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Rebecca Roman[†]

I. INTRODUCTION

"Free" speech seems like a misnomer when looking at the price public universities have to pay to protect students' First Amendment rights. Accommodating controversial speakers on campus requires universities to balance budget constraints with free speech. Recently, universities' obligation to provide security to people on campus and their commitment to free speech have come into conflict, resulting either in hefty security costs or lawsuits because the law is unsettled as to who should pay the security fees for controversial speakers.[1] The potent combination of rising security costs and frequent and aggressive responses to these controversial speakers makes this a serious First Amendment issue.[2] However, trying to impose the security fees on the student groups who invite these speakers may infringe on students' First Amendment rights.

Examples of this clash between free speech and financial feasibility are easy to find. In 2017, the University of California, Berkeley spent four million dollars on security costs and other expenses for events featuring controversial speakers like Milo Yiannopoulos and Ben Shapiro.[3]

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[1] Teresa Watanabe, *Q&A: UC Berkeley Chancellor Carol T. Christ: 'Free Speech Has Itself Become Controversial'*, L.A. TIMES (Sept. 14, 2017), https://www.latimes.com/local/education/la-me-uc-berkeley-chancellor-free-speech-20170914-htmlstory.html [https://perma.cc/XAT2-U48W].

[2] Douglas Belkin, *Fear of Violent Protests Raises Cost of Free Speech on Campus*, WALL ST. J. (Oct. 22, 2017), https://www.wsj.com/articles/fear-of-violent-protests-raises-cost-of-free-speech-on-campus-1508670000 [https://perma.cc/T94J-GWVX].

[3] Ashley Wong, *UC Berkeley Spent $4 Million on 'Free Speech' Events Last Year*, DAILY CALIFORNIAN (Feb. 4, 2018), https://www.dailycal.org/2018/02/04/uc-berkeley-split-4m-cost-free-

UC Berkeley Chancellor Carol Christ says such security costs are "certainly not sustainable."[4] On the other hand, UC Berkeley paid out $70,000 to two student groups to settle a free speech suit that was filed after the University tried to restrict speeches by two controversial speakers.[5] On the other side of the country, University of Florida Spokeswoman Janine Sikes noted that "[p]ublic institutions cannot continue to pay this kind of money," when discussing the $500,000 tab the University ran up in security costs when white nationalist Richard Spencer visited campus.[6] Meanwhile, the University of Washington paid $122,500 in legal fees in a settlement with College Republicans after trying to make the student group pay $17,000 as a "security fee" for costs associated with hosting a rally with the conservative group, Patriot Prayer.[7]

The crux of the problem established by these examples is that there are two incongruent yet uncompromisable interests at stake. One is the protection of students' First Amendment rights to free speech, and the other is the finite budgets of universities and the money they must spend to protect that speech. This Comment first argues that public universities cannot impose additional security fees on student groups who invite controversial speakers without running afoul of the First Amendment and provides universities with constitutionally permissible alternatives to help lower security costs. Section II provides necessary background on applicable First Amendment doctrine. Section III discusses Supreme Court precedent on fees in public forums and student speech rights in a university setting, as well as recent lower court campus security fee cases. Finally, Section IV uses that progression of cases to establish that imposing additional security costs on student groups that invite controversial speakers impermissibly infringes on students' First Amendment rights. In light of this conclusion, Section V lays out constitutionally permissible alternatives for universities to manage security costs.

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speech-events-uc-office-president/ [https://perma.cc/3LAF-835Q].

[4] Watanabe, *supra* note 1.

[5] Alex Morey, *UC Berkeley Agrees to Pay $70k, Change Policies, in Speech Suit Settlement*, FIRE (Dec. 14, 2018), https://www.thefire.org/uc-berkeley-agrees-to-pay-70k-change-policies-in-speech-suit-settlement/ [https://perma.cc/X2FM-SHLU].

[6] Belkin, *supra* note 2.

