

MUST UNIVERSITIES “SUBSIDIZE” CONTROVERSIAL IDEAS?:
ALLOCATING SECURITY FEES WHEN STUDENT GROUPS
HOST DIVISIVE SPEAKERS

by Erica Goldberg*

INTRODUCTION

Across the political spectrum, student groups wishing to host controversial or provocative speakers potentially face prohibitive security fees imposed by their universities. University administrators, who anticipate that audience members hostile to a speaker’s message will create security concerns, too often respond by requiring extra security measures to prevent disruption and charging the student organization for the associated costs.

At the University of Colorado at Boulder, a security fee of over \$2,340 was initially assessed against the student group, Students for True Academic Freedom, for an event featuring professors and activists William Ayers and Ward Churchill.¹ The university predicted a hostile audience reaction to the speakers and required “full patrol” police security, including six police officers, which seemed excessive to the student group.² Both activists had spoken at the university before without the presence of any university security staff.³ The fee was also significantly higher than the \$700 security cost that the student group had budgeted for the event.⁴ The university’s imposition of extra security costs was later reversed, and the costs were covered by the university.⁵

* Justice Robert H. Jackson Legal Fellow, Foundation for Individual Rights in Education; Visiting Assistant Professor, Penn State University, Dickinson School of Law (beginning in August 2011); J.D., Stanford Law School, 2005; B.A., Tufts University, 2002.

¹ See E-mail from Sean W. Daly, student, Univ. of Colorado, to Julie Marianne Wong, V.C., Univ. of Colorado (Mar. 3, 2009, 8:20 MST), <http://www.thefire.org/article/10331.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ The University reversed course after intervention from the Foundation for Individual Rights in Education (FIRE). See *University of Colorado at Boulder: Prohibitive Security Fee Charged for Controversial Speakers*, FIRE, <http://www.thefire.org/case/777.html>.

Temple University's levy of a security fee against the student group Temple University Purpose (TUP), although imposed after an event instead of before, followed nearly the same trajectory.⁶ When TUP hosted a presentation by Dutch politician Geert Wilders, who was tried in the Netherlands for his controversial remarks about terrorism and Islam, the university provided extra security due to anticipated audience reaction.⁷ TUP was never informed that it was responsible for this cost and was later charged \$800 in extra security fees for an event that proceeded without disturbance.⁸ The university ultimately decided to withdraw the fee after strenuous objections.⁹

Scenarios like these are all too frequent occurrences at universities where the administration's desire to avoid bad publicity clashes with student groups' interest in bringing noteworthy and opinionated speakers to campus.¹⁰ At public universities, which must abide by the First Amendment,¹¹ confusion abounds over who bears the burden of extra security costs for controversial speakers and how to determine

⁶ See J. Peter Friere, *Temple University Tacks on Last Minute Fee for Free Speech Event*, WASHINGTON EXAMINER, Jan. 20, 2010, <http://www.sfexaminer.com/blogs/beltway-confidential/temple-university-tacks-last-minute-fee-free-speech-event>.

⁷ Letter from Adam Kissel, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ., to Ann Weaver Hart, President, Temple Univ. (Jan. 4, 2010), <http://www.thefire.org/article/11494.html>.

⁸ *Id.*

⁹ Letter from Valerie Harrison, Assoc. Univ. Counsel, Temple Univ., to Adam Kissel, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ. (Apr. 7, 2010), <http://www.thefire.org/article/11747.html>.

¹⁰ Other examples of student groups challenging extra security costs occurred at the University of California at Berkeley, the University of California at Los Angeles, and the University of Massachusetts. See E-mail from John Lehmanik, Officer, UC Berkeley Police Department, to Berkeley Objectivist Club (Feb. 5, 2009, 3:14 PST), <http://www.thefire.org/article/10325.html>; Letter from Tara E. Sweeney, Senior Program Officer, Found. for Individual Rights in Educ., to Norman Abrams, Acting C., UCLA (Feb. 19, 2007), <http://www.thefire.org/article/7865.html>; *University of Massachusetts at Amherst: Student Group Charged Unconstitutional Security Fee for Controversial Speaker*, FIRE, <http://www.thefire.org/case/784.html>. See also Bob Egelko, *Campus Security Bills for Speakers Challenged*, S.F. CHRONICLE, Mar. 29, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/C/a/2009/03/28/MNMK16J4BI.DTL>.

¹¹ For the purpose of this article, "public universities" will be defined as universities established by the state, at least partially supported by state taxes, and required to abide by the federal Constitution. See, e.g., *Rosenberger v. Rector*, 515 U.S. 819, 822 (1995) ("The University of Virginia, an instrumentality of the Commonwealth for which it is named [is] bound by the First and Fourteenth Amendments . . ."); *Teitel v. Univ. of Houston Bd. of Regents*, 285 F. Supp. 2d 865, 872 (S.D. Tex. 2002) (noting that state universities may charge non-residents higher tuitions, which "is justified by the State's wish to retain an education at a reduced rate for the benefit of its citizens, whose tax dollars, have supported the maintenance of the public universities' services" (citing *Vlandis v. Kline*, 412 U.S. 441, 452-54 (1973))).

the size of the security fee charged to student groups.¹² This confusion is caused by the unique relationship of a university to its student groups.

By contrast, the law governing security fees in traditional public forums,¹³ like parks or streets, is well established. In *Forsyth County v. The Nationalist Movement*,¹⁴ the Supreme Court overturned a county ordinance that “permit[ted] a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order.”¹⁵ The Court held that imposing security fees intended to recoup the expenses of audience response to speech is an impermissible form of content-based regulation.¹⁶ Additionally, the Court held that the county’s ordinance lacked sufficient standards that would prevent an administrator from “encouraging some views and discouraging others through the arbitrary application of fees.”¹⁷

When applying *Forsyth* to a public university’s imposition of security fees for divisive speakers, however, the analysis becomes complicated. The Supreme Court has been somewhat inconsistent in applying First Amendment standards to student organizations at public universities. Further, security fees directly affect the speech of outside, non-student speakers, not the student organizations themselves. To date, no legal scholarship has addressed the constitutionality of imposing extra security fees on student groups to cover the costs of hosting divisive or controversial speakers.¹⁸

This Article argues that public universities must promulgate a content-neutral method of determining security fees. To that end, the Article devises standards to govern the assessment of security fees that do not place unbridled discretion in the hands of administrators.

¹² See Bob Egelko, *Campus Security Bills for Speakers Challenged*, S.F. CHRON., Mar. 29, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/C/a/2009/03/28/MNMK16J4BI.DTL>.

¹³ A traditional public forum is one that “by long tradition or by government fiat ha[s] been devoted to assembly and debate.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). In these types of forums, like streets and parks, the ability of government to limit expressive activity is the most circumscribed. *Id.*

¹⁴ 505 U.S. 123 (1992).

¹⁵ *Id.* at 124, 137.

¹⁶ *Id.* at 134-35.

¹⁷ *Id.* at 133.

¹⁸ The Fifth Circuit recently applied *Forsyth* to a security fees case involving a university, although the university’s policy did not govern only student organizations, and the court of appeals decided the case using the laws applicable to a traditional public forum. *Sonnier v. Crane*, 613 F.3d 436, 438-41, 448-49 (5th Cir. 2010), *opinion withdrawn in part on reh’g* 2010 WL 635873 (5th Cir. 2011). See also *infra* Part III.B.

After following these content-neutral standards, a university must pay for any extra security required. A university should not impose the financial burden of extra security on student groups hosting controversial speakers because it would impermissibly chill the groups' speech.

Part I of this Article begins by charting the animating principles behind *Forsyth*, which involved security fees in a traditional public forum.¹⁹ Part II begins by addressing the context of student organizations at universities by first providing background on how student groups are formed and funded.²⁰ Part II then outlines current Supreme Court jurisprudence and the doctrinal ambiguity surrounding First Amendment standards governing student organizations, from *Healy v. James*²¹ to the Supreme Court's recent opinion in *Christian Legal Society v. Martinez*.²² Part III examines the issue of student organizations sponsoring outside speakers to determine whose rights are at stake.²³ Specifically, Part III explores the students' right to receive information and the outside speaker's right to access the university forum. Part IV argues that *Forsyth*'s rule against administrators possessing "unbridled discretion" and its content-neutrality rule should be applied to the student organizational context.²⁴ Finally, Part V analyzes several schools' security fee policies and devises a way for schools to allocate security fees between the student organization and the university's own funds in a constitutionally acceptable manner.²⁵

I. THE BURDEN OF AUDIENCE REACTION IN A TRADITIONAL PUBLIC FORUM

The Supreme Court has already resolved that the government bears the burden of audience reaction to speech in traditional public forums like streets and public parks.²⁶ *Forsyth County v. The Nation-*

¹⁹ See *infra* Part I.

²⁰ See *infra* Part II.

²¹ 408 U.S. 169 (1972).

²² 130 S. Ct. 2971 (2010). See *infra* Part II.C.

²³ See *infra* Part III.

²⁴ See *infra* Part IV.

²⁵ See *infra* Part V.

²⁶ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed . . . [and i]n these quintessential public forums, the government may not prohibit all communicative activity.").

*alist Movement*²⁷ addressed this burden and held that when protected speech elicits anger and violent reactions from listeners, the government may not charge the speaker for the increased security costs.²⁸ Additionally, the government cannot place an extra financial burden on a speaker whose protected speech necessitates enhanced security measures.²⁹ *Forsyth* provided two distinct yet interrelated reasons for its decision, but left ambiguity regarding whether its rationale applies in other contexts. An examination of the animating principles behind *Forsyth* is necessary before it can be extended to other contexts.

A. Forsyth’s *Dual Reasoning*

In *Forsyth*, the Supreme Court deemed unconstitutional an ordinance enacted in response to a series of civil rights marches in Forsyth County, Georgia.³⁰ The county ordinance provided for the “issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes.”³¹ Permit applicants were required to pay in advance “a sum not more than \$1,000.00 for each day such parade, procession, or open air public meeting shall take place.”³² In determining the permit fee, the “county administrator was empowered to ‘adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed.’”³³

In 1989, the National Socialist Party (NSP) applied for a permit to conduct a rally demonstrating opposition to the federal holiday honoring Dr. Martin Luther King, Jr.³⁴ A fee of \$100 was imposed on the NSP to compensate for the administrator’s time in processing the

²⁷ 505 U.S. 123 (1992).

²⁸ See Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 799 & n.96 (2004) (explaining how, in these types of cases “the First Amendment requires a subsidy from taxpayers generally to demonstrators”).

²⁹ *Forsyth*, 505 U.S. at 135-36 (“Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.” (citing *Gooding v. Wilson*, 405 U.S. 518 (1972); *Terminiello v. Chicago*, 337 U.S. 1 (1949))).

³⁰ *Id.* at 137.

³¹ *Id.* at 126 (quoting Petition for Writ of Certiorari at 98, *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992) (No. 91-538)).

³² *Id.* (quoting Petition for Writ of Certiorari, *supra* note 31, at 119).

³³ *Id.* at 126-27 (emphasis added) (quoting Petition for Writ of Certiorari, *supra* note 31, at 119).

³⁴ *Id.* at 127.

permit.³⁵ Although this sum may have been constitutional as applied to the NSP, the NSP mounted a facial challenge³⁶ to the ordinance instead of paying the fee.

The Supreme Court articulated two independent reasons for overturning the ordinance. First, the Court noted that an administrative scheme requiring a permit and fee before citizens can engage in certain types of public expression constitutes a prior restraint on speech.³⁷ Thus, the Court stated that it must not “delegate overly broad licensing discretion to a government official.”³⁸ The Court found the county ordinance delegated overly broad discretion because “[t]he decision how much to charge for police protection or administrative time—or even whether to charge at all—is left to the whim of the administrator[,]” and is unreviewable.³⁹

The Court explained that this type of overly broad licensing scheme is inconsistent with such time, place, and manner regulations⁴⁰

³⁵ Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 127 (1992).

³⁶ See *id.* A facial challenge to a statute “is not dependent on the facts surrounding any particular permit decision” but is instead concerned with the potential for abuses of power in other circumstances. See *id.* at 133 n.10 (citing *Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 770 (1988)). Thus, although the administrator testified that he “deliberately kept the fee low by undervaluing the cost of the time he spent processing the application,” the specific processing of the NSP’s permit is irrelevant to this facial challenge. See *id.* at 132, 133 n. 10.

³⁷ See *id.* at 130 (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)) (citing *Shuttlesworth v. Birmingham* 394 U.S. 147, 150-51 (1969); *Niomotko v. Maryland* 340 U.S. 268, 271 (1951)). Prior restraints are labeled as such because they limit expression before it is uttered, without a judicial determination. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Courts disfavor prior restraints because they restrict speech before it even reaches its audience. See *Niomotko*, 340 U.S. at 271 (detailing cases condemning ordinances “which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid”); see also *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963))); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) (“[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”). There has also been a special historical abhorrence to prior restraints. The preeminent English legal scholar William Blackstone, for example, believed that there could be no freedom of the press if publications were subject to the prior restraint of a licensing scheme. See 4 WILLIAM BLACKSTONE, COMMENTARIES *152 (“To subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.”).

³⁸ *Forsyth*, 505 U.S. at 130 (citing *Freedman v. Maryland* 380 U.S. 51, 56 (1965)).

³⁹ *Id.* at 133.

⁴⁰ The Supreme Court has explained that “[a] major criterion for a valid time, place, and manner restriction is that the restriction ‘may not be based upon either the content or subject

that are permissible in a traditional public forum “because such discretion has the potential for becoming a means of suppressing a particular point of view.”⁴¹ In traditional public forums like streets or parks, the government’s power to restrict speech is the most limited.⁴² In these forums, “the government may enforce reasonable time, place, and manner regulations as long as the restrictions ‘are content-neutral,⁴³ are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.’”⁴⁴ Permit schemes that vest too much power in an administrator fail the

matter of speech.” *Heffron v. Int’l Soc. for Krishna Consciousness*, 452 U.S. 640, 648 (1981) (quoting *Consolidated Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980)). A time or place restriction limits expression only during particular times or to specific places. See Elisabeth Alden Longworthy, Note, *Time, Place, or Manner Restrictions on Commercial Speech*, 52 GEO. WASH. L. REV. 127, 130 (1983). Manner restrictions control the mechanisms of expression and “often entail regulation of conduct as well as speech.” *Id.* at 132. A regulation restricting the distribution of printed materials to a certain area within a state fair, for example, is considered a time, place, or manner restriction because “the Rule applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds.” *Heffron*, 452 U.S. at 648-49.

⁴¹ *Forsyth*, 505 U.S. at 130-31 (quoting *Heffron*, 452 U.S. at 649).

⁴² See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.”).

