* at 235.

254. 364 U.S. 479 (1960).

255. *Id.* at 480.

256. *Id.* at 490.

257. *Id.*

v. Board of Regents of the University of the State of New York[258] and *Wieman v. Updegraff*[259] also considered constitutional challenges to state "subversive activity" and "loyalty oath" legislation during the Cold War and also found the legislation to be unconstitutionally vague and overbroad.[260] While these precedents undoubtedly established some important safeguards, they dealt exclusively with the free speech and free association rights of individual professors against oppressive state action. In spite of broad statements in support of academic freedom, none of them established specific doctrinal standards with which to safeguard the university mission where, as in *Southworth*, students or other partisans engaged in various culture wars alleged that the dialogic process of university life offended their sensibilities and their constitutional rights of free speech, free association and free exercise.

Two cases prior to *Southworth* considered the mission of the public university under a First Amendment (free exercise) challenge: *Rosenberger*, (which crafted the viewpoint neutrality rule adopted by *Southworth)* and *Widmar v. Vincent*.[261] Both of these cases implicated the Religion Clauses of the First Amendment.[262]

In *Widmar*, the Court was asked to decide whether a registered student group that wished to use facilities at the University of Missouri at Kansas City for religious worship and discussion could be excluded by a University regulation prohibiting the use of facilities for religious worship or instruction.[263] The University argued that the regulation was justified, even required, by the Establishment Clause and by the University's stated mission to provide a "'secular education'" to its students.[264] The Court found that neither the University's interpretation of its mission nor the Establishment Clause justified exclusion of the religious group.[265] Rather, the Court found the public forum doctrine to be determinative and found that the University's content-based exclusion of

258. 385 U.S. 589 (1967).

259. 344 U.S. 183 (1952).

260. *See Keyishian*, 385 U.S. at 609–10; *Wieman*, 344 U.S. at 192.

261. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Widmar v. Vincent, 454 U.S. 263 (1981).

262. *See Rosenberger*, 515 U.S. at 823; *Widmar*, 454 U.S. at 270.

263. *Widmar*, 454 U.S. at 264–65.

264. *Id.* at 268.

265. *Id.* at 271.

the student group from facilities generally open to student groups served no compelling state interest.[266] Allowing the students to use the University's facilities would not fail *Lemon's* three-pronged Establishment Clause test, and the secular mission of the University did not require exclusion of religious groups from an (otherwise) "open forum."[267]

In *Rosenberger,* the Court found that a viewpoint-neutral student activity fee program allocating funds to a student newspaper that advocated a particular religious view did not offend the Establishment Clause.[268] In so doing, *Rosenberger* framed the issue, as did *Widmar*, as a public forum case that required vigorous scrutiny of content-based discrimination.[269] The *Rosenberger* majority invoked the traditional university mission of free and open inquiry in support of its conclusion that the content-based exclusion was prohibited.[270]

The permissive thrust of *Rosenberger* was then turned into a requirement in *Southworth*, and this is the issue which concerned the concurring justices.[271]

> The majority today validates the University's student activity fee after recognizing a new category of First Amendment interests and a new standard of viewpoint neutrality protection. I agree that the University's scheme is permissible, but do not believe that the Court should take the occasion to impose a cast-iron viewpoint neutrality requirement to uphold it .... Instead, I would hold that the First Amendment interest claimed by the student respondents ... here is simply insufficient to merit protection by anything more than the viewpoint neutrality already accorded by the University ....[272]

The concurring Justices' concerns point to the open-ended nature of a new limitation on the university mission: viewpoint neutrality.[273] Viewpoint neutrality, which was first applied in *Southworth* to the "second curriculum" of student activity programs, with no doctrinal bar, only broadly expressed disclaimers, and

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266. *Id.* at 276–77.

267. *Id.* at 271–73.

268. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 846 (1995).

269. *Id.* at 845–46.

270. *Id.*

271. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 236 (2000) (Souter, J., concurring).

272. *Id.* (Souter, J., concurring).

273. *Id.* (Souter, J., concurring).

therefore nothing to prevent its application in other aspects of university life.[274]

VIII. CONCLUSION

What we have come to call the academic "culture wars" are, in fact, the dialogic processes through which the university mission—to expand human knowledge and understanding—is accomplished. This exists, in spite of the fact that these "wars" (as the name suggests) are usually contentious and often bereft of the kind of collegiality the public might expect in university life. Ongoing debates in literary theory and English literature are the most well publicized examples of culture wars in contemporary university life.

The jazz idiom is a useful metaphor for demonstrating how the dialogic process works in the various academic disciplines—how competing claims for normative, even foundational, status between the establishment and any number of outsider positions serve to open up conceptual space, hence to expand knowledge, awareness and understanding in the academic disciplines. Here, I have applied the metaphor to contemporary jurisprudential "culture wars" in the academic discipline of law. Jazz shows how normative claims, on both sides of the battle lines, must yield to a contingent, descriptive status. The result is that the canon is also transformed by relinquishing its previous foundational claims. The canon is revitalized and enlarged by the infusion of new insights and alternative perspectives. "Culture wars" describe the dialogic process that the university mission is designed to foster.

Previously, Supreme Court doctrine relative to the university mission dealt with challenges mounted outside the university community. For the most part, these challenges emanated from enforcement of state statutes inspired by Cold War repressive politics. In the Cold War-era cases, the Court protected individual professors from enforcement of these statutes through First and Fourteenth Amendment analysis under the rubric of academic freedom. But contemporary challenges to the mission are coming from inside the university community, and they come wielding the First Amendment not as a shield but as a sword. *Southworth*,

274. *Id.* (Souter, J., concurring).

the most recent in this line of cases, imposes a new rule on the dialogic process in the extracurricular arena of university life. However, a review of that case and its predecessors reveals that there is no doctrinal bar to its application in the curricular and scholarly areas of university life. *Southworth*, widely touted as a victory for the university, in fact puts its mission in a distinctly tenuous position.

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