[7] Katherine Long, *UW to Pay $122,500 in Legal Fees in Settlement with College Republicans over Free Speech*, SEATTLE TIMES (June 18, 2018), https://www.seattletimes.com/seattle-news/uw-to-pay-127000-in-legal-fees-in-settlement-with-college-republicans-over-free-speech/ [https://perma.cc/WX8V-L5DM].

II. FIRST AMENDMENT DOCTRINE

There are two foundational First Amendment issues at play in addressing the free speech implications of security fees in a university context: public forum doctrine and the heckler's veto.

A. Public Forum Doctrine

Public forum doctrine is an analytical tool used by courts to determine what kinds of restrictions the government can impose on speech based on where the speech takes place. There are three types of forums in which speech is protected to varying degrees: (1) traditional public forums, (2) designated public forums, and (3) nonpublic forums.

Traditional public forums are those places that "have immemorially been held in trust for the use of the public," such as parks and public streets.[8] In addition to the traditional public forum, the government can create a designated public forum by opening public property for communicative activity.[9] This second type of forum does not have to be a public forum indefinitely, but so long as the government uses it as a public forum, courts will treat it as such.[10] Designated public forums can be further broken down into limited and non-limited designated forums. Non-limited designated forums are not limited on who can speak or what can be discussed.[11] In contrast, a limited designated forum is a type of designated public forum opened only for certain groups or types of speech.[12] Lastly, nonpublic forums are forums for public speech that are not "traditional" and have not been designated a public forum by the government.[13] Examples of nonpublic forums include airport terminals, public schools' internal mail systems, and polling places.

In a nonpublic forum, the government may apply content-based restrictions on speech, as long as the restrictions are reasonable and do not discriminate based on speakers' viewpoints.[14] Traditional and

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[8] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).

[9] *See id.* at 45.

[10] *See id.* at 46 (citing Widmar v. Vincent, 454 U.S. 263, 269–70 (1981)).

[11] Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 498 (2005).

[12] *See id.*; *see also Perry Educ. Ass'n*, 460 U.S. at 46 n.7, 47 ("A public forum may be created for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects.").

[13] *See* Langhauser, *supra* note 11, at 498.

[14] *See id.* at 494, 503 ("Succinctly stated, 'content' refers broadly to the subject matter of the speech; 'viewpoint' refers to the perspective from which a speaker views a particular topic—e.g. viewing child-rearing questions from a Christian perspective; and 'effect' is what happens or is likely to happen in response to the expression of that content and/or viewpoint.") (footnote omitted) (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995)).

designated forums are more protective of free speech. In these forums, content-neutral restrictions will be subject to intermediate scrutiny, meaning they "must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . need not be the least restrictive or least intrusive means of doing so."[15] A regulation is content neutral if it serves purposes unrelated to the content of the expression.[16] Restrictions on the time, place, and manner of expressive activity are generally content neutral because they do not discriminate based on the content of the message.[17] For example, in *Ward v. Rock Against Racism*,[18] the Supreme Court held that New York City did not run afoul of the First Amendment when it passed a regulation on the volume of amplified music at concerts in Central Park because its purpose was to regulate noise levels, as opposed to the content of the music.[19]

In traditional and designated public forums, content-based restrictions will be subject to strict scrutiny, meaning that to be upheld, the regulation must further a compelling state interest and be narrowly tailored to achieve that interest.[20] While there is no precise definition of a compelling state interest, examples include "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services."[21] For a regulation to be narrowly tailored, the regulation must promote a substantial government interest that cannot be achieved as effectively in a less restrictive way.[22] In other words, the regulation must "not [be] substantially broader than necessary to achieve the government's interest."[23] For illustration, in *McCullen v. Coakley*,[24] the Massachusetts state legislature sought to protect its interest in public safety and patient access to reproductive health care by making it a crime to "knowingly stand on a 'public way or

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[15] Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

[16] *Id.* at 791.

[17] *Id.*

[18] 491 U.S. 781.

[19] *See id.* at 792.

[20] *See* Langhauser, *supra* note 11, at 502.