⁴³ “The requirement that the government be content-neutral in its regulation of speech means that the government must be both viewpoint neutral and subject-matter neutral.” Erwin Chemerinsky, *The Fifty-Fifth Cleveland-Marshall Fund Lecture: The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 202-03 (1994) (citing *Perry Educ. Ass’n*, 460 U.S. at 45). Content-based speech regulations target speech for their subject matter or topic. See Marvin Ammorri, *Beyond Content Neutrality: Understanding Content-Based Promotion of Democratic Speech*, 61 FED. COMM. L.J. 273, 283-84 (2008). Regulations that are not content-based, or “content-neutral regulations,” control merely the time, place, or manner in which speech is uttered and their objectives are “justified without reference to the content of the regulated speech.” *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770-71 (1976). In a traditional public forum, content-neutral regulations are subject to less scrutiny than content-based regulations, which are permissibly only if the state can “show that its regulation is necessary to serve a COMPELLING state interest and that it is narrowly drawn to achieve that end.” *Perry Educ. Ass’n*, 460 U.S. at 45 (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). The requirement of content neutrality is also broader and more speech-protective than the requirement of viewpoint neutrality, which prevents the government from “discriminating against speakers based on particular views, beliefs, or opinions” See Ammorri, *supra*, at 283-84 (explaining that “a law suppressing political (or, say indecent) speech would be content-based but not viewpoint-based; a law suppressing *Republican* political (or indecent) speech would be viewpoint-based”). However, courts often conflate content neutrality and viewpoint neutrality. See Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 101 (1996). For further exploration of content-neutral and viewpoint-neutral regulations, see *infra* Part II.B.

⁴⁴ *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry Educ. Ass’n*, 460 U.S. at 45).

content-neutrality prong. They carry an unacceptable risk that government officials will restrict speech based on the speech's content or viewpoint, even if the scheme itself does not appear to be content-based on its face.

The Court's first reason for invalidating the ordinance—because it enables the administrator potentially to conceal content-based decisions—is thus related to the Court's second reason—because the ordinance is explicitly content-based. According to the Court, the ordinance contained “more than the possibility of censorship through uncontrolled discretion.”⁴⁵ It permitted on its face a content-based metric for assessing security fees.⁴⁶ The Court observed:

The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.⁴⁷

Although the county depicted the ordinance as intending to compensate for the costs of maintaining public order, and not to burden certain types of speech unequally,⁴⁸ the Court held that varying permit costs by “[l]isteners' reaction to speech is not a content-neutral basis for regulation.”⁴⁹ Even if the county's motivations were benign, the ordinance treated controversial content differently than more socially acceptable content. The county voiced concern that invalidating its ordinance would deny local governments the ability to recoup “*policing costs which are incurred in protecting those using government property for expression.*”⁵⁰ The Court dismissed this concern as more proof that the ordinance was not content neutral.⁵¹ According to the Court, the county's method of raising revenue for police protection left “no question that [the county] intends the ordinance to recoup costs that are related to listeners' reaction to the speech.”⁵² Needing to raise

⁴⁵ Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 133 (1992).

⁴⁶ *Id.* at 134.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 134 n.12 (emphasis in original) (quoting Brief for Petitioner at 17, Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992) (No. 91-538)).

⁵¹ Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134 n.12 (1992).

⁵² *Id.*

revenue to cover security expenses, the Court held, “does not justify a content-based permit fee.”⁵³

The Court explained that “[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”⁵⁴ Presumably, then, the costs for protecting speakers from hostile audience response must be borne by taxpayers in the region instead of by those exercising their speech rights.⁵⁵

The two reasons behind the Court’s decision, while interrelated, are quite distinct. One exhibits a concern for the *potential* for content-based discrimination, while the other acknowledges that judging speech by its anticipated response is actually a type of content-based discrimination. The first ground for reversal safeguards against state officials chilling speech with which they personally disagree, while the second ground prohibits placing the burden of a hostile or violent audience reaction on the speaker.

B. *Animating Principles Behind Forsyth*

Because the Forsyth County ordinance applied to speech in a traditional public forum, the Court incorporated the speech-protective standards governing content-neutrality and time, place, and manner restrictions that apply in a traditional public forum.⁵⁶ The Court noted that the ordinance regulated speech in “the archetype of a traditional public forum,”⁵⁷ and it did not extend its analysis to other types of forums. Further elucidation of the two unspoken animating principles behind *Forsyth*—aversion to the heckler’s veto and the difference between governmental “subsidization” of speech and non-taxation of speech—helps illuminate this issue.

⁵³ *Id.* at 135-36 (citing *Ark. Writers’ Project v. Ragland*, 481 U.S. 221, 229-31 (1987)).

⁵⁴ *Id.* at 134-35.

⁵⁵ See Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 *GEO. L.J.* 779, 799 n.96 (2004) (explaining how, in these types of cases “the First Amendment requires a subsidy from taxpayers generally to demonstrators”); see also *infra* Part I.B (providing further examples of the government’s duty to protect controversial speech).

⁵⁶ *Forsyth*, 505 U.S. at 130.

⁵⁷ *Id.* (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

1. The Heckler's Veto

Although the concept of the “heckler’s veto” is never explicitly mentioned by the majority in *Forsyth*, the case is often cited as a classic example of how courts treat this speech principle.⁵⁸ *Forsyth* and other heckler’s veto cases require the government to protect unpopular speakers from would-be citizen censors. These cases also seek to avoid incentivizing those censors to stifle speech.

The concept of the heckler’s veto arises in First Amendment jurisprudence when those hostile to a speaker’s message have the ability to influence others to stop the speech by threatening the speaker.⁵⁹ Because allowing hecklers essentially to “veto” speech in this way encourages violent responses to otherwise protected speech and disfavors unpopular opinions, the Supreme Court has taken measures to avoid hecklers controlling speech.⁶⁰ One scholar labeled the heckler’s veto “one of the pariahs in First Amendment jurisprudence,” explaining that “[c]ourts are loathe to allow one person (the ‘heckler’) in the audience who objects to the speaker’s words to silence a speaker.”⁶¹

⁵⁸ See, e.g., Cheryl Leanza, *Reclaiming the First Amendment: Constitutional Theories of Media Reform: Heckler’s Veto Case Law as a Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1310 (2007) (including *Forsyth* in a section on heckler’s veto case law); Nadine Strossen, *Tribute to Justice Antonin Scalia*, 62 N.Y.U. ANN. SURV. AM. L. 1, 6 n.20 (2006) (holding that *Forsyth* “str[uck] down as a hecklers’ veto a county ordinance that made the fee for a parade license contingent on an administrator’s estimate of providing security for the events”); Elizabeth Wilborn, *Teaching the New Three Rs – Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 148 n.155 (1995) (citing *Forsyth* for the proposition that “general First Amendment principles do not permit the ‘heckler’s veto’ to override political speech activities”). Justice Rehnquist’s dissenting opinion also categorizes the *Forsyth* majority as invalidating the county ordinance due to the law’s “incorporation of a ‘heckler’s veto.’” *Forsyth*, 505 U.S. at 140 (Rehnquist, C.J., dissenting) (“[T]he Court worries that, under this ordinance, the county will charge a premium to control the hostile crowd of 10,000, resulting in the kind of ‘heckler’s veto’ we have previously condemned.”).

⁵⁹ Michel J. Polelle, *Racial and Ethnic Group Defamation: A Speech-Friendly Proposal*, 23 B.C. THIRD WORLD L.J. 213, 249 n.142 (2003).

⁶⁰ See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 183–84 (1986). For a detailed account of jurisprudence on the heckler’s veto, which evolved from the “clear and present danger” doctrine, see Leanza, *supra* note 58, at 1308–12.

⁶¹ John J. McGuire, *The Sword of Damocles Is Not Narrow Tailoring: The First Amendment’s Victory in Reno v. ACLU*, 48 CASE W. RES. L. REV. 413, 417 n.16 (1998). McGuire argued that an overturned provision of the Communications Decency Act, 47 U.S.C. § 223 (2006), which prohibited the internet transmission of communications that are “patently offensive as measured by contemporary community standards . . . provided a heckler’s veto to the most easily offended community in America.” McGuire, *supra*, at 416–17.

The Supreme Court has limited the power of the heckler’s veto in a variety of contexts. In *Reno v. American Civil Liberties Union*,⁶² the Court overturned a provision of the Communications Decency Act, which prohibited the dissemination via the Internet of indecent messages to persons under 18.⁶³ The Court rebuffed the Government’s argument that the statute was constitutional because it applied only to individuals who *knowingly* transmitted indecent material to minors.⁶⁴ According to the Court, this *mens rea* requirement “would confer broad powers of censorship, in the form of a ‘heckler’s veto,’ upon any opponent of indecent speech who might simply log on and inform the would-be discourses that his 17-year-old child . . . would be present.”⁶⁵

The *Reno* decision exemplifies the Court’s concern with a statute’s potential to enable citizen-censors to silence others and block access to a speech forum. *Reno* limited the government’s ability to create a statutory scheme that equips individuals to silence views that they disfavor, but conferred no affirmative obligation on the government to protect speakers. A series of Supreme Court cases that overturned defendants’ convictions for breaches of the peace, however, imply that not only must the government avoid creating statutes susceptible to the heckler’s veto, but must also act affirmatively to protect controversial speakers.⁶⁶

These Supreme Court cases, *Edwards v. South Carolina*,⁶⁷ *Cox v. Louisiana*,⁶⁸ and *Gregory v. City of Chicago*,⁶⁹ emphasize that a primary “function of free speech under our system of government is to

⁶² 521 U.S. 844 (1997).

⁶³ *Id.* at 849, 878-80.

⁶⁴ *Id.* at 880.

⁶⁵ *Id.* at 880.

⁶⁶ As one scholar notes, “in a series of cases involving civil rights protestors, the Court consistently overturned [breach of the peace] convictions of marchers facing hostile audiences, on the grounds that the police could have, and had an obligation to, prevent any violence by the audience.” Ashutosh Avinash Bhagwat, *Associational Speech*, 120 *YALE L. J.* 978, 1011 (2011); see *Gregory v. City of Chi.*, 394 U.S. 111 (1969); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

⁶⁷ 372 U.S. 229 (1963) (overturning the conviction of 187 individuals for the crime of breach of the peace because it was a violation of their First Amendment rights).

⁶⁸ 379 U.S. 536 (1965) (overturning conviction of civil rights leader for disturbing the peace and invalidating a public-disturbance statute).

⁶⁹ 394 U.S. 111 (1969) (overturning the conviction of disorderly conduct imposed on demonstrators supporting school desegregation).

invite dispute.”⁷⁰ In *Edwards*, for example, the Court overturned the convictions for African American student protestors who refused to disperse after the police issued several warnings.⁷¹ The Court held that the State could not “make criminal the peaceful expression of unpopular views” because speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”⁷² According to the Court in *Edwards*, *Cox*, and *Gregory*, when publicly expressed views are “sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection . . . constitutional rights may not be denied simply because of hostility to their assertion or exercise.”⁷³ Those with unpopular views are therefore entitled to police protection to safeguard their constitutional rights.⁷⁴ Only if the situation becomes unmanageable may speakers be silenced.⁷⁵

2. Subsidization Versus Non-Taxation

A consequence of the heckler’s veto principle is that speakers, regardless of their views, have a positive right to police protection against hostile listeners.⁷⁶ As one scholar observed, *Forsyth* “extended this principle to the point of holding that governments may not even charge unpopular speakers for the cost of protection.”⁷⁷ *Forsyth* is a logical extension of the *Edwards* line of cases and thus presumably applies to security fees assessed both before a parade, as in *Forsyth*, or after speech is uttered when the government can accurately determine how much security was actually needed without

⁷⁰ *Cox*, 379 U.S. at 551 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949); *Edwards*, 372 U.S. at 237).

⁷¹ *Edwards*, 372 U.S. at 230, 233-34.

⁷² *Id.* at 237.

⁷³ *Cox*, 379 U.S. at 551 (citing *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963); *Edwards*, 372 U.S. at 237).

⁷⁴ See Bhagwat, *supra* note 66, at 1011.

⁷⁵ *Id.*

⁷⁶ See Leanza, *supra* note 58, at 1306 (“[T]he First Amendment grants a positive right to the speaker: the local government must take action to protect the speaker against a hostile crowd.”).

⁷⁷ Bhagwat, *supra* note 66, at 1011 (noting further “though nondiscriminatory charges applicable to all speakers are permitted”).

examining the content of the speech.⁷⁸ To that end, the burden of protecting unpopular speakers must rest with the whole community; otherwise, hecklers could make it financially unfeasible for those with unpopular views to assemble and demonstrate.

Contrary to some scholars’ assertions, however, spreading the financial burden of protecting unpopular speakers among taxpayers does not “subsidize” controversial speech. The *Forsyth* majority correctly “treated the [security] fee as an impermissible tax while the dissenters . . . treated it as a mere discretionary refusal to subsidize.”⁷⁹ Kathleen Sullivan framed this disagreement among the majority and dissenting opinions in *Forsyth* as:

On one hand, if people are entitled to say what they want in the public forum at public expense, then a [security] fee is a ‘burden.’ On the other hand, if the government must permit but need not subsidize speech, then no [security] fee is a burden; rather, the refusal to charge one is a subsidy.⁸⁰

This conceit, while useful, is not entirely accurate. Sullivan has overlooked the fact that the blame for the extra security costs should be placed on the hostile audience, not the speaker. Therefore, the “public expense” does not simply permit speakers to express themselves, but ensures that those seeking to create a substantial disturbance and drown out the speech of others are thwarted in their efforts.

Depicting heckler’s veto cases as requiring “the state to *ensure* dissemination of clashing and unpopular views,” as one scholar does,

⁷⁸ A footnote in *Forsyth* suggests that a security fee imposed after a parade would be equally unconstitutional. See *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 n.12 (1992). The *Forsyth* Court appears to believe that even if speech has already been uttered and extra police were called in only when a disturbance occurred, imposing extra security fees on the speaker would be impermissibly content-based. This suggestion occurs in the context of addressing the dissent’s argument that remand is necessary. According to the Court, “the dissent prefers a remand because there are no lower court findings on the question whether the county plans to base parade fees on hostile crowds. . . . We disagree. A remand is unnecessary because there is no question that petitioner intends the ordinance to recoup costs that are related to listeners’ reaction to the speech.” *Id.* This footnote strongly indicates that burdening speech based on actual audience response, even if administrators are not judging the speech explicitly by its content, is as content-based as burdening speech based on anticipated audience response.

⁷⁹ See Kathleen M. Sullivan, *The Supreme Court 1991 Term: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 50 (1992).

⁸⁰ *Id.* at 50-51.

is also incorrect.⁸¹ For example, the government does not need to provide affirmative funding for speakers with minority viewpoints to promote representation of all views.⁸² In fact, it is often unconstitutional for the government to distort the market of speech by penalizing well-funded speakers to facilitate or allow for the expression of less well-funded views.⁸³

Because those who express their views peacefully should have equal access to a traditional public forum,⁸⁴ extra police protection does not *subsidize* unpopular expression but merely ensures that it is not *penalized* because of the misdeeds of others. For example, the government does not subsidize speech when it arrests and prosecutes those who steal *The New York Times* or hijack a film screening at a movie theater. Rather, the government must protect all those whose speech comes under attack in a public forum and cannot disfavor those whose viewpoints require more protection.⁸⁵

The principles animating *Forsyth*, including a refusal to accede to the heckler's veto and a fear of administrators using their discretion pretextually to stifle certain ideas, translate well into the student organizational context, where both students and administrators often

⁸¹ Leanza, *supra* note 58, at 1308 (emphasis added).

⁸² Although the government, in some circumstances, *may* sponsor certain speech it wishes to promote, when the government "expends funds to encourage a diversity of views from private speakers, VIEWPOINT-based restrictions are not proper." See Barbara A. Sanchez, *United States v. American Library Association: The Choice Between Cash and Constitutional Rights*, 38 AKRON L. REV. 463, 493 n.150 (2005) (citing *Rosenberger*, 515 U.S. at 833-34). See also *infra* Part II.B.