[21] McCullen v. Coakley, 573 U.S. 464, 486–87 (2014) (citations omitted) (citing Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 376 (1997)). *See generally* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 398 (2006). *But see* Ronald Steiner, *Compelling State Interest*, MTSU (2009), https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest [https://perma.cc/CEX4-DV74] ("An interest is compelling when it is essential or necessary rather than a matter of choice, preference, or discretion.").

[22] Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989).

[23] *Id.*

[24] 573 U.S. 464 (2014).

sidewalk' within 35 feet" of an abortion clinic.[25] The Supreme Court held that the statute was not narrowly tailored because the "buffer zones" burdened significantly more speech than was necessary to achieve the asserted state interests.[26] In fact, the Court found that another provision in the same statute protected the state's interests as effectively in a less restrictive way, by making it a crime to knowingly impede "another person's entry to or exit from a reproductive health care facility."[27]

In sum, content-based restrictions on speech in public forums will be subject to strict scrutiny review, while restrictions on speech in nonpublic forums will only face intermediate scrutiny. Section III will establish that universities contain a variety of public and nonpublic forums. For example, a classroom is not a public forum,[28] but a student activity fee often is a public forum, albeit a "metaphysical" one.[29]

B. The Heckler's Veto

The heckler's veto pertains to restrictions placed on speech by the government in response to an audience's reaction or expected reaction. A heckler's veto is an "impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience."[30] The Supreme Court has held that a speaker should not be silenced because of a hostile audience, and many courts have imposed affirmative obligations on the state to provide for the security of controversial speakers in public forums.[31]

The government's obligation to protect and promote unpopular speech in a typical heckler's veto case is not without limit. First, speech protections only apply to protected speech; that is, certain categories of speech do not qualify for First Amendment—and therefore government—protection. For example, speech that amounts to incitement of violence would not be protected, even in a traditional public forum.[32]

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[25] *Id.* at 469, 486 (internal quotation marks omitted).

[26] *Id.* at 490.

[27] *See id.* at 490–91.

[28] *See* Bishop v. Arnov, 926 F.2d 1066, 1071 (11th Cir. 1991).

[29] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995).

[30] Startzell v. City of Philadelphia, 533 F.3d 183, 200 (3d Cir. 2008).

[31] *See* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) ("Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob."); *see also* Ovadal v. City of Madison, 416 F.3d 531, 537 (7th Cir. 2005) ("The police must permit the speech and control the crowd; there is no heckler's veto.") (quoting Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993)); Grider v. Abramson, 994 F. Supp. 840, 845–46 (W.D. Ky. 1998) ("The police were not at liberty to do nothing; authorities had to develop some way of allowing the rallies to proceed while at the same time protecting those participating."), *aff'd*, 180 F.3d 739 (6th Cir. 1999).

[32] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (establishing that speech advocating illegal conduct is protected under the First Amendment unless the speech is likely to incite

Additionally, "the law does not expect or require [the police] to defend the right of a speaker to address a hostile audience, however large and intemperate, when to do so would unreasonably subject them to violent retaliation and physical injury."[33] With this background in mind, this Comment argues that universities that impose additional security fees on student groups who invite controversial speakers are engaging in a de facto heckler's veto by imposing these additional costs due to audiences' reactions.

III. PROGRESSION OF CASES

There are two series of cases implicated by the question of who should pay security fees required to host controversial speakers on campus. The first outlines when security fees can be charged in certain public forums. The second outlines the relationship between universities and student speech. This Comment argues that these two series of cases fit together to establish that when universities establish a designated public forum, imposing additional security costs on student groups who invite controversial speakers to campus constitutes an infringement on students' First Amendment rights. The recent security fee cases in Subsection C illustrate that some courts have adopted this conclusion.

A. Fees and Permits in Public Forums

The government must protect controversial speakers in traditional public forums and may not charge speakers for increased security costs based on audience reaction to their controversial speech.[34] However, the Supreme Court has held that regulations regarding the use of public forums that ensure the safety and convenience of the people are not inconsistent with the First Amendment, so long as they do not give the government too much discretion.[35] In *Cox v. New Hampshire*[36] the Supreme Court upheld a statute that required organizers to obtain a special license before putting on a demonstration in a public forum.[37] The statute authorized a municipality to charge a permit fee for the "maintenance of public order" of up to $300.[38] The Court held that it was constitutional to charge a fee limited to the purpose of

"imminent lawless action").

[33] Glasson v. City of Louisville, 518 F.2d 899, 909 (6th Cir. 1975), *overruled on other grounds by* Bible Believers v. Wayne Cty., 805 F.3d 228 (6th Cir. 2015).

[34] *See Forsyth*, 505 U.S. at 135–36.

[35] *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

[36] 312 U.S. 569.

[37] *Id.* at 575–78.

[38] *Id.* at 576–77.

meeting the expense of administering the licensing act and maintaining public order.[39] The Court went so far as to state that:

> [t]he suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.[40]

In contrast to *Cox*, the Supreme Court has also held that a similar ordinance allowing county commissioners to assess a fee of up to $1,000 per day was unconstitutional because it gave a county administrator too much discretion to determine how much to charge.[41] In *Forsyth County v. Nationalist Movement*,[42] the Supreme Court granted certiorari to determine "the constitutionality of charging a fee for a speaker in a public forum."[43] As a result of demonstrations that led to unrest in a small rural county, commissioners enacted an ordinance that required a permit and a fee to be paid in advance of any event.[44] The fee was to be determined as needed to "meet the expense incident to the administration of the ordinance and to the maintenance of public order," but was capped at $1,000.[45] The commissioners wanted to impose some of the increased security costs on the demonstrators because the provision of "necessary and reasonable protection" to participants in these demonstrations "exceed[ed] the usual and normal cost of law enforcement."[46] When the plaintiffs proposed a demonstration a few years later, the county imposed a $100 fee for the permit.[47] The plaintiffs sued claiming the fee infringed on their First Amendment rights.[48]

In a public forum, content-based regulations of speech must be "narrowly tailored to serve a significant government interest."[49] In *Forsyth*, the ordinance imposing a fee based on audience reaction was content-based because "[t]hose wishing to express views unpopular with

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[39] *Id.* at 577.

[40] *Id.*

[41] *See* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 133 (1992).

[42] 505 U.S. 123.

[43] *Id.* at 129.

[44] *See id.* at 130.

[45] *Id.* at 126–27 (internal quotation marks omitted).

[46] *Id.* at 126 (internal quotation marks omitted).

[47] *Id.* at 134–35 (1992).

[48] *Id.* at 127.

[49] *Id.* at 130.

bottle throwers, for example, may have to pay more for their permit."[50] Applying strict scrutiny, the Supreme Court found that the statute was not narrowly tailored because there were no "narrowly drawn, reasonable and definite standards guiding the hand of the Forsyth County administrator."[51] Specifically, the administrator did not have to rely on objective factors or explain his unreviewable decision; therefore, a biased administrator could use the fees as a form of censorship.[52] The uncontrolled discretion of the ordinance permitted a content-based metric for assessing security fees.[53] Thus, it invalidated the ordinance.[54]

The language of the regulations in *Cox* and *Forsyth* are hard to distinguish, making the outcomes hard to reconcile.[55] The *Forsyth* Court did not overrule *Cox*, but stated it did not read *Cox* to permit a state entity to charge controversial speakers a premium due to hostile audience reaction.[56] While this explanation fails to explain how such similar language can be read in opposite ways, it makes clear that the Supreme Court would not permit a premium to be charged to controversial speakers going forward.

The Supreme Court recently upheld a content-neutral permit system that allowed for permit seekers to be excluded if the exclusion helped preserve park facilities, prevented dangerous uses of forums, and assured financial accountability for damage caused by an event.[57] In *Thomas v. Chicago Park District*,[58] a park ordinance required individuals to obtain a permit before hosting events of more than fifty people.[59] The ordinance listed reasons why the Park District could deny an application for a permit, including that "the applicant has not tendered the required application fee," "the applicant . . . has on prior occasions damaged Park District property and has not paid in full for such damage," and "the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public."[60]

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[50] *Id.* at 134 (citing Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989)).