⁸³ See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 901, 906 (2010) (holding that "[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations" on the theory that they are "too powerful"). See also Sullivan, *supra* note 79, at 156-57 (discussing the *Citizens United* majority's rejection of the "antidistortion" principle and paternalistic approaches to the redistribution of speech).

⁸⁴ See *Olivieri v. Ward*, 801 F.2d 602, 607-08 (2d Cir. 1986) (giving advocates and opponents of gay rights who sought access to the same sidewalk in front of St. Patrick's Cathedral equal time to conduct their demonstrations).

⁸⁵ *United States v. Eichman*, 496 U.S. 310, 319 (1990) ("If there is a bedrock principle underlying the FIRST AMENDMENT, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989))); *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring) (calling viewpoint-based regulations "censorship in a most ODDIOUS form"). See also Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1911 (2006) ("Viewpoint discrimination remains paradigmatically repugnant to the First Amendment.").

experience the desire to suppress protected speech.⁸⁶ The lower courts, however, are divided on whether *Forsyth*'s ban on allowing administrators unbridled discretion is relevant only to traditional public forums.⁸⁷ Although several scholars would deem the heckler's veto to “violate the rules of any type of ‘forum,’”⁸⁸ some believe that the heckler's veto applies only to public forums, or that the doctrine is affected by forum analysis.⁸⁹ To determine whether *Forsyth* should apply in the student organizational context, the next section explores differences between the speech standards governing the traditional public forum and those governing the student organizational context.

⁸⁶ See, e.g., Jay Matthews, *They Messed With the Wrong Blogger*, WASH. POST, July 24, 2009, available at <http://www.thefire.org/public/pdfs/4da9d663cd35b4773dc612216131a053.pdf?direct> (detailing Stanford University's attempts to stifle the speech of a student critical of the philosophies of the Education Program); Editorial, *Curbing Speech at Quinnipiac*, N.Y. TIMES, Oct. 28, 2008, at A30, available at http://www.nytimes.com/2008/10/29/opinion/29wed3.html?_r=1 (criticizing censorship of student journalists); Dorothy Rabinowitz, *American Politics Aren't 'Post Racial'*, WALL ST. J., July 7, 2008, available at <http://www.thefire.org/article/9490.html> (documenting the punishment of a student-employee at Indiana University-Purdue University of Indianapolis for reading a book denouncing the Ku Klux Klan that displayed a picture of the Klan on the cover).

⁸⁷ *Compare* Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch., 457 F.3d 376, 386 (4th Cir. 2006) (“There is broad agreement that, even in LIMITED public and non-public FORUMS, investing governmental officials with boundless DISCRETION over access to the FORUM violates the First Amendment.”), with *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 95 (1st Cir. 2004) (“Our view is that a grant of DISCRETION to exercise judgment in a non-public FORUM must be upheld so long as it is ‘reasonable in light of the characteristic nature and function’ of that FORUM.” (quoting *Griffin v. Sec’y of Veterans Affairs*, 288 F.3d 1309, 1323 (Fed. Cir. 2002))).

⁸⁸ See Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U.L. REV. 1357, 1361 (2007) (arguing that using a “heckler's veto method of enforcement,” in which the government places restrictions on access to certain forums speech for speech that is not considered to be in good taste and inoffensive, would “violate the rules of any type of forum.”).

⁸⁹ See Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257, 304 (1985) (discussing “the principle protecting a public forum user against a heckler's veto”) (emphasis added); see also Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 TEX. L. REV. 1117, 1144–45 (2000) (describing how some courts may view library policies restricting offensive speech as containing an impermissible heckler's veto, while others may “recognize[] ‘the reality that, with the exception of traditional public FORUMS, the government retains the choice of whether to designate its property as a FORUM for specified classes of speakers’” (quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 680 (1998))).

II. STUDENT ORGANIZATIONS AND FORUM ANALYSIS

At universities, student organizations enhance the college experience by allowing students to associate based on shared skills, interests, philosophies, political beliefs, religions, and cultures. Student groups that hold meetings, host events, and sponsor speakers are recognized and funded by universities to foster discourse and encourage a diversity of viewpoints.⁹⁰

An examination of the ways in which public universities recognize and fund their student organizations, and of the speech protections already applicable to these groups, should illuminate whether *Forsyth* rationales should apply to university policies affecting student organizations.

A. *Student Organizations and the Student Activity Fee*

Although there is some variation in how public universities recognize and fund student organizations, most follow the same general practices. For the purposes of this article, the description of the funding of university-recognized⁹¹ student organizations is limited to the examples below.

Student organizations are largely funded by student activities fees.⁹² Typically, state law empowers public universities to collect a “student activities fee” from each student as part of his or her tuition

⁹⁰ *Bd. of Regents of Univ. of Wis. Sys. v. Southworth* (*Southworth I*), 529 U.S. 217, 222–23 (2000) (describing diverse student organizations); *Rosenberger v. Rector*, 515 U.S. 819, 840 (1995) (describing the student activities fund’s purpose as “to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life”); *see also* *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2999 (2010), (Kennedy, J., concurring) (describing the educational benefits of student organizations, including “facilitat[ing] interactions between students, enabling them to explore new points of view, to develop interests and talents, and to nurture a growing sense of self.” (citing *Bd. of Educ. of Independent Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 831, n.4 (2002))).

⁹¹ Universities may have different rules regarding what is required to be a recognized student organization, but the recognition process must be viewpoint neutral. Recognition entitles a group to access to facilities and student activities money, and the standards governing access to this forum will be examined in Part II.C.

⁹² *See* Annette Gibbs, *Are Mandatory Student Activity Fees Really Mementos of the Past?*, 28 J.L. & EDUC. 65, 67 (1999) (“Higher education institutions’ long tradition of using student activity fees to support their student organizations is characterized by immense success and overwhelming approval of most students.”).

bill.⁹³ This fee can be mandatory,⁹⁴ and, in the words of one university, is intended to “‘enhance the educational experience’ of its students by ‘promoting extracurricular activities,’ ‘stimulating advocacy and debate on diverse points of view,’ enabling ‘participation in political activity,’ ‘promoting student participation in campus administrative activity,’ and providing ‘opportunities to develop social skills.’”⁹⁵

Some portion of a university’s student activities fees usually covers expenses unrelated to student organizations, like intramural sports, student health services, and costs related to infrastructure.⁹⁶ Another portion is often entrusted to the student government to provide funding for recognized student organizations.⁹⁷ The student government, empowered to allocate the designated student activities fee money to student organizations, must perform this function in a manner that does not discriminate against a group’s viewpoint.⁹⁸ Funded student groups therefore span the political, philosophical, religious, and cultural spectrums.⁹⁹

The student activities fee comprises a limited sum of money, so student governments have developed various procedures for determining a student group’s budget.¹⁰⁰ Student groups can make funding requests to the student government’s funding committee, either once a year to cover operating expenses and propose their annual budget,¹⁰¹

⁹³ See Christine Theroux, Note, *Assessing the Constitutionality of Mandatory Student Activity Fee Systems: All Students Benefit*, 33 CONN. L. REV. 691, 693 (2001); Gregory B. Sanford, Note, *Your Opinion Really Does Not Matter: How the Use of Referenda in Funding Public University Student Groups Violates Constitutional Free Speech Principles*, 83 NOTRE DAME L. REV. 845, 846 (2008).

⁹⁴ See *Southworth I*, 529 U.S. at 221 (holding that a mandatory student activities fee does not violate students’ First Amendment right against compelled speech so long as the fee is allocated in a viewpoint-neutral manner).

⁹⁵ *Id.* at 222–23 (quoting the University of Wisconsin’s appendix materials).

⁹⁶ *Id.* at 223 (quoting the University of Wisconsin’s appendix materials).

⁹⁷ Theroux, *supra* note 93, at 693 (citing Matthew I. Weinstein, *I’m Paying for that?—Assessing the Constitutionality of Mandating Student Activity Fees to Support Objectionable Political and Ideological Activities at Public Universities in Southworth v. Grebe*, 44 VILL. L. REV. 257, 260 (1999)).

⁹⁸ *Southworth I*, 529 U.S. 217, 221 (2000). See also *infra* Part II.B.

⁹⁹ *Southworth I*, 529 U.S. at 223 (giving examples of registered student groups at the University of Wisconsin, which “included the Future Financial Gurus of America; the International Socialist Organization; the College Democrats; the College Republicans; and the American Civil Liberties Union Campus Chapter”).

¹⁰⁰ Sanford, *supra* note 93, at 846. Some procedures for allocating the student activities fee have been deemed unconstitutional. I will explore this issue in Part II.B.

¹⁰¹ For instance, the student activity fee funds the printing costs of the campus newspaper. See, e.g., *Kania v. Fordham*, 702 F.2d 475, 476–77 (1983) (explaining that, in addition to small

or for special one-time expenditures, like hosting a particular speaker.¹⁰² Student groups use this money to fund activities like posting flyers, paying for food at meetings, and organizing events.¹⁰³ If a student group anticipates expenses for which the student government does not provide funding, it can supplement its budget by charging ticket prices for events. Often, student groups can appeal to the university administration if they feel aggrieved by the funding distribution process.¹⁰⁴

Because public universities collect student activities fees as part of tuition, some consider this money to belong to the state, and therefore conceptualize the funding of student organizations as a governmental subsidy for speech.¹⁰⁵ One Supreme Court Justice, however, has convincingly argued otherwise. In a concurring opinion, Justice Sandra Day O'Connor explained why student activities fees belong to the students:

Unlike moneys dispensed from state or federal treasuries, the Student Activities Fund is collected from students who themselves administer the fund and select qualifying recipients only from among those who originally paid the fee. The government neither pays into nor draws from this common pool, and a fee of this sort appears conducive to granting individual students proportional refunds. The Student Activities Fund, then, represents not government resources, whether derived from tax revenue, sales of assets, or otherwise, but a fund that simply belongs to the students.¹⁰⁶

subscription and advertising revenue, the remainder of a college newspaper's printing costs came from the student activities fee).

¹⁰² Sanford, *supra* note 93, at 846 ("These funds help organizations convey their messages to the university population through speakers, lectures, rallies, or flyers.").

¹⁰³ *Id.*

¹⁰⁴ *Southworth v. Bd. of Regents of Univ. of Wis. Sys. (Southworth II)*, 307 F.3d 566, 582 (7th Cir. 2002).

¹⁰⁵ See Nicole B. Cásarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 501 (2000) (characterizing the allocation of student activity fee money to student organizations as a government benefit/subsidy) (internal footnotes omitted). See also *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2986 (2010) (describing a university's opening of a forum for student organizations to be "what is effectively a state subsidy"). *Martinez* departs from the jurisprudence, however, by declaring all limited public forums as tantamount to state subsidies. See *infra* Part II.C.

¹⁰⁶ *Rosenberger v. Rector*, 515 U.S. 819, 851–52 (1995) (O'Connor, J., concurring).

This categorization of student activities fees is significant. If *Forsyth* applies to security fees for speakers sponsored by student organizations, a public university would be obligated to pay for security costs with money properly considered its own; not the students’ money.¹⁰⁷

Regardless of who is the rightful “owner” of the student activities fees, the Supreme Court has held that when a public university uses these fees along with the provision of other school facilities, that the government has effectively established a forum for speech purposes.¹⁰⁸ Student activities fees are used to “facilitate extracurricular student speech” that is not attributable to the government.¹⁰⁹ As such, particular First Amendment protections apply to public university decisions that involve student organizations and the use of student activities fees. The Supreme Court decisions analyzing the applicable First Amendment standards are ambiguous and contradictory, but they create a general paradigm for categorizing the forum established for student organizations and for determining which First Amendment standards apply.

B. *Forum Analysis and the Confusion of the Limited Public*

Free speech jurisprudence usually begins with a forum analysis to establish the character of the forum impacted by a governmental regulation to determine the First Amendment standards that attach.¹¹⁰ The test for categorizing a forum, however, has “generated tremendous confusion and controversy.”¹¹¹ This is partially because the Supreme Court has described the four categories of forums—traditional public, designated public, limited public, and non-public—in inconsistent terms.¹¹² Further, once a forum is labeled, the Court does

¹⁰⁷ For further exploration of this issue, see *infra* Part V.

¹⁰⁸ See *Rosenberger*, 515 U.S. at 830 (holding that the student activities fee at the University of Virginia “is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable”) (internal citations omitted). See also *infra* Part II.C.

¹⁰⁹ *Southworth I*, 529 U.S. 217, 220-21, 229 (2000).

¹¹⁰ As the Supreme Court has explained, to determine whether a regulation is permissible, it “must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic.” *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985).

¹¹¹ Robert L. Warring, Comment, *Talk is Not Cheap: Funded Student Speech at Public Universities on Trial*, 29 U.S.F. L. REV. 541, 556 (1995).

¹¹² Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 653 (“Another frequently voiced criticism of the public forum doctrine is its inconsistent terminology used for forums other than the traditional public forum.”). There is even dispute about

not attach consistent First Amendment standards to that forum.¹¹³ The analysis becomes even murkier when assessing student organizations, in part because they are often considered a limited public forum, the category that generates the most confusion.¹¹⁴

Generally, in traditional public forums like streets or parks, the government can promulgate content-neutral time, place, and manner restrictions.¹¹⁵ Content-based restrictions on speech are subject to strict scrutiny in traditional public forums.¹¹⁶ A designated public forum, like a traditional public forum, “consists of public property which the State has opened for use by the public as a place for expressive activity.”¹¹⁷ As one scholar explains, “‘The government must intentionally open the property for expressive use by the *general* public or by a particular *class of speakers*.’”¹¹⁸ Because a designated public forum functions similarly to a traditional public forum, but simply

how many categories exist. *Id.* at 654. Many scholars consider there to be three types of forums. See, e.g., Nancy J. Whitmore, *First Amendment Showdown: Intellectual Diversity Mandates and the Academic Marketplace*, 13 COMM. L. & POL’Y 321, 339 (2008) (“In determining the nature of a forum, courts have generally divided government property into three categories: traditional public, designated public and nonpublic forums.”) (citing *Faith Ctr. Church v. Glover* 480 F.3d 891, 907 (9th Cir. 2006)).

¹¹³ For example, as one scholar detailed, the Supreme Court “viewed the limited public forum as a place subject to the public forum standard” prior to 1990, but then used the term “to describe a place subject to the nonpublic forum standard . . . [but never] expressly acknowledged this shift.” Caplan, *supra* note 112, at 654 (citing *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006); *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106-07 (2001); *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001); *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 804 (majority), 817 (Blackmun, J., dissenting) (1985); *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 48-49 (1983)).

¹¹⁴ *Id.* (“The most confusion surrounds the phrase ‘limited public forum.’”).

¹¹⁵ See *Heffron v. Int’l Soc. for Krishna Consciousness*, 452 U.S. 640, 648 (1981) “[a] major criterion for a valid time, place, and manner restriction is that the restriction ‘may not be based upon either the content or subject matter of speech’” (quoting *Consolidated Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 536 (1980)).

¹¹⁶ See *Perry*, 460 U.S. 37, 45 (1983) (“In these quintessential public forums . . . for the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). As explained above, “subject matter or content-based discrimination exists when the state attempts to prevent discussion of entire topics, rather than just specific points of view.” *Cásarez*, *supra* note 105, at 508.