[51] *Id.* at 133 (internal citations omitted).

[52] *Id.* at 133–34.

[53] *Id.*

[54] *Id.* at 137.

[55] *Compare id.* at 126–27 (the fee was to be determined as needed to "meet the expense incident to the administration of the Ordinance and to the maintenance of public order"), *with* Cox v. New Hampshire, 312 U.S. 569, 576–77 (1941) (the statute authorized a municipality to charge a permit fee for the "maintenance of public order" of up to $300).

[56] *Forsyth*, 505 U.S. at 136.

[57] *See* Thomas v. Chi. Park Dist., 534 U.S. 316, 322 (2002).

[58] 534 U.S. 316.

[59] *Id.* at 322.

[60] *Id.* at 318 n.1.

Although mere time, place, and manner restrictions can be applied in a discriminatory way by giving too much discretion to park officials, there was no fear that an official would grant or deny a permit based on its content under the ordinance in this case.[61] The Park District could only deny a permit for one of the reasons set forth in the ordinance, and the Court found those grounds to be "reasonably specific and objective, and [did] not leave the decision 'to the whim of the administrator.'"[62] Together, *Cox*, *Forsyth*, and *Thomas* illustrate that, in traditional public forums, permits and fees must be assessed in an objective and content neutral way and speakers cannot be excluded or surcharged based on the content of their speech (lest the regulation be subject to strict scrutiny).

B. Universities and Students' First Amendment Rights

Students enjoy the constitutional protections of the First Amendment in a university setting.[63] Though the Supreme Court has long recognized the authority of the state and of school officials to "prescribe and control conduct in the schools,"[64] it has held that First Amendment protections are "nowhere more vital than in the community of American schools."[65] It is important to note that this Comment addresses the First Amendment rights of students at public universities because the First Amendment only applies to government actors.[66] Although many private universities protect student speech with commendable commitment, those institutions are not bound by the First Amendment.[67] However, there are many reasons why private universities should adhere to First Amendment principles.[68] Thus, this Comment may be applicable to private universities committed to protecting free speech as well.

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[61] *Id.* at 323–24.

[62] *Id.* at 324 ("They provide 'narrowly drawn, reasonable and definite standards' to guide the licensor's determination.") (quoting Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 133 (1992)).

[63] *See* Healy v. James, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large.").

[64] *Id.*

[65] *Id.* ("The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas . . . .'") (quoting Keyishian v. Bd. of Regents State Univ. of N.Y., 385 U.S. 589, 603 (1967)). Of course, there are many cases that cabin this broad pronouncement and allow school administrators to restrict speech on campuses. *See generally* JUSTIN DRIVER, THE SCHOOLHOUSE GATE (2018).

[66] *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) ("[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor.").

[67] *See* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS xi (2017) ("We recognize, of course, that the First Amendment applies only to public colleges and universities.").

[68] Aside from the benefits generally associated with the First Amendment, like the sharing of

The cases that set the parameters for a university's ability to interfere with students' First Amendment rights arose in the context of student group recognition. The following cases established that universities provide limited public forums to registered student organizations and that universities cannot deny these student organizations access to those forums based on a group's viewpoints.

Denial of official recognition of a student organization, without sufficient justification, violates students' First Amendment right of association.[69] In *Healy v. James*,[70] the Supreme Court held that a public educational institution exceeds constitutional bounds when it "restrict[s] speech or association simply because it finds the views expressed by [a] group to be abhorrent."[71] The Court further held that the denial of official recognition to a student group without justification unconstitutionally impedes a group's ability to associate by denying access to campus resources.[72]

Using the same logic as in *Healy*, the Supreme Court has made clear that universities cannot allow some groups to use campus resources but deny others based on the content of their messages.[73] In *Widmar v. Vincent*,[74] a state university was sued by a religious student group that was denied access to campus facilities because of a regulation that prohibited the use of school property for religious purposes in an attempt to avoid state support for religion.[75] The Court held that the University had rendered itself a limited public forum by holding itself open for use by student groups.[76] Relying on *Healy*, the Supreme Court reiterated that students have a right to free speech on campus and that the withholding of campus resources is a form of prior restraint, subject to strict scrutiny.[77] The Court held that the regulation was invalid because it was a content-based regulation on religious activity and the University could not show that regulation of that activity was necessary

ideas, President Trump issued an executive order directed at both public and private universities urging them to protect free speech on campus or risk losing federal funds. *See* Andrew Kreighbaum, *Trump Signs Broad Executive Order*, INSIDE HIGHER ED (Mar. 22, 2019), https://www.insidehighered.com/news/2019/03/22/white-house-executive-order-prods-colleges-free-speech-program-level-data-and-risk [https://perma.cc/BQ2P-UQ4Q].

[69] *See Healy*, 408 U.S. at 181 ("[T]he freedom of association is . . . implicit in the freedoms of speech, assembly, and petition.").

[70] *Id.*

[71] *Id.* at 187–88.

[72] *Id.* at 181.

[73] *See* Widmar v. Vincent, 454 U.S. 263, 267 (1981).

[74] 454 U.S. 263.

[75] *Id.* 265–66.

[76] *Id.* at 267–68, 272.

[77] *Id.* at 267 n.5.

to serve a compelling interest or that the regulation itself was narrowly drawn to achieve that end.[78]

Similarly, universities cannot fund the speech of some groups but not others based on viewpoints.[79] Though it often authorized the payment of printing costs for student publications, the University in *Rosenberger v. Rector & Visitors of the University of Virginia*[80] denied printing costs to a student group's newspaper on the ground that it promoted religious beliefs.[81] The Supreme Court held that the University had created a limited public forum by enacting a policy of providing funding for the printing costs of student publications and that the denial of funding for the plaintiffs' publication involved unconstitutional viewpoint discrimination, violating the students' First Amendment rights.[82] It did not matter that that the University was denying funding for speech as opposed to a platform for speech, as in *Widmar*.[83]

Healy, *Widmar*, and *Rosenberg* establish that the "First Amendment generally precludes public universities from denying student organizations access to school-sponsored forums because of the groups' viewpoints."[84] It may be permissible, however, to deny a student group access to campus resources if the resources are a subsidy and withholding access would not constitute a prior restraint on free speech. At issue in *Christian Legal Society v. Martinez*[85] was the constitutionality of a university policy that required registered student organizations to accept an "all-comers" policy to allow all students to participate in any student organization.[86] A student group sued the University after they were rejected as a registered student organization ("RSO") for refusing to comply with the all-comers policy.[87] The Court deemed the RSO program a limited public forum, such that it could only impose restrictions on speech that were reasonable in light of the purposes of the forum and viewpoint neutral.[88] Unlike earlier cases, the Supreme Court characterized the denial of school resources to student organizations as denial of a subsidy, as opposed to a prior restraint.[89] In doing so, it forewent an

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[78] *Id.* at 270, 276.

[79] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995).

[80] *Id.*

[81] *Id.* at 827.

[82] *Id.* at 831.

[83] *Id.* at 832–33 (citing *Widmar*, 454 U.S. at 276).

[84] Christian Legal Soc. v. Martinez, 561 U.S. 661, 667–68 (2010) (citing *Rosenberger*, 515 U.S. 819; *Widmar*, 454 U.S. 263; Healy v. James, 408 U.S. 169 (1972)).

[85] 561 U.S. 661.

[86] *Id.* at 668.

[87] *Id.*

[88] *Id.* at 679 (citing *Rosenberger*, 515 U.S. at 829).