¹¹⁷ *Id.*

¹¹⁸ Paul E. McGreal, *The Case for a Constitutional Easement Approach to Permanent Monuments in Traditional Public Forums*, 103 NW. U. L. REV. COLLOQUY 185, 188 (2008) (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998) (emphasis added)). For an oft-cited description of the different types of forums, see also *Perry*, 460 U.S. at 45-46.

exists outside of the traditional locations like public streets or parks, the same speech standards apply to both types of forums.¹¹⁹

At the other end of the spectrum is the nonpublic forum, where the government has the most latitude to regulate speech. A nonpublic forum is a place where the government performs functions generally unrelated to, or inconsistent with, the fostering of public expression, including military bases, teachers’ mailboxes, and even the sidewalk in front of the post office.¹²⁰ In a nonpublic forum, content-based restrictions are permissible as long as they do not discriminate on the basis of viewpoint, and speech can be restricted if the exclusion is reasonable in light of the purposes of the forum.¹²¹

The limited public forum generates the most confusion because of questions regarding its difference in character from a designated public forum and a nonpublic forum.¹²² A limited public forum, like a designated public forum, is open to a class of speakers (for instance, students) to promote the exchange of ideas. Unlike a designated public forum, however, a limited public forum may limit itself to certain topics.¹²³ Once a forum is labeled a limited public forum, it is usually subject to the same test applicable to nonpublic forums.¹²⁴ This raises

¹¹⁹ Caplan, *supra* note 112, at 653.

¹²⁰ Sullivan, *supra* note 79, at 45-46 & n.153 (citing *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (post office sidewalks); *Cornelius v. NAACP Legal Def. Educ. Fund*, 473 U.S. 788, 813 (1985) (charity drive aimed at federal employees); *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 53-54 (1983) (teachers’ school mailboxes); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (military base)).

¹²¹ *Cornelius*, 473 U.S. at 806 (“Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”) (citing *Perry*, 460 U.S. at 49; *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)).

¹²² Whitmore, *supra* note 112, at 340 (“While the forum analysis traditionally has recognized three categories, the law has become somewhat murky by the Court’s use of a fourth designation, the limited public forum, and questions concerning the precise distinction, if any, between a limited public forum and a designated public forum or nonpublic forum.”). *See also supra* note 101.

¹²³ The Supreme Court has held that “[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.” *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) (citing *Perry*, 460 U.S. at 49; *Cornelius*, 473 U.S. at 806).

¹²⁴ *See* Warring, *supra* note 111, at 555 (citing *Cornelius*, 473 U.S. at 817-18). However, once opened, a limited public forum must accept all speech within the forum’s parameters. According to the Supreme Court, “[o]nce it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its dis-

the question: why create a separate classification for limited public forums? Perhaps the answer to the “mysterious and perplexing”¹²⁵ limited public forum is that courts will deem limited public forums as “open” to more speakers and topics than nonpublic forums, and will therefore find fewer restrictions reasonable in light of the purposes of the forum. Thus, although the test for limited public forum and nonpublic forum is the same, the application of this test should be more speech protective in the limited public forum, to distinguish it from a nonpublic forum.

The Supreme Court has held that “the campus of a university, at least for its students, possesses many of the characteristics of a public forum,”¹²⁶ and that “[t]he college classroom with its surrounding environs is peculiarly the marketplace of ideas.”¹²⁷ As the cases traced in the next section indicate, however, the Supreme Court has come to classify speech restrictions affecting student organizations as occurring within a limited public forum. Perhaps because of the tension between the less speech-protective rules that apply to the limited public forum, and the role of the university as a place intended to facilitate expression and generate unfettered debate,¹²⁸ the Supreme Court has been particularly inconsistent in classifying student organizations and applying uniform speech standards to this forum.¹²⁹

C. *The Blurring of Speech Standards in the Student Organizational Context*

Over the past four decades, the Supreme Court has addressed student organizations at public universities in a variety of First Amendment contexts. These include a student organization’s ability to be recognized, its use of university facilities, and its use of student

tion is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint.” *Rosenberger*, 515 U.S. at 829.

¹²⁵ Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 *NOVA L. REV.* 299, 301 (2009). Rohr’s article provides an insightful clarification into both the “legal significance” of the term limited public forum, and identifying characteristics of this type of forum. *Id.* at 302.

¹²⁶ *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981).

¹²⁷ *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

¹²⁸ See *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”).

¹²⁹ See, e.g., George B. Davis, Note, *Personnel Is Policy: Schools, Student Groups, and the Right to Discriminate*, 66 *WASH & LEE L. REV.* 1793, 1807 (2009) (“When a public university creates a forum for student groups to obtain recognition, where does that forum fall on the aforementioned spectrum? The Court’s answer has not always been clear.”).

activities fees. Although classifying the forum containing student organizations has been an elusive endeavor, general trends in the Supreme Court jurisprudence have emerged that militate in favor of incorporating the rationale of *Forsyth* into this arena.

1. *Healy* and the Benefits Conferred upon Student Organizations

The first Supreme Court case to address student organizations at public universities, *Healy v. James*,¹³⁰ repudiated the notion that, “because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.”¹³¹ The case arose when students at Central Connecticut State College applied to form a local chapter of the national organization Students for a Democratic Society (SDS) with a stated mission of discussion of leftist politics and implementation of constructive social changes.¹³² At issue in the case was whether the denial of recognition to SDS violated the associational rights guaranteed by the First Amendment, where recognition conferred the ability for SDS to use campus facilities and bulletin boards.¹³³

The Court approached its task aware of the tension between “the mutual interest of students, faculty members, and administrators in an environment free from disruptive interference with the educational process . . . [and] the equally significant interest in the widest latitude for free expression and debate consonant with the maintenance of order.”¹³⁴ The Court noted that a “climate of unrest prevailed on many college campuses in this country” due to student activities protesting the Vietnam War coupled with the universities’ responses.¹³⁵ Additionally, SDS chapters at other colleges had been responsible for instigating civil disobedience and violence.¹³⁶

After consideration of the record, the Supreme Court reversed the lower court’s judgment that the university’s denial of recognition

¹³⁰ 408 U.S. 169 (1972).

¹³¹ *Id.* at 180 (“[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

¹³² *Id.* at 172.

¹³³ *Id.* at 181–82.

¹³⁴ *Id.* at 171.

¹³⁵ *Id.*

¹³⁶ *Healy v. James*, 408 U.S. 169, 171–73 (1972).

did not abridge any First Amendment rights.¹³⁷ According to the Supreme Court, the denial of recognition constituted a prior restraint, and “the burden was upon the College administration to justify its decision of rejection.”¹³⁸ The Court held that several of the reasons for the non-recognition given by the university president were inadequate,¹³⁹ including the president’s belief that the group espoused a philosophy of violence: “The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.”¹⁴⁰ If the president reasonably believed that SDS would *act* on a philosophy of violence, the Court noted there would be a permissible basis for nonrecognition.¹⁴¹

Although *Healy* did not conduct forum analysis¹⁴² or establish speech standards governing student organizations, its analysis is instructive for several reasons. First, the Court held that a denial of recognition is a burden on student groups’ freedom of association because recognition carries an ability to use certain school facilities. These benefits are significant and cannot be denied to students based on their speech.¹⁴³ Further, the Court held that the university bears the burden of proof to demonstrate a permissible (non-viewpoint-related) reason for denial of recognition. This argues in favor of importing the *Forsyth* “unbridled discretion” standard into the stu-

¹³⁷ *Id.* at 183. According to the Court, “[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges th[e] associational right. The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes.” *Id.* at 181.

¹³⁸ *Id.* at 184.

¹³⁹ *Id.* at 185.

¹⁴⁰ *Id.* at 187–88.

¹⁴¹ *Id.* at 189–90.

¹⁴² Focus on forum analysis as critical to determining speech protections is a relatively recent phenomenon, as “[f]orum analysis became firmly institutionalized in *Perry Education Association v. Perry Local Educators’ Association*” which was decided in 1983. See Seth D. Rogers, Note, 4 WYO. L. REV. 753, 761 (2004) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983)). See also Pamela A. Schecter, *Public Forum Analysis and State Owned Publications: Beyond Kuhlmeier v. Hazelwood School District*, 55 FORDHAM L. REV. 241, 242–44 (providing a history of the court’s articulation of forum analysis and describing how *Perry* “clarified the public forum doctrine by establishing three categories of public property: public forum by tradition, public forum by designation, and nonpublic forum”).

¹⁴³ *Healy v. James*, 408 U.S. 169, 187 (1972) (“The mere disagreement of the President with the group’s philosophy affords no reason to deny it recognition. As repugnant as these views may have been, especially to one with President James’ responsibility, the mere expression of them would not justify the denial of First Amendment rights.”).

dent organizational context. Clear standards governing the recognition of student organizations help ensure that student organizations are not denied benefits due to their viewpoints.

2. *Widmar* and *Rosenberger* Classify the Forum

The next two cases where the Supreme Court confronted the First Amendment standards governing student groups, *Widmar v. Vincent*¹⁴⁴ and *Rosenberger v. Rector*,¹⁴⁵ highlight the difficulties faced by the Court in classifying forums involving student organizations.

In *Widmar*, the Court addressed a university regulation prohibiting “the use of University buildings or grounds ‘for purposes of religious worship or religious teaching.’”¹⁴⁶ Prior to adopting this regulation, the university had “routinely provide[d] University facilities for the meetings of registered organizations,” and defrayed the costs via a student activities fee.¹⁴⁷ The Court struck down the university’s denial of access to its facilities to Cornerstone, an evangelical Christian group, and categorized the use of university facilities as a forum generally open to student groups.¹⁴⁸ It held that “the campus of a public university, at least for its students, possesses many of the characteristics of a public forum,” and “‘denial to [particular groups] of use of campus facilities for meetings and other appropriate purposes’ must be subjected to the level of scrutiny appropriate to any form of prior restraint.”¹⁴⁹

The Court considered the denial of facilities to religious groups to be a “content-based” exclusion from a “generally open forum,” and held the university to the standard applicable for content-based restrictions in traditional and designated public forums.¹⁵⁰ At the same time, though, the Court acknowledged that a “university differs in significant respects from public forums such as streets or parks or

¹⁴⁴ 454 U.S. 263 (1981).

¹⁴⁵ 515 U.S. 819 (1995).

¹⁴⁶ *Widmar*, 454 U.S. at 265.

¹⁴⁷ *Id.* at 265.

¹⁴⁸ *Id.* at 267 (“Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups.”).

¹⁴⁹ *Id.* at 268 n.5 (alteration in original).

¹⁵⁰ *Id.* 269-70 (“In order to justify discriminatory exclusion from a public forum based on the religious content of a group’s intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”).

even municipal theaters,” and appreciated “a university’s authority to impose reasonable regulations compatible with [its] mission.”¹⁵¹ Nonetheless, the restriction excluding a religious student group was deemed unconstitutional, despite the university’s argument that its mission was secular.¹⁵²

In holding that the university’s mission did not justify its content-based exclusion of student groups from the use of its facilities,¹⁵³ the Court essentially treated access to public university facilities by student organizations to be a public forum with some discrete limitations. The Court noted that universities are “peculiarly the marketplace of ideas,”¹⁵⁴ but that a public university is not required to “make all of its facilities equally available to students and nonstudents alike, or . . . grant free access to all of its buildings.”¹⁵⁵

If the speech standard articulated in *Widmar* remained today, and content-based burdens on student organizational speech were subject to strict scrutiny as if student organizations were a designated public forum, *Forsyth*’s holding would be directly applicable. Instead, a later case with somewhat similar facts, *Rosenberger v. Rector*, altered this framework and applied the less speech-protective standards applicable to limited public forums to the denial of student activity fees to a religious student newspaper.¹⁵⁶ An examination of the case, however, reveals ambiguity in how much the Court’s application of its new framework is actually a departure from *Widmar*.

In *Rosenberger*, the University of Virginia withheld authorization for a religious student newspaper that “primarily promotes or manifests a particular belief in or about a deity or an ultimate reality” to use student activities fees to cover printing costs.¹⁵⁷ The newspaper, produced by a student organization called Wide Awake Productions (WAP), wrote articles from a “Christian viewpoint” on topics such as

¹⁵¹ *Id.* at 268 n.5.

¹⁵² *Widmar v. Vincent*, 454 U.S. 263, 268, 276 (1981). The Court deemed un compelling the university’s interest in avoiding an Establishment Clause violation because “an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion[, and it was] unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion.” *Id.* at 271–72.

¹⁵³ *Id.* at 269.

¹⁵⁴ *Id.* at 268 n.5 (“The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’” (quoting *Healy v. James*, 408 U.S. 169, 180 (1972))).

¹⁵⁵ *Id.*

¹⁵⁶ See *Rosenberger v. Rector*, 515 U.S. 819, 829–30 (1995).

¹⁵⁷ *Id.* at 819.

racism, pregnancy, and religious music, and each page was marked with a cross.¹⁵⁸ The student government denied the group’s application for student activity fees to cover the publishing costs, deeming the publication “religious activity.”¹⁵⁹

In overriding the university’s denial of payment to WAP, the Court first held that the student activities fund “is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”¹⁶⁰ The Court then categorized the forum and applicable speech standards in a way that, at first glance, contradicted the test articulated in *Widmar*:

The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not “reasonable in light of the purpose served by the forum,” nor may it discriminate against speech on the basis of its viewpoint. Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.¹⁶¹

Thus, the Court deemed WAP to have been excluded from a limited public forum, in which a university may restrict certain types of speech based on its content, but may not make viewpoint-based distinctions.¹⁶² The Court then struck down, as viewpoint-based, the university’s regulation excluding publications that “primarily promote[] or manifest[] a particular belief in or about a deity or an ultimate

¹⁵⁸ *Id.* at 826.

¹⁵⁹ *Id.* at 827. WAP was accepted as a registered student organization because it was not considered “an organization whose purpose is to practice a devotion to an acknowledged ultimate reality or deity.” *Id.* at 840.

¹⁶⁰ *Id.* at 830 n.8.

¹⁶¹ *Id.* at 829–30 n.7.

¹⁶² *Rosenberger v. Rector*, 515 U.S. 819, 829–30 (1995).

reality,”¹⁶³ even though it acknowledged that the university’s restriction on religious speech applied to atheist perspectives as well as religious ones.¹⁶⁴ According to the Court, “Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”¹⁶⁵

The *Rosenberger* Court’s articulation of viewpoint neutrality is a departure from common understandings of the difference between content and viewpoint discrimination.¹⁶⁶ Describing the exclusion of an entire range of viewpoints on a particular topic as viewpoint discrimination renders the concept of viewpoint neutrality incomprehensible. As the *Rosenberger* dissent noted, the goal of viewpoint neutrality is to “bar the government from skewing public debate”¹⁶⁷ by favoring some viewpoints over others, but the university’s regulation “applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. . . . [I]t applies to agnostics and atheists as well as it does to deists and theists”¹⁶⁸

Although the boundary between restrictions that are content-based and viewpoint-based is not always easy to draw,¹⁶⁹ the Court defined viewpoint-based discrimination more broadly (closer to the conception of content-based restrictions) in *Rosenberger* than in other contexts.¹⁷⁰ Perhaps the *Rosenberger* Court’s conflation of content and viewpoint indicates a desire to apply to the student organizational context the more speech-protective standards governing traditional

¹⁶³ *Id.* at 822–23, 830–31. In invalidating this regulation, the Court also held that the Establishment Clause of the First Amendment permits providing benefits to religious organizations, so long as the government applies principles to fund private speech that treat religion neutrally. *Id.* at 842–43.

¹⁶⁴ *Id.* at 831 (“It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.”).

¹⁶⁵ *Id.*

¹⁶⁶ See *supra* note 43.

¹⁶⁷ *Rosenberger*, 515 U.S. at 894 (Souter, J., dissenting).

¹⁶⁸ *Id.* at 895.

¹⁶⁹ See Whitmore, *supra* note 112, at 342 (“The inherent difficulty of distinguishing between unconstitutional viewpoint discrimination and legitimate speaker- or subject-based discrimination was recognized by the Court in *Rosenberger v. Rector & Visitors of the University of Virginia*.” (citing *Rosenberger v. Rector*, 515 U.S. 819 (1995))).

¹⁷⁰ Cásarez, *supra* note 105, at 526 (remarking that the Court “stretched the definition of viewpoint even farther” in *Rosenberger* than in previous cases”). Cásarez argues that the Court “has used an expansive definition of viewpoint discrimination in several limited public forum cases involving schools and universities” *Id.* at 504.

public forums. The Court’s implication may be that the true nature of the student organizational forum lies somewhere between the traditional public forum and the limited public forum.¹⁷¹

The Court’s suspicion that the university would not evenhandedly apply its policy denying funding to publications that “primarily promote or manifest a particular belief in or about a deity or an ultimate reality”¹⁷² provided another motivation for blurring the line between content and viewpoint discrimination. According to the Court, “Were the prohibition applied with much vigor at all, it would bar funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes.”¹⁷³ This analysis led one scholar to conclude that the *Rosenberger* Court “demonstrated that it is willing to look beyond assertions that restrictions are content-based to find that the restriction actually discriminates based on viewpoint.”¹⁷⁴ *Rosenberger*’s concern that the university would misuse its latitude to craft permissible content-based limitations as a pretext for implementing an impermissible viewpoint-based restriction resembles the Court’s fear in *Forsyth* that the county would use a permit policy ostensibly based on recouping security costs as a way to burden unpopular viewpoints.

It is important to note that, in conducting its forum analysis, the *Rosenberger* Court did not distinguish between provision of facilities, at issue in *Widmar*, and provision of student activities fee funding. The Court rejected the university’s argument that “from a constitutional standpoint, funding of speech differs from provision of access to facilities because money is scarce and physical facilities are not.”¹⁷⁵ According to the Court, “[T]he government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity.”¹⁷⁶

¹⁷¹ See Sanford, *supra* note 93, at 855 (describing the student activities fund as “closely analogous” to a traditional public forum) (citing *Southworth I*, 529 U.S. 217, 229-230 (2000)).

¹⁷² *Rosenberger*, 515 U.S. at 823 (quoting University of Virginia’s Student Activities Fund Guideline § 66a).

¹⁷³ *Id.* at 836.

¹⁷⁴ Sanford, *supra* note 93, at 851.

¹⁷⁵ *Rosenberger*, 515 U.S. at 835.

¹⁷⁶ *Id.*

3. *Southworth* and Unpopular Speech

Compounding the ambiguity created by *Widmar*¹⁷⁷ and *Rosenberger*¹⁷⁸, *Board of Regents of University of Wisconsin Systems v. Southworth* (“*Southworth I*”)¹⁷⁹ categorized student activities fees as being governed by the “standard of viewpoint neutrality found in the public forum cases.”¹⁸⁰ In *Southworth I*, the Court confronted speech issues related to student organizations in a different posture: students claimed that use of mandatory student activities fees to fund student groups to which they objected violated their First Amendment right against compelled speech.¹⁸¹ The Court rejected this challenge and held that “[t]he First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.”¹⁸²

According to the Court, viewpoint neutrality provides a constitutional safeguard because all viewpoints have an equal chance of being funded.¹⁸³ Thus, “[t]here is symmetry then in our holding here and in *Rosenberger*: Viewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program’s operation once the funds have been collected.”¹⁸⁴

The Court in *Southworth I* remanded the case to determine whether the method of disbursement of the student activity fee, through a majority vote of the student body, constituted a sufficiently viewpoint-neutral process.¹⁸⁵ While not ruling on the issue, the Court strongly implied that leaving the disbursement of student activity fees to a majority vote is unconstitutional:

To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. *The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views.*

¹⁷⁷ 454 U.S. 263 (1981).

¹⁷⁸ 515 U.S. 819 (1995).

¹⁷⁹ 529 U.S. 217 (2000).

¹⁸⁰ *Id.* at 230.

¹⁸¹ *Id.* at 204-05.

¹⁸² *Id.* at 221.

¹⁸³ *Id.* at 233.

¹⁸⁴ *Id.*

¹⁸⁵ *Southworth I*, 529 U.S. 217, 235 (2000).

Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here.¹⁸⁶

Insofar as the Court required that “minority views are treated with the same respect as . . . majority views,” applying *Forsyth’s* “unbridled discretion” prohibition to the allocation of student activities fee would deter administrators from assessing security fees against student organizations who sponsor speakers with disfavored or minority viewpoints.

4. *Martinez’s* Unprecedented Approach

Recently, the Supreme Court addressed another case involving the de-recognition of a student organization, again departing dramatically from its prior approaches. In *Christian Legal Society v. Martinez*,¹⁸⁷ the Court considered the constitutionality of a policy enacted by the University of California Hastings College of the Law that required all registered student organizations to accept all students as members and allow all students to run for leadership positions within any organization.¹⁸⁸ The Christian Legal Society, in contravention of the policy, sought to limit voting membership and leadership positions to those who “share the organization’s core beliefs about religion and sexual orientation.”¹⁸⁹ The group challenged the university’s policy as infringing its rights to free speech and expressive association.¹⁹⁰

The Supreme Court, applying the limited public forum framework articulated in cases like *Rosenberger* and *Southworth I*,¹⁹¹ upheld Hastings’s all comers policy as both viewpoint neutral¹⁹² and reasonable based on the “forum’s function.”¹⁹³ The Court in *Martinez* articulated the speech standards dictated by prior cases, but its application of this already-confused framework further muddied the doctrine. The majority opinion deferred to Hastings’s view that because student

¹⁸⁶ *Id.* at 235–36 (emphasis added).

¹⁸⁷ 130 S. Ct. 2971 (2010).

¹⁸⁸ *Id.* at 2978. Although the parties disputed whether this was the relevant policy governing the University’s actions, the majority opinion analyzed this all-comers policy based on factual stipulations made in the courts below. *See id.* at 2982–83.

¹⁸⁹ *Id.* at 2978.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 2985–86.

¹⁹² *Id.* at 2978.

¹⁹³ *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2992–93 (2010).

organizations promote “tolerance, cooperation, and learning,”¹⁹⁴ each organization must be open to all students.¹⁹⁵ This conception of the purpose of the forum as a place where students must learn to tolerate others’ views instead of foster their own opinions starkly contrasts the Court’s speech-protective view of student organizations in *Southworth I*, which lauded the importance of student organizations in fostering a diversity of speech.¹⁹⁶ Indeed, as Justice Anthony Kennedy noted in his concurrence in *Martinez*, Hastings’s all comers policy and conception of the student organizational forum may make “it difficult for certain groups to express their views in a manner essential to their message.”¹⁹⁷

Moreover, the Court blithely dismissed the concern that “if organizations must open their arms to all . . . saboteurs will infiltrate groups to subvert their mission and message.”¹⁹⁸ This possibility of hostile takeovers, recognized by the dissenting opinion,¹⁹⁹ means that groups with minority or offensive views may be marginalized by members who wish to subvert a group’s message. Instead of ensuring that the all comers policy was not a mere pretext for viewpoint discrimination, the Court remanded this issue as unrelated to its analysis.²⁰⁰ This contrasts starkly with the *Rosenberger* Court’s critical analysis of whether a university’s denial of funding to all groups who espouse a belief in an ultimate reality would be applied evenhandedly.²⁰¹

Finally, and most alarmingly for student speech rights, the Court provided a novel characterization of the denial of benefits to student organizations as “dangling the carrot of subsidy, not wielding the stick

¹⁹⁴ *Id.* at 2990.

¹⁹⁵ *Id.* at 2989 (“Just as Hastings does not allow its professors to host classes open only to those students with a certain status or belief, so the Law School may decide, reasonably in our view, that the . . . educational experience is best promoted when all participants in the forum must provide equal access to all students.”) (internal quotation marks omitted).

¹⁹⁶ See, e.g., *Southworth I*, 529 U.S. 217, 231 (2000) (describing the university’s purpose in recognizing student organizations as “to facilitate a wide range of speech”).

¹⁹⁷ *Martinez*, 130 S. Ct. at 2999 (Kennedy, J., concurring).

¹⁹⁸ *Id.* at 2992.

¹⁹⁹ *Id.* at 3017 n.10 (Alito, J., dissenting) (explaining how the possibility of hostile takeovers compromises viewpoint neutrality).

²⁰⁰ *Id.* at 2995. As the dissent notes, there was ample evidence that Hastings intended to apply its all-comers policy in a viewpoint-discriminatory fashion. *Id.* at 3017-18 (Alito, J., dissenting).

²⁰¹ See *supra* text accompanying notes 171-73 (discussing the *Rosenberger* Court’s skepticism with the school’s ability to apply its funding policy in an even-handed fashion).

of prohibition.”²⁰² In earlier cases, exclusion from the student organizational context was classified as an onerous prior restraint,²⁰³ not the seemingly innocuous denial of a benefit. The majority’s attachment of the word “subsidy” to the student organizational context likely led to the view, expressed in Justice Stevens’s concurrence, that a school may discriminate against groups that exercise their expressive association in ways that are unfavorable to the university: “It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities.”²⁰⁴ This sentiment runs counter to every case from *Healy* onward, which held that student organizational speech is private speech that does not bear the imprimatur of the university.²⁰⁵

The extent to which *Martinez* has altered the First Amendment protections afforded student organizations remains to be seen. Although it is now clear that student organizations constitute a limited public forum, much of the Supreme Court jurisprudence allots student organizations speech protections that lie somewhere between those applicable in a traditional public forum and a limited public/nonpublic forum. Taken together, these cases also manifest many of the same concerns about protecting controversial speech that animated the Court in *Forsyth*; even the Court in *Martinez* noted that if hostile takeovers *did* disrupt the expression of minority views, “Hastings presumably would revisit and revise its policy.”²⁰⁶

Part III of this Article addresses how lower courts interpret this jurisprudence, by generally ruling in favor of importing *Forsyth* into the student organizational context.²⁰⁷ Necessarily, Part III first considers the fundamental difference between the Supreme Court cases described above and student groups hosting controversial speakers.

²⁰² *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2986 (2010).

²⁰³ *Healy v. James*, 408 U.S. 169, 184 (1972) (“It is to be remembered that the effect of the College’s denial of recognition was a form of prior restraint, denying to petitioners’ organization the range of associational activities described above.”).

²⁰⁴ *Martinez*, 130 S. Ct. at 2998 (Stevens, J., concurring).

²⁰⁵ See *supra* Part II.C.1-3 (discussing *Healy*, *Widmar*, *Rosenberger*, and *Southworth I*). See also *Martinez*, 130 S. Ct. at 3006-07 (Alito, J., dissenting) (detailing reasons why the majority opinion has incorrectly and improperly characterized the benefits to student organizations as “effectively a state subsidy”).

²⁰⁶ *Martinez*, 130 S. Ct. at 2993. It is unclear what Justice Ginsburg means by “Hastings presumably would revisit and revise its policy.” This statement appears stronger than a mere suggestion, but does not go so far as to hold that, in the event that hostile takeovers threaten student groups’ expression, Hastings must revise and revisit its policy.

²⁰⁷ See *infra* Part IV.B.

Part III then explores how the addition of non-student speakers affects this First Amendment analysis.

III. THE RIGHTS AT STAKE

In the Supreme Court cases discussed above, university policies directly affected the associational rights of a student group, or restricted speech uttered by, and attributable to, the student group and no other entity.²⁰⁸ Imposing security fees upon student organizations sponsoring outside speakers, by contrast, abridges non-student speech.

The involvement of non-student speech affects the Court's forum analysis, which depends in part upon whose rights are at stake and how courts conceive of the scope of the forum.²⁰⁹ In *Widmar v. Vincent*, the Supreme Court made allowances for greater restrictions placed upon non-students.²¹⁰ In *Southworth I*, the Court held that allocations from the student activities fee cannot distinguish between funding on-campus and off-campus expression, in light of the forum's

²⁰⁸ See *Southworth I*, 529 U.S. 217, 229 (2000)

The University's whole justification for fostering the challenged expression is that it springs from the initiative of the students, who alone give it purpose and content in the course of their extracurricular endeavors If the challenged speech here were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker. That is not the case before us.

Rosenberger v. Rector, 515 U.S. 819, 834 (1995) (describing the case as one in which "the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers"); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (holding that a university's recognition of religious student groups is not an Establishment Clause violation because "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices").

²⁰⁹ See *Southworth I*, 529 U.S. at 267 n.5 ("This Court has recognized that the campus of a public university, at least *for its students*, possesses many of the characteristics of a public forum.") (emphasis added) (citing *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Cox v. Louisiana*, 379 U.S. 536 (1965)); *ACLU v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005) (upholding a university's restrictions on the on-campus expressive activities of outside speakers and noting that the university campus "is an institute of higher learning that is devoted to its mission of public education [which] necessarily focuses on the students and other members of the university community"); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 863 (N.D. Tex. 2004) ("The University's interest in an orderly administration of its campus and facilities in order to implement its educational mission does not trump the interest of its students, for whom the University is a community, in having adequate opportunities and venues available for free expression.").

²¹⁰ See *Widmar*, 454 U.S. at 268 n.5 ("We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.").

purpose “to foster vibrant campus debate among students.”²¹¹ The Court noted, however, that if a public university wished to restrict off-campus activities, it could create a limited public forum in this area so long as the rules governing off-campus activities were viewpoint neutral.²¹² The rights at stake when student groups host outside speakers requires altering the relevant forum analysis and speech protections.

A. *Student’s Rights*

Although it is the *outside speaker’s* expression that is targeted and stifled by extra security fees, student groups’ First Amendment rights are still implicated. Student groups possess a right to receive information that is burdened when the university imposes an unconstitutional security fee. Further, the speech of student groups is infringed by security costs imposed when the group invites a speaker, regardless of whether the group claims the non-student speaker’s views as its own.

1. The Right to Receive Information

The right to receive information is a corollary to freedom of speech because “[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.”²¹³ Given a willing speaker, freedom of speech protects both the source and the recipients of the communication.²¹⁴

The Supreme Court has held that the right to receive information is independent of the right of the speaker to disseminate that information. In *Stanley v. Georgia*,²¹⁵ the Supreme Court invoked this right in holding that the State cannot criminalize the possession of obscene material in one’s home, but may regulate the sale and distribution of this material.²¹⁶ Further, in *Lamont v. Postmaster General*,²¹⁷ the

²¹¹ *Southworth I*, 529 U.S. at 234.

²¹² *Id.*

²¹³ *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

²¹⁴ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (overturning a statute that prohibits pharmacists from publishing prescription drug prices based on consumers’ right to receive the information).

²¹⁵ 394 U.S. 557 (1969).

²¹⁶ *Id.* at 564 (“It is now well established that the Constitution protects the right to receive information and ideas.”).