[89] *Id.* at 683.

analysis of the regulation under strict scrutiny, opting instead for the "less restrictive limited-public-forum analysis."[90]

The *Martinez* Court ultimately held that the all-comers policy did not violate the students' First Amendment rights because the policy was a reasonable and viewpoint-neutral condition on RSO status.[91] The policy was considered reasonable because it comported with the limited forum's purpose to bring together individuals with "diverse backgrounds and beliefs, encourage[ing] tolerance, cooperation, and learning among students."[92] The all-comers policy was also viewpoint neutral because the policy drew no distinction between groups based on their message or perspective.[93] Additionally, even without official recognition, the group had access to alternative channels, such as access to school facilities and advertising mechanisms.[94]

On a related note, in furtherance of free speech, universities may impose a mandatory fee to sustain open dialogues on campus so long as the allocation of funding to student groups is viewpoint neutral.[95] In *Board of Regents v. Southworth*,[96] a group of students tried to challenge a mandatory student fee policy at their university, claiming it violated their First Amendment rights because the fee was used to fund speech with which plaintiffs did not agree.[97] The University collected the activity fee to "facilitate[] the free and open exchange of ideas by, and among, its students."[98] The Court held it was constitutionally permissible to collect a fee for that purpose, so long as it protected students' First Amendment interests by allocating those funds to student groups in a viewpoint neutral way.[99]

The cases in this section paved the way for the recent security fee cases to be decided—and more commonly, settled—by ascertaining that universities offer a number of limited public forums. These cases show that when universities establish such forums, courts will step in to ensure that all students' speech rights are protected equally. However, courts have left open the question of how this precedent applies in the context of imposing security costs on student groups who invite controversial speakers to campus.

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[90] *Id.*

[91] *Id.* at 697

[92] *Id.* at 689 (internal quotation marks omitted).

[93] *Id.* at 694–95.

[94] *Id.* at 690.

[95] *See* Bd. of Regents v. Southworth, 529 U.S. 217, 229–30 (2000).

[96] 529 U.S. 217.

[97] *Id.* at 221.

[98] *Id.* at 229.

[99] *Id.* at 229–30.

C. Recent Campus Security Fee Cases

Professor Erica Goldberg has advocated that courts should apply a *Forsyth* analysis—requiring a court to determine whether a fee structure gives administrators "unbridled discretion" and whether the structure is content neutral—to universities when assessing the constitutionality of security fees.[100] She also recommended that universities create a separate fund for extra security, rather than asking students or the speaker to pay.[101] Since her article was published in 2011, a number of cases have addressed the constitutionality of imposing security costs on student groups who invite controversial speakers, though most have been resolved by a settlement rather than a judgement.

While there is no Supreme Court judgment dealing with security fee allocation for speakers invited by students, the Court has made clear that a fee policy that gives a state actor too much discretion to determine security costs will be held unconstitutional.[102] With this idea in the background, the Fifth Circuit decided *Sonnier v. Crain*,[103] in which an uninvited, non-student speaker sued the Southeastern Louisiana University to enjoin enforcement of the speech policy regulating speech by non-students on campus and imposing security fees.[104] The fee policy stated that the "sponsoring individual(s) or organization(s) [would be] responsible for the cost of . . . security beyond that normally provided by the University."[105] The speaker claimed that the speech policy violated the First Amendment because it gave the University "sole discretion . . . in determining both the need for, and the strength of the security" and would impute any additional costs on the sponsoring individual or organization.[106] Relying on *Forsyth*, the Court struck down the policy because it gave the University "unbridled discretion" to determine the security fee.[107]

When a university gives itself broad discretion to determine security costs for hosting speakers on campus, the underlying regulation will likely be held unconstitutional. In an order granting the student plaintiffs' motion for a temporary restraining order, a federal district

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[100] Erica Goldberg, *Must Universities "Subsidize" Controversial Ideas?: Allocating Security Fees When Student Groups Host Divisive Speakers*, 21 GEO. MASON U. CIV. RTS. L.J. 349, 395–96 (2011).

[101] *Id.* at 403.

[102] *See generally* Forsyth Cty. v. Nationalist Movement, 505 U.S. 123 (1992).

[103] 613 F.3d 436 (5th Cir. 2010), *opinion withdrawn in part on reh'g*, 634 F.3d 778 (5th Cir. 2011).

[104] *Id.* at 438.

[105] *Id.* at 440 n.4.

[106] *Id.* at 447.