²¹⁷ *Lamont*, 381 U.S. at 301.

Court struck down a federal law regulating the receipt of “communist political propaganda” from abroad.²¹⁸ The overturned statute instructed the Postmaster General to detain all communications of this nature and notify the intended recipient, who then had to return the notification before the Postmaster General could release the detained communication.²¹⁹ According to the Court, the law was “unconstitutional because it require[d] an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee[']s First Amendment rights.”²²⁰

In both *Stanley* and *Lamont*, the Court was unconcerned with the speaker’s rights, and focused its analysis on the listener’s right to receive information. Thus, even if a non-student speaker does not have a First Amendment right to access a public university’s forum, or a right to use public university money for his security, the student organization hosting may have an independent right to hear his speech.²²¹ Notably, the law at issue in *Lamont* involved an *encumbrance* on the right to receive information instead of an outright *ban*, and the Court’s concern centered on the chilling effect of burdening the listener’s right to receive the information.²²² The assessment of extra security fees against student groups who host controversial speakers may have a similar chilling effect. Student groups, wishing to avoid onerous security costs, may likely be reluctant to host speakers whose views are divisive or agitating.

The right to receive information is especially significant at a university because of its function in facilitating the marketplace of ideas.²²³ In *Kleindienst v. Mandel*,²²⁴ the Court considered whether

²¹⁸ *Id.* at 302–03 (“Communist political propaganda” was defined as “political propaganda . . . which is issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions or from which foreign assistance is withheld pursuant to certain specified statutes.”).

²¹⁹ *Id.* at 302.

²²⁰ *Id.* at 305.

²²¹ See *Osborne v. Ohio*, 495 U.S. 103, 141 n.15 (1990) (Brennan, J., dissenting) (“The distinction drawn in *Stanley* is not an anomaly in the law; to the contrary, we have often protected expression valued by listeners, whether or not the *source* of the communication was fully entitled to the safeguards of the First Amendment.”).

²²² *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (The Court believed that this “affirmative obligation” placed on mail recipients would “have a deterrent effect” on individuals fearful of alerting the government that they were seeking communist political propaganda from abroad.).

²²³ See Laura A. Jeltema, *Legislators in the Classroom: Why State Legislators Cannot Decide Higher Education Curricula*, 54 AM. U.L. REV. 215, 243 (2004) (discussing students’ right

the Attorney General’s refusal “to allow an alien scholar to enter the country to attend academic meetings violate[d] the First Amendment rights of American scholars and students who had invited him[.]”²²⁵ The Court held that the students’ right to receive information attached, even though they could access the scholar’s ideas through his books, because of the “particular qualities inherent in sustained, face-to-face debate, discussion and questioning.”²²⁶ Ultimately, however, the Court deemed the listeners’ First Amendment interest outweighed by the Government’s “plenary congressional power to make policies and rules for exclusion of aliens”²²⁷

This “congressional power”²²⁸ is not implicated in the case of student groups’ sponsoring speakers who legally reside in the United States. Although public universities are permitted to craft rules regulating which speakers may enter their campuses, these policies must pass constitutional muster or they will impermissibly burden the right to receive information.²²⁹ For example, in *Smith v. University of Tennessee* a federal district court addressed a lawsuit by student organizations whose requests to invite speakers had been denied by the University of Tennessee:

No one has the absolute, unlimited right to speak on a university campus; however, when the university opens its doors to visiting speakers, it must follow constitutional principles if it seeks to regulate those whom recognized groups may invite.²³⁰

This district court applied First Amendment rules to the non-student speaker’s expression to ensure that the university had not unconstitutionally burdened the student organizations’ right to receive information.²³¹ Ultimately, the court invalidated as overbroad and

to receive information and to access educational materials, which is especially applicable in higher education because “university students, as adults, need not be shielded from controversial ideas and materials”).

²²⁴ 408 U.S. 753 (1972).

²²⁵ *Id.* at 754.

²²⁶ *Id.* at 765.

²²⁷ *Id.* at 769–70.

²²⁸ *Id.* at 769.

²²⁹ *See supra* note 92.

²³⁰ *Smith v. Univ. of Tenn.*, 300 F. Supp. 777, 780-81 (E.D. Tenn. 1969).

²³¹ *Id.* at 780 (“Although the invited speaker is not a plaintiff in this suit, the legal interests of the students who sought to invite Dr. Leary and who would have made up the audience are sufficient to present a substantial legal controversy with the persons whose actions barred the

vague, several speaker regulations, including one requiring “the guest speaker’s competence and topic to be relevant to the approved constitutional purpose of the organization.”²³² Similarly, in *Stacy v. Williams*, a federal district court struck down regulations banning political candidates from speaking on campus as infringing students’ and faculty members’ constitutional rights.²³³ The court held that once a public university “opens the lecture halls it must do so nondiscriminatorily.”²³⁴

Following this logic, courts must apply speech protections to the assessment of security fees against outside speakers to avoid impermissibly burdening student organizations’ First Amendment right to receive information.²³⁵ The relevant question, then, is whether *Forsyth* should be incorporated as part of these speech protections.

2. The Speech Rights of Student Groups

Student organizations penalized by an unconstitutional security fee policy have several bases on which to claim a violation of their speech rights, especially if, as this Article later argues, public universities must propound content-neutral regulations to govern the allocation of security fees. First, it is arguable that the non-student speech upon which the security fee is based is attributable to the student group that has invited the speaker. This is especially true when the student group selects the speaker on the basis of her views, attaches the group’s name to an event showcasing the speaker, and pays certain costs so that the speaker’s views can be heard. From that perspective, extra security fees are a burden on the student group’s speech in the same way as denying a student organization funding to publish its religious newspaper.²³⁶

appearance.” (citing *Snyder v. Board of Trustees of Univ. of Ill.*, 286 F. Supp. 927 (N.D. Ill. 1968); *Lamont v. Postmaster Gen. of United States*, 381 U.S. 301 (1965)).

²³² *Id.* at 782.

²³³ *Stacy v. Williams*, 306 F. Supp. 963, 978-79 (N.D. Miss. 1969).

²³⁴ *Id.* at 971.

²³⁵ Of course, the right to receive information depends on a willing speaker and a willing recipient, but those audience members who deliberately choose to enter a venue to create security concerns and interrupt the speaker should not be deemed willing recipients.

²³⁶ See *supra* Part II.C; see also *Rosenberger v. Rector*, 515 U.S. 819, 836 (1995) (“The Guideline invoked by the University to deny third-party contractor payments on behalf of WAP effects a sweeping restriction on student thought and student inquiry in the context of University sponsored publications.”).

Student groups, however, may not want to claim that invited speakers represent their views. In addition, student groups often host debates in which they invite a variety of speakers with opposing views on a topic of interest, so it logically follows that not all of the speakers' views can be attributable to the student group. In that case, student organizations can claim that, while they may not necessarily agree with the views of their invited speakers, the student organizations' speech rights are directly infringed because their hosting the speakers is a manifestation of their belief that a debate on a particular issue should occur.

B. *Speaker's Rights*

Invited speakers also deserve First Amendment protections. As demonstrated above, once the university opens its campus to some outside speakers, it cannot unconstitutionally discriminate against other speakers.²³⁷

Outside speakers are also able to vindicate their right of access to these forums. In *Lamb's Chapel v. Center Moriches Union Free School District*,²³⁸ a public school district opened up its property when not in use for school purposes to the general public for social, recreational, civic, and political activity.²³⁹ A local church asked for access to the property after hours to showcase a film series but was denied because of the religious purpose of the films.²⁴⁰ In holding the school district's denial of access unconstitutional, the Court asserted that “the critical question [is] whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.”²⁴¹ The Court held that denial based on religious perspective is a viewpoint-based restric-

²³⁷ As one federal district court explained,

While it might be constitutional for a state university to deny use of its facilities to all outside speakers, it is clearly unconstitutional to allow some outside speakers to use facilities but to deny their use to speakers who are controversial or considered undesirable by the college administration, board of trustees, or state legislature.

ACLU v. Radford Coll., 315 F. Supp. 893, 896 (W.D. Va. 1970).

²³⁸ 508 U.S. 384 (1993).

²³⁹ *Id.* at 387.

²⁴⁰ *Id.* at 388–89.

²⁴¹ *Id.* at 393–94. The Court therefore did not need to determine the character of the forum.

tion that is impermissible even in a nonpublic forum.²⁴² The rationale of *Lamb's Chapel*, which involved elementary and high school facilities, applies to a greater extent at a public university, where the government has less latitude to restrict speech.²⁴³

The Fifth Circuit recently held Southeastern Louisiana University's security fee policy to be unconstitutional when challenged by four non-students who were denied access to the campus after they entered "to express a religious message to students."²⁴⁴ The security fee policy controlled "public assembly or demonstration"²⁴⁵ at the university. Specifically, the policy noted that the sponsoring individuals or organizations were responsible for the cost of security beyond that normally provided by the university, without detailing how the need for security was to be determined.²⁴⁶

According to the Fifth Circuit, this policy violated *Forsyth* because "no objective factors are provided for the University to rely upon" when determining security fees.²⁴⁷ Although this case governs security fees assessments on university campuses when public forum analysis is applicable, and thus may not apply in the limited public forum of the student organizational context, it nonetheless is an important case that demonstrates that outside speakers may invoke their First Amendment rights against university policies, and that courts will not tolerate unconstitutional security fees policies.

In addition, one three-judge panel, faced with a lawsuit by both student organizations and two outside speakers, found that all "plaintiffs" were entitled to an order enjoining university administrators from barring outside speakers affiliated with the Communist Party.²⁴⁸ In overturning this law as vague, the court did not distinguish between the rights of the students and the outside speakers.²⁴⁹

Both student organizations' and outside speakers' constitutional rights are at stake when access to school facilities and the student activities funding are denied. As discussed in the next section, *Forsyth's* concern with administrators exercising "unbridled discretion" in

²⁴² *Id.*

²⁴³ See Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 30-31, 35-40 (2008).

²⁴⁴ *Sonnier v. Crain*, 613 F.3d 436, 438 (5th Cir. 2010).

²⁴⁵ *Id.* at 440 n.3.

²⁴⁶ *Id.* at 440 n.4.

²⁴⁷ *Id.* at 448.

²⁴⁸ *Dickson v. Sitterson*, 280 F. Supp. 486, 487-91 (M.D. N.C. 1968).

²⁴⁹ *Id.* at 499.

assessing security fees, and *Forsyth*'s prohibition on content-based assessments of security fees should apply with respect to these rights.

IV. IMPORTING *FORSYTH* INTO CASES INVOLVING SECURITY FEES

Because student organizations and the student activities fee are held to the standards applicable to limited public forums,²⁵⁰ *Forsyth*'s prohibition on administrators having “unbridled discretion” may arguably be inapplicable. One scholar, for example, contends that the risk of governmental abuse of discretion may be more “tolerable in the context of a forum that occupies a limited space in the marketplace of ideas, that the government need not create and can close at will.”²⁵¹ Additionally, *Forsyth*'s ban on imposing extra security fees for controversial speech as a content-based restriction on speech is technically not relevant to limited public forums like the student organizational context, where content-based restrictions are permissible.²⁵²

As chronicled above, however, the Supreme Court jurisprudence on student organizations militates strongly in favor of importing both aspects of *Forsyth*.²⁵³ The unique characteristics of the university setting also counsel in favor of ensuring that student organizations receive *Forsyth*'s protections. Some lower courts have already begun applying *Forsyth*'s prohibition on administrators having “unbridled discretion” to the student organizational context as a necessary component of viewpoint neutrality.²⁵⁴ These cases have not involved security fees, but their logic is equally valid to that context.

A. Adopting the “Unbridled Discretion” Prohibition in the Student Organizational Context

In *Forsyth*, the Supreme Court explained that “the danger of censorship and of abridgment of our precious First Amendment freedoms is too great” to permit state officials unbridled discretion in

²⁵⁰ See *supra* Part II.B–C.

²⁵¹ See Jacobs, *supra* note 88, at 1386 (“[T]olerating different ‘risks of abuse’ of government discretion is appropriate according to the context.” (quoting *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 124 (1973))).

²⁵² See *supra* Part II.B–C.

²⁵³ See *supra* Part II.B–C.

²⁵⁴ See *infra* Part IV.B.

restraining speech.²⁵⁵ Although the Court has not addressed whether this mandate applies outside of traditional public forums, lower courts and scholars have argued that the Court's concerns are equally valid in other contexts.²⁵⁶ As one scholar remarked, this speech protection should be applied in all forums because "[u]nbridled discretion empowers officials to pick and choose which viewpoints to allow, and viewpoint discrimination is forbidden in all forums."²⁵⁷

In fact, the danger of invidious viewpoint discrimination²⁵⁸ may be greater in a more limited type of forum than in a traditional public forum because an administrator can mask unconstitutional viewpoint-based decisions as content-based exclusions, which are permissible in a limited public forum. This danger propelled the Court's decision in *Rosenberger*, where the Court expressed concern that the university would not evenhandedly apply a prohibition on publications that "primarily promote or manifest a particular belief in or about a deity or an ultimate reality."²⁵⁹ Importing the "unbridled discretion" standard into rules governing the student organizational context would decrease the risk that public universities may misuse their latitude to make content-based decisions.

²⁵⁵ *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)).

²⁵⁶ *See Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 386 (4th Cir. 2006) (stating "Although the Supreme Court has not yet had occasion to apply the unbridled discretion doctrine outside the context of a traditional public forum, the dangers posed by unbridled discretion—particularly the ability to hide unconstitutional viewpoint discrimination—are just as present in other forums."); *see also* Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits are Permitted?*, 56 *DRAKE L. REV.* 381, 414 n.172 (2008) (stating "It would seem that the Supreme Court would frown on unbridled discretion no matter where it is found.").

²⁵⁷ Kellum, *supra* note 256, at 414 n.172 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983)).

²⁵⁸ Invidious viewpoint discrimination is one of the core threats to free speech against which the First Amendment is designed to protect. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (internal citations omitted); *see also* Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 *LOY. L.A. L. REV.* 67, 118 (2007) ("Few, if any, knowledgeable observers would dispute the inherently invidious nature of viewpoint-based discrimination in light of the manner in which it inevitably undermines the values served by democracy and the system of free expression of which it is a part.").

²⁵⁹ *Rosenberger v. Rector*, 515 U.S. 819, 836–37 (1995) (doubting that the university will apply its restriction "with much vigor at all" as authors such as Karl Marx, Bertrand Russell, and Jean-Paul Sartre would be excluded from student publications). *See supra* Part II.C.

Indeed, the particular tensions involved in running a university further increase the risk that administrators will abuse their discretion in creating and maintaining limited public forums. Universities tout themselves as places where faculty generate new ideas and students expand their knowledge and challenge their perspectives, yet administrators are often fearful of generating bad publicity and losing donations from alumni.²⁶⁰ The incentive to stifle controversial viewpoints while appearing to champion free speech creates special dangers for administrators abusing their discretion and masking viewpoint-based determinations.²⁶¹

B. *The Seventh Circuit’s and Second Circuit’s Incorporation of Forsyth*

Lower courts have already begun incorporating *Forsyth* into the speech protections afforded student organizations in the allocation of university benefits. On remand from the Supreme Court’s decision in *Southworth I*,²⁶² the Seventh Circuit addressed whether the University of Wisconsin, which empowered the student government to make funding decisions subject to administrative appeal, allocated its student organizational funding without regard to viewpoint.²⁶³ In its analysis, the court considered whether *Southworth I*’s “requirement of viewpoint neutrality includes a mandate that a decisionmaker not possess unbridled discretion.”²⁶⁴

Although the university argued that *Forsyth*’s prohibition on unbridled discretion applied “only in the context of licensing and per-

²⁶⁰ See Kenneth Lasson, *Controversial Speakers on Campus: Liberties, Limitations, and Common-Sense Guidelines*, 12 ST. THOMAS L. REV. 39, 40 (1999) (noting the irony created by the fact that universities, “which almost universally view themselves as bastions of free speech,” need to support research and scholarship that “curry favorable coverage from the media and attract large amounts of dollars from alumni” and arguing that academic administrators “shy away from conflict and contention” and “abhor negative publicity,” and thus “have become intuitively reluctant to sponsor ideas that clash too loudly”). See generally Theroux, *supra* note 93 (discussing instances of censorship at public universities).

²⁶¹ See *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2984, 95 (2010) (allowing the lower courts to consider on remand whether Hastings was using its all-comers policy pretextually to discriminate against disfavored viewpoints) (internal citations omitted).

²⁶² 529 U.S. 217, 221 (2000) (holding that student activity fees may be used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral).

²⁶³ See *Southworth II*, 307 F.3d 566 (7th Cir. 2002).

²⁶⁴ *Id.* at 595.

mit cases,”²⁶⁵ the Seventh Circuit disagreed. The court explained that both *Rosenberger* and *Southworth I* analogize the “metaphysical” student activities fee to a public forum.²⁶⁶ The appellate court traced the Supreme Court’s permit cases invoking the unbridled discretion standard, including *Forsyth*,²⁶⁷ *Shuttlesworth v. City of Birmingham*,²⁶⁸ and *Thomas v. Chicago Park District*,²⁶⁹ concluding that “the unbridled discretion standard is part of the constitutional requirement of viewpoint neutrality.”²⁷⁰ According to the Seventh Circuit:

While the Supreme Court has never expressly held that the prohibition on unbridled discretion is an element of viewpoint neutrality, we believe that conclusion inevitably flows from the Court’s unbridled discretion cases. From the earliest unbridled discretion cases to *Thomas*, the Supreme Court has made clear that when a decisionmaker has unbridled discretion there are two risks: First, the risk of self-censorship, where the plaintiff may edit his own viewpoint or the content of his speech to avoid governmental censorship; and second, the risk that the decisionmaker will use its unduly broad discretion to favor or disfavor speech based on its viewpoint or content, and that without standards to guide the official’s decision an as-applied challenge will be ineffective to ferret out viewpoint discrimination. Both of these risks threaten viewpoint neutrality.²⁷¹

In essence, the Seventh Circuit held that the Supreme Court’s prohibition on unbridled discretion was applicable to all forums where viewpoint neutrality is forbidden. The court explained that “if the student government lacks specific and concrete standards to guide its

²⁶⁵ *Id.* at 574–75.

²⁶⁶ *Id.* at 580. The Court’s recent decision in *Christian Legal Society v. Martinez* does not change this assertion. The majority opinion cited *Rosenberger* favorably and never intimated that it was altering the framework articulated in *Rosenberger*. See *Martinez*, 130 S. Ct. at 2984 n.12.

²⁶⁷ *Southworth II*, 307 F.3d at 577-78 (citing *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992)).

²⁶⁸ *Id.* at 575-76 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 149-50 (1969) (holding parade-permit ordinance unconstitutional that enabled city commissioner to deny a permit to protect “public welfare, peace, safety, health, decency, good order, morals or convenience”)).

²⁶⁹ *Id.* at 587 (citing *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 323 (2002) (holding that a permit ordinance regulating time, place, and manner must “contain adequate standards to guide the official’s decision and render it subject to effective judicial review”)).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 578-79.

funding decisions, it could use its unbridled discretion to discriminate on the basis of viewpoint.”²⁷² The court noted this discrimination “would go unnoticed because without standards there is no way of proving that the decision was unconstitutionally motivated.”²⁷³ The court concluded that limitations on unbridled discretion should include mandates requiring students to act in a viewpoint-neutral manner, rules listing criteria for making funding decisions, and procedural safeguards requiring the student government to explain its reasons for a funding decision and provide an appeals process.²⁷⁴

Six years after *Southworth v. Board of Regents of University of Wisconsin System (Southworth II)*, the Second Circuit acknowledged the “appropriateness” of the Seventh Circuit’s decision to “incorporate[] the rule against unbridled discretion into the requirement of viewpoint neutrality.”²⁷⁵ In *Amidon v. Student Association*, the Second Circuit held that an advisory student referendum, whereby a student-body vote advises the student government on how much funding student organizations should receive, “injects a substantial risk of undetectable viewpoint discrimination into the allocation process.”²⁷⁶ The court deemed the campus-wide referendum unconstitutional due to a lack of “effective safeguards to prevent a discriminatory advisory referendum from tainting the allocation process,” despite the student government not being bound by its results.²⁷⁷

The court found that the advisory student referendum process did not adequately limit the discretion of the student government, though it did not propagate a general rule “that unbridled discretion *in general* violates *Southworth I*’s call for viewpoint neutrality.”²⁷⁸ In this case, the appellate court held that the standards for determining whether the student government should defer to the results of the referendum were “too vague and pliable to effectively provide the constitutional protection of viewpoint neutrality required by *Southworth I*.”²⁷⁹

²⁷² *Id.* at 580.

²⁷³ *Southworth II*, 307 F.3d 566, 580 (7th Cir. 2002).

²⁷⁴ *Id.* at 581–89. I explore how *Southworth II* incorporates *Forsyth* more specifically in the next subsection.

²⁷⁵ *Amidon v. Student Ass’n*, 508 F.3d 94, 103 (2d Cir. 2007) (citing *Southworth II*, 307 F.3d at 578).

²⁷⁶ *Id.* at 103.

²⁷⁷ *Id.* at 103–05.

²⁷⁸ *Id.* at 103 (emphasis added).

²⁷⁹ *Id.* at 104.

The Second Circuit then required safeguards that were more stringent than that of the Seventh Circuit to diminish the risk of viewpoint discrimination on the part of the student government and administrators.²⁸⁰ The court held that even criteria that included “[w]hether the organization can demonstrate that it will expend funds for the enrichment of campus life at [the university] . . . [and] [w]hether the organization can demonstrate that it has undertaken successful events and activities in the past . . . do[es] not ensure that an official’s discretion is adequately ‘bridled’” in part because the criteria were non-exhaustive.²⁸¹ The Second Circuit required that the student activities fee be allocated “based upon neutral, objective criteria,”²⁸² including “the varying costs [student organizations] will face in communicating their messages and providing their services, such as the size of space needed or the costs of distributing programs to attendees.”²⁸³

Although, as *Amidon* noted, using these criteria might “have a disparate impact on different viewpoints,” what matters is that the criteria ensure that the “university’s purpose is not to discriminate based on viewpoint.”²⁸⁴ Requiring public universities to propound precise, objective criteria before making funding decisions eliminates the possibility of administrators *purposely* burdening unpopular speech;²⁸⁵ is

²⁸⁰ *Id.* (citing *Southworth II*, 307 F.3d at 587-88).

²⁸¹ *Amidon v. Student Ass’n*, 508 F.3d 94, 104 (2d Cir. 2007) (quoting Student Association Bylaw § 517.5).

²⁸² *Id.* at 105 (citing *Rosenberger v. Rector*, 515 U.S. 819, 835 (1995); *Southworth II*, 307 F.3d 566, 595 (7th Cir. 2002)).

²⁸³ *Id.* (citing *Southworth II*, 307 F.3d at 595).

²⁸⁴ *Id.* (citing *Boy Scouts of Am. v. Wyman*, 335 F.3d 80, 93-94 (2d Cir. 2003)).

²⁸⁵ See, e.g., Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227 (1983) (chronicling how the Court has “tended increasingly to emphasize motivation as a paramount constitutional concern”); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (“First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.”); see also Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 769 (2000) (arguing for a “purposivist” approach to First Amendment doctrine where the focus is on ascertaining whether the government was motivated by an improper anti-speech purpose).

a major underpinning of First Amendment jurisprudence,²⁸⁶ and is arguably the true concern in *Forsyth*.²⁸⁷

C. *Applying the Prohibition on “Unbridled Discretion” to Security Fee Cases*

Although neither *Southworth II* nor *Amidon* involves securities fees for speakers hosted by student organizations, the application of *Forsyth* to funding student organizations is equally valid in the context of security fee determinations. The disbursement of student activities fees adds money to an organization’s budget, and the assessment of security fees subtracts funding from an organization’s coffers. Both types of decisions affect how much money a student organization has. As one scholar argues, the size of a student organization’s budget directly impacts the power of the group’s speech.²⁸⁸ Courts already treat the recognition of a student group as indistinct from how much funding a group should receive.²⁸⁹ All restrictions affecting an organization’s budget should therefore be analyzed in a speech context.

Moreover, the denial of university facilities and the assessment of security fees are prior restraints on speech.²⁹⁰ Even if the university assesses a security fee after an event, it may so dramatically affect an organization’s budget that it restrains future speech or causes student

²⁸⁶ Stone, *supra* note 285, at 228 (“[T]he government may not exempt expression from an otherwise general restriction because it agrees with the speaker’s views; and the government may not restrict expression because it might be embarrassed by publication of the information disclosed. This precept and its corollaries are central to our first amendment jurisprudence”) (internal citations omitted).

²⁸⁷ See *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992).

²⁸⁸ Sanford, *supra* note 93, at 858 (“The power of a group’s speech is tied directly to the funds it receives. Funding is, in essence, a megaphone: the more a group receives, the larger its megaphone.”).

²⁸⁹ See *Amidon v. Studeant Ass’n*, 508 F.3d 94, 100 (2d Cir. 2007) (holding that “no constitutional significance” exists between deciding whether to fund a group at all and a decision on how much funding a group should receive because “given the nature of the public forum at issue, a low level of funding can have the same impact as no funding at all”).

²⁹⁰ See *Forsyth*, 505 U.S. at 130 (“The Forsyth County ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies . . . is a prior restraint on speech”); *Widmar v. Vincent*, 454 U.S. 263, 268 (1981) (holding that “the denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes must be subjected to the level of scrutiny appropriate to any form of prior restraint”) (internal citations omitted).

organizations to self-censor, a concern expressed in *Forsyth*, *Southworth II*,²⁹¹ and *Amidon*.²⁹²

Further, universities are especially fearful of bad publicity and political pressure stemming from inviting unpopular speakers to their campuses.²⁹³ In the absence of the protections required by *Forsyth* and *Southworth II*, administrators may use their discretion to charge excessive security fees to student groups that sponsor speakers with disfavored messages.²⁹⁴ Therefore, public universities should be required to propound “neutral, objective criteria”²⁹⁵ for assessing security fees, just as in *Amidon*, to address this issue.

These objective criteria should incorporate *Forsyth*’s second animating rationale—the prohibition against assigning security fees based on an anticipated need to recoup the costs of extra security. *Forsyth* held that charging higher security fees for controversial speech constituted content-based discrimination. Although content-based discrimination may technically be permissible when applied to student organizations,²⁹⁶ the distinction between content discrimination and viewpoint discrimination has been blurred by the Supreme Court.²⁹⁷ Oftentimes, the labels “content,” “viewpoint,” and “subject matter” have been used imprecisely and interchangeably.²⁹⁸ The *Forsyth* Court likely intended to protect unpopular *viewpoints* when it held that charging higher security for controversial speech was imper-

²⁹¹ 307 F.3d 566, 578–79 (7th Cir. 2002).

²⁹² 508 F.3d at 104.

²⁹³ See, e.g., Abbie Ruzicka, *UMass-Amherst Cancels Talk by Ex-Radical Leader*, THE BOSTON GLOBE, Nov. 6, 2009, http://www.boston.com/news/local/massachusetts/articles/2009/11/06/umass_amherst_cancels_talk_by_ex_radical_leader/; Letter from William Creeley, Director of Legal and Public Advocacy, Foundation for Individual Rights in Education, to James B. Milliken, President, University of Lincoln (Nov. 3, 2008), available at <http://www.thefire.org/index.php/article/9949.html>.

²⁹⁴ See *supra* Introduction and note 9.

²⁹⁵ See *Amidon v. Student Ass’n*, 508 F.3d 94, 105 (2d Cir. 2007).

²⁹⁶ See *Rosenberger v. Rector*, 515 U.S. 819, 829–30 (1995) (noting the “distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.”).

²⁹⁷ See *id.* at 831 (remarking that the distinction between content-based discrimination and viewpoint-based discrimination “is not a precise one”); see also *supra* Part II.C.

²⁹⁸ See *Cásarez*, *supra* note 105, at 505. In attempting to define “viewpoint,” *Cásarez* explains that “the Court has further complicated matters by using terms inexactly, sometimes referring to ‘viewpoint,’ ‘subject-matter,’ and ‘content’ discrimination as though they were constitutionally indistinguishable.” *Id.*

missibly *content*-based. Scholarship and court opinions have widely reflected this view.²⁹⁹

The muddling of the categories of content-based and viewpoint-based discrimination has been especially acute when student organizations at public universities are involved.³⁰⁰ Greater speech protections are afforded in this environment than in other limited public forums, and content-based restrictions—if *Forsyth* did, in fact, intend to use the label “content,” and not “viewpoint”—should not always be permitted for policies affecting student organizations.³⁰¹

Charging money to recoup security costs may not evince an *intent* to discriminate based on the administration’s view of the speech, as barred by *Amidon*. Charging money to recoup security costs, however, does require the university to examine the content of speech directly and to treat unpopular or provocative views differently. This contravenes the principle in *Southworth II* that minority opinions should receive the same respect as majority opinions.³⁰² Part V reconciles *Forsyth* with the Supreme Court’s and lower court’s cases involving student organizations to propose a set of specific, content-neutral criteria for administrators to use in assessing security fees. If the security fees for controversial speakers are greater than the cost calculated using this metric, public universities should be responsible for covering the remaining expenses using its own funds.

²⁹⁹ See Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1280 (2008) (arguing that “to sustain differential fees for parades or pickets based on public hostility to a speaker or a group effectively punishes unpopular viewpoints”). In fact, in a different case involving “unbridled discretion,” the Supreme Court noted that “without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech *or viewpoint* of the speaker.” *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763–64 (1988) (overturning ordinance requiring permit before placing private structures on public property) (emphasis added).

³⁰⁰ See *supra* Part II.B–C.

³⁰¹ See *Roberts v. Haragan*, 346 F. Supp. 2d 853, 863 n.11 (N.D. Tex. 2004) (“Although a campus is ‘limited,’ in the general sense of that word, to the use of its students and personnel, this does not reduce it in its entirety to the category of a limited public forum subject to reasonableness standards [That would] ignore the fact that a university campus is a community in a very real sense to that group of persons to whom its use is ‘limited,’ and that as to them it ‘possesses many characteristics of a public forum.’” (quoting *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981))).

³⁰² *Southworth I*, 529 U.S. 217, 235 (2000).

V. ASSESSING SECURITY FEES USING CONSTITUTIONALLY PERMISSIBLE CRITERIA

The principles that underlie the rationale in *Forsyth* dictate that public universities cannot base security fee assessments on an examination of the content of the speech to determine if it poses a security risk.³⁰³ This is true even if the school does not intend to punish certain viewpoints but merely seeks to recoup security expenses, which tend to be higher for unpopular speakers.³⁰⁴ Rather, as shown below, public universities should consider content-neutral and risk-neutral factors when determining security fee assessments.

A. *Constitutionally Allowable Factors to Consider When Assessing Security Fees*

The student activities fees cases *Southworth II* and *Amidon* attempt to prevent administrators from intentionally penalizing certain viewpoints. These cases, however, allow for funding decisions that have a “disparate impact” on student organizations.³⁰⁵ Thus, organizations need not be funded equally, so long as funding differences are not reflective of student or administrative tolerance of a group’s views.

A reconciliation of these cases dictates a two-pronged approach to security fee assessments. First, public universities may not assess security fees by directly examining the content of a speaker’s message. Rather, a public university may charge student organizations different amounts for security costs, even if this has a disproportionate effect on certain types of speech, so long as the administration uses “neutral,

³⁰³ See *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (“The costs to which petitioner refers are those associated with the public’s reaction to the speech. Listeners’ reaction to speech is not a content-neutral basis for regulation.”) (internal citations omitted).

³⁰⁴ *Id.* (rejecting the argument that “the ordinance is content neutral because it is aimed only at a secondary affect—the cost of maintaining public order”).

³⁰⁵ *Amidon v. Student Ass’n*, 508 F.3d 94, 105 (2d Cir. 2007) (“SUNY-Albany is therefore free to allocate based upon neutral, objective criteria, that ultimately have a disparate impact on different viewpoints so long as the university’s purpose is not to discriminate based on viewpoint”) (internal citations omitted). The Court in *Martinez* also noted that “a regulation that has a differential impact on student groups” was permissible as long as the university did not “not target conduct on the basis of its expressive content.” *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2994 (2010).

objective criteria” and does not intend to burden unpopular or controversial views.³⁰⁶

As stated in *Amidon*, because a student organization has “financial needs [that] do not necessarily reflect its viewpoint, the university does not ‘impermissibly distort its marketplace of ideas’ by considering those needs.”³⁰⁷ Similarly, student organizations sponsoring speakers have security costs that vary in ways that do not offend the First Amendment. For example, the number of audience members attending a speaker’s talk affects how many security officers the university requires. A talk given in a larger auditorium, with more entrances and exits, may necessitate more security officers. Further, if the event is open to the public, or if money is exchanged for selling tickets, more security officers may be necessary.

These factors, like the number of audience members attending a speaker’s event, may partially reflect the viewpoint being expressed during the talk. Assessing security fees based on factors like audience attendance, however, should be considered an “objective, neutral” criterion for First Amendment purposes. As the Seventh Circuit noted in *Southworth II*, there are legitimate reasons, which do not depend on the content of the speech at issue, to use the number of attendees of an event as a metric for determining how much funding that event requires:

[T]he University cannot use the popularity of the speech as a factor in determining funding. That does not mean that the University can never consider the number of students involved because some variable expenses will legitimately depend on this factor, such as the amount of money needed for refreshments or programs distributed to attendees. Or, as illustrated above, the number of students interested in an event may necessitate the renting of a larger space, and in this circumstance it is legitimate to consider the size of the attending audience.³⁰⁸

In addition, the size of the audience may be wholly *unrelated* to a speaker’s views, either generally or the views expressed during a particular event. Famous or public figures usually garner large attendance regardless of their views, simply because of their notoriety or

³⁰⁶ *Amidon*, 508 F.3d at 105 (citing *Rosenberger v. Rector*, 515 U.S. 819, 835 (1995); *Southworth II*, 307 F.3d 566, 595 (7th Cir. 2002)).

³⁰⁷ *Id.* (quoting *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 179 (2007)).

³⁰⁸ *Southworth II*, 307 F.3d 566, 595 (7th Cir. 2002).

importance. Finally, the reasons for a particular audience member's presence may be unknown and could reflect either agreement or disagreement with the speaker. An individual may decide to attend a speaker's presentation either because his views are controversial or well-regarded. A particular audience member may wholeheartedly agree or disagree with the speaker, or may even plan to disrupt the speech. Assigning security fees based on audience size, therefore, would not serve as a means to punish unpopular views, and might not even disproportionately punish unpopular views, two particular concerns in *Forsyth*,³⁰⁹ *Rosenberger*,³¹⁰ and *Southworth II*.³¹¹

Other factors, like whether tickets are being sold, the type of auditorium being used, and whether the event is open to the public, may similarly be tangentially related to the content of the speech, but do not offend the principles underlying *Forsyth*, *Rosenberger*, *Amidon*, and *Southworth II*. A student organization can provide information on these factors without the university's considering the content of the speech.

B. *A Proposal for Security Assessment Policies*

Public university policies vary in the provisions that they contain. Some universities may not even detail how security fees are calculated, which affords administrators "unbridled discretion" to make those determinations.³¹² Public universities should adopt clearly articulated policies that conform to *Forsyth*, *Southworth*, and their progeny to ensure that administrators do not punish unpopular views or assess speaker's fees based on controversial content. The policies' provisions should include the following basic elements: (1) risk-neutral and content-neutral standards for determining security fees; (2) explicit guidelines on how those fees are determined; and (3) a trans-

³⁰⁹ See *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (rejecting county ordinance assessing security fees, in part, because "those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit").

³¹⁰ See *Rosenberger v. Rector*, 515 U.S. 819, 830 (1995) (noting the University's recognition that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional in funding, as in other contexts").

³¹¹ See *Southworth II*, 307 F.3d at 593 ("Both *Forsyth* and *Chicago Acorn* illustrate that in determining access to a forum the criteria considered must be unrelated to the content of the speech and must not have the effect of excluding unpopular or minority viewpoints.").

³¹² See, e.g., Case Western Reserve University, CASE POLICE AT SPECIAL EVENTS, available at <http://studentaffairs.case.edu/handbook/policy/university/eventsecurity.html>.

parent process for student groups to appeal security fees that are larger than normal.

Temple University’s written policy, for example, would not be in compliance. The Campus Safety department³¹³ at Temple is responsible for the final determination of the required number of security personnel for an event, using factors such as “projected attendance, time and location of event, type of activity planned (e.g., lectures may require less security than concerts), and the number of organizational personnel available to help monitor the event.”³¹⁴ Equally content-neutral factors, such as whether the sponsoring organization plans to provide “event staff” and whether the event is advertised as open to the public, further affect security requirements. Temple University, however, also allows Campus Safety to conduct a “Risk Assessment.”³¹⁵ According to the Student Activities Office, “Increased risks (e.g., threats received) will increase the security requirement.”³¹⁶

This “Risk Assessment” category empowers the university to charge student organizations more in anticipation of hecklers, an impermissible consideration under *Forsyth*.³¹⁷ Although these risk assessment criteria do not enable Campus Safety to examine the speech directly for controversial content, student groups that sponsor speakers who receive threats (i.e., those who may be “unpopular with bottle throwers”)³¹⁸ are charged more in security fees. Temple’s policy leads to divisive or minority views not being given “the same respect as majority views.”³¹⁹ The greater financial burden placed on controversial views may also lead to a chilling effect on groups sponsoring unpopular or divisive speakers.³²⁰

More troublesome than Temple University’s “Risk Assessment” category is when a public university fails to formalize its security fees

³¹³ Temple University’s Campus Safety Services is responsible for campus policing. See Temple University’s Campus Safety Services, *THE PERSONAL TOUCH TO CAMPUS POLICING* (2004), available at http://css.ocis.temple.edu/about_us/.

³¹⁴ Temple University Student Activities, *PROGRAMMING TIPS* (2008), available at <http://www.temple.edu/studentaffairs/studentactivities/studentorgs/blackbook-programming.asp>.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ See *supra* Part I.B.

³¹⁸ See *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

³¹⁹ *Southworth I*, 529 U.S. 217, 235 (2000).

³²⁰ Benjamin Lombard, *First Amendment Limits on the Use of Taxes to Subsidize Selectively the Media*, 78 CORNELL L. REV. 106, 124 (1992) (discussing how imposing financial burdens on speech through differential taxation “diminishes the permissible quantity and effective exercise of speech”).

policy. For instance, the University of California at Berkeley initially imposed a \$3,000 security fee on the Objectivist Club for hosting a speech by Elan Journo on “America’s Stake in the Arab-Israeli Conflict.”³²¹ After complaints, the university later agreed to assess this security fee using “neutral criteria” instead of “anticipated audience response.”³²² The university, however, did not change its general policy and appears to be assessing security fees on a case-by-case basis.³²³ Without guidance or any clearly defined criteria, little is stopping this university from imposing prohibitive security fees that hinge upon impermissible considerations, like the controversial nature of the topic or speaker, onto student organizations.

A constitutional security fee policy must clearly outline the content-neutral factors the university will consider in determining a group’s security fee, including audience size, type of venue, and number of event staff from the sponsoring organization. There is still some risk that administrators will analyze these criteria unfairly or in a biased manner. But only by establishing neutral, objective criteria and giving the administration discretion that is “no greater than necessary” to evaluate security costs, will the risk of this type of impropriety be reduced to a constitutionally permissible magnitude.³²⁴

C. *Funding the Extra Security Costs*

If a public university has received threats against a particular speaker or believes a particular topic may provoke disruptions among audience members, the university may wish to provide enhanced security above what the constitutional criteria dictates. In that case, the security costs calculated using content-neutral considerations, like audience size and event venue, may be insufficient. The university, however, has several options.

³²¹ Letter from William Creeley, Director of Legal and Public Advocacy, FIRE, to Chancellor Robert J. Birgeneau, University of California at Berkeley (Feb. 12, 2009), *available at* <http://www.thefire.org/article/10323.html>.

³²² See Letter from Michael R. Smith, Chief Campus Counsel and Associate General Counsel at the University of California at Berkeley, to William Creeley, Director of Legal and Public Advocacy, FIRE (Feb. 29, 2009), *available at* <http://www.thefire.org/public/pdfs/c487700ad686cb2e20b7f23ae90d338b.pdf?direct>.

³²³ *Id.*

³²⁴ *Southworth II*, 307 F.3d 566, 592 (7th Cir. 2002) (“While the Funding Standards grant a certain amount of discretion, that discretion is no greater than necessary to allow the student government to evaluate the funding requests”).

The university’s safest option, from a constitutional perspective, is to create a separate fund for extra security fees for those speakers who create a greater security risk. These speakers may willingly provide their own security detail, but if the university requires more, the university should expend funds from its own money instead of imposing those costs on the student organization that is hosting the speaker. In *Forsyth*, the Supreme Court recognized that controversial speech may require higher security fees, but held that this cost could not be placed on the speaker’s host.³²⁵ Presumably, then, this cost must be borne by the government through money collected from the county’s taxpayers. Similarly, the university should use its own money to provide security it deems warranted because of the speaker’s content.

Forsyth required the *government* to cover enhanced security costs for controversial speakers. Concordantly, the university must not reimburse itself using money from student activities fees, which is rightfully viewed as belonging to the students.³²⁶ Because any pool of money that the university creates may be partially funded by tuition, it may be financially indistinct from the student activities fund, which is also funded through tuition. The legal distinction between this pool of money and the student activities fee, however, is important for several reasons.

First, the student government administers the student activities fee.³²⁷ If the student government is aware of which organizations are spending extra money in security fees, it might be less inclined to provide funding for these organizations’ future events. In this way, student organizations that host controversial speakers would be penalized for necessitating extra security costs. Further, a funding source distinct from the student activities fee might also contain money from the university’s endowment, or separate donations. That money is more appropriately considered to belong to the university, which is obligated as an instrumentality of the state to safeguard controversial speakers from harm and ensure that they are not denied equal access to its forums.³²⁸

³²⁵ *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133-34 (1992).

³²⁶ *See Rosenberger v. Rector*, 515 U.S. 819, 851-52 (2000) (O’Connor, J., concurring); *see also supra* Part II.A. *But see Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2986 (2010) (describing the student organizational forum as “effectively a state subsidy”).

³²⁷ *See supra* Part II.A.

³²⁸ *See supra* Part I.B.2.

Universities may be resistant to the idea of raising money to support extra security costs instead of imposing them on the student group whose speaker is precipitating those costs. Understandably, a university's budget constraints may create administrative concerns over raising sufficient resources as well. A university experiencing financial difficulty may decide to prohibit student organizations from hosting outside speakers altogether, similar to when several universities cut male athletics programs to adhere to a federal statute that required universities to afford male and female athletes similar opportunities.³²⁹

Instead, public universities should consider constitutional methods of recouping or diminishing the costs of security necessitated by controversial speech. For example, a public university could require that student organizations that host speakers who garner more than a certain number of audience members (regardless of whether there is a heightened security risk) charge money for tickets. These ticket revenues would automatically go to a student security fund and could be used by the university whenever it expects security disruptions that are disproportionate to the size of a student organization's event. This might burden speech, albeit in a viewpoint-neutral way. To avoid such burdening, public universities should also appeal to donors interested in academic freedom and the free exchange of ideas to create a fund specifically for controversial speakers. Additionally, public universities may take greater care to examine how much security is actually needed; universities that impose extra security costs on student organizations have a greater incentive to be more risk averse and demand more security even when the likelihood of disruption is low.³³⁰ Often, schools fear disruptions that never materialize, and have an alarmist view of security concerns. To diminish security issues before they arise, universities can create student programming to raise awareness about the importance of the free exchange of ideas, and promote policies that discourage students from reacting disruptively to protected speech.

³²⁹ Danielle M. Ganzi, Note, *After the Commission: The Government's Inadequate Responses to Title IX's Negative Effect on Men's Intercollegiate Athletics*, 84 B.U.L. REV. 543, 558 (2004) (explaining that "courts have accepted budget constraint as a valid reason for universities to comply with Title IX by reducing athletic opportunities for men to the point that the numbers are 'substantially proportionate' to the opportunities available to women").

³³⁰ See discussion of the William Ayers and Ward Churchill events in the Introduction.

CONCLUSION

This article has endeavored to explain why *Forsyth* should be applied in the student organizational context, especially when administrators impose security fees on student organizations who host controversial speakers. The rationales behind *Forsyth*, including protection of unpopular views from the heckler’s veto, are equally necessary in forums created by the university. *Forsyth*’s ban on administrators having “unbridled discretion,” and *Amidon*’s requirement that public universities propound clear, neutral criteria when making funding decisions, are necessary to safeguard students’ right to receive information and speakers’ rights to access the university’s forum regardless of their viewpoints.

Complying with the Constitution can be difficult and expensive, as public universities must ultimately cover the costs of heightened security necessitated by hostile audience response to controversial speakers. The principles underlying *Forsyth*, *Southworth*, and their progeny, however, solidify the university’s role as facilitator of the “marketplace of ideas.”³³¹ Violent responses to controversial speech are unfortunate, but penalizing speakers for the misdeeds of their listeners is a far greater injustice.³³²

³³¹ *Keyishian v. Board of Regents*, 385 U.S. 589, 605–06 (1967). In *Keyishian*, the Court noted that “the Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.” *Id.* at 603 (internal quotation marks and alterations omitted).

³³² See *supra* Part I.B. (discussing how protecting speakers from hostile audiences avoids penalizing controversial speakers and should not be considered a subsidy on speech). See also *Rosenberger v. Rector*, 515 U.S. 819, 836 (2000) (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”).