[107] *Id.* at 447–48.

court recently applied *Forsyth* in the context of a security fee for a controversial speaker invited to campus by a student group.[108] In *College Republicans v. Cauce*,[109] a student group sought to bring a controversial speaker to campus for a "Freedom Rally."[110] The University's event policy required student organizations to pay the anticipated costs of security for on-campus events.[111] For the rally, the University determined that it needed enhanced security based on the time and location of the event, how many people were estimated to attend the event, and audience responses to the controversial speaker at prior events.[112] The University therefore demanded a $17,000 reimbursement from the group.[113] The student group filed suit claiming the fee policy violated their First and Fourteenth Amendment rights by "regulating the student organization's expression based on its conservative viewpoints and the potential reaction of those who oppose [the speaker]."[114]

In reaching its conclusion in *Cauce*, the court relied on *Forsyth*, finding that the security fee policy at issue was neither reasonable nor viewpoint neutral because it gave administrators "broad discretion to determine how much to charge student organizations for enhanced security, or whether to charge at all."[115] The court noted that the amount of the fee would "depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content."[116] The policy also failed because the fees were assessed based on "history or examples of violence, bodily harm, property damage, significant disruption of campus operations and violations of the campus code of conduct and state and federal law."[117] The court feared this would lead administrators to "inevitably impose elevated fees for events featuring speech that is controversial or provocative and likely to draw opposition."[118] This case was resolved when the parties agreed to a settlement—with the University agreeing to pay $122,500 in legal fees to the College Republicans' attorneys and agreeing to rescind the security fee policy for student group events.[119] Though the University decided it

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[108] *See* Coll. Republicans v. Cauce, No. C18-189-MJP, 2018 WL 804497, at *2 (W.D. Wash. Feb. 9, 2018) (citing *Forsyth Cty.*, 505 U.S. at 133).

[109] 2018 WL 804497.

[110] *Id.* at *1.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at *2 (citing Forsyth Cty. Nationalist Movement, 505 U.S. 123, 133 (1992)).

[116] *Id.* (citing *Forsyth*, 505 U.S. at 134).

[117] *Id.* at *3 (internal quotation marks omitted).

[118] *Id.*

[119] *See* Long, *supra* note 7.

would no longer charge student groups a security fee for speakers, the settlement did not preclude the University from "creating a constitutionally permissible security fee for student events" in the future.[120]

In another recent case on security fees for invited speakers, a California district court allowed a student group to proceed on an Equal Protection claim against its university for imposing a security fee that was much higher than it had been for other similarly situated events.[121] In *Young American's Foundation v. Napolitano*,[122] a registered student organization had organized an on-campus speaking engagement featuring Milo Yiannopoulos, a controversial conservative figure.[123] The university cancelled the Yiannopoulos event when protests turned violent.[124]

In response to this event, University officials instituted policies that put restrictions on the student organization's subsequent speaking engagements featuring controversial figures.[125] Under the policies, the University charged a $5,788 security fee for one of its events.[126] For another event, the University imposed a $15,738 security fee, later reduced to $9,162.[127] The reduced fee was still almost twice as much as the fee charged for an event featuring Supreme Court Justice Sotomayor in the same facility, with more people, and with access to a larger part of the facility.[128]

The court in *Napolitano* ultimately found that plaintiffs had sufficiently alleged an Equal Protection Clause violation, based on the imposition of an unreasonable fee.[129] Relying on *Cox*, the court noted that "with regard to security fees, government officials may . . . properly impose fees consistent with the First Amendment."[130] However, the court was not convinced that the fees in this case were reasonable, stating that, "[i]n the absence of a pleaded explanation for any of the fees imposed, and where, as here, an explanation is not otherwise apparent, such allegations suffice to support an as-applied challenge" to the

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[120] *Id.*

[121] *See* Young Am.'s Found. v. Napolitano, No. 17-CV-02255-MMC, 2018 WL 1947766, at *9 (N.D. Cal. Apr. 25, 2018).

[122] 2018 WL 1947766.

[123] *Id.* at *1.

[124] *See id.*; *see also* Young Am.'s Found. v. Kaler, 370 F. Supp. 3d 967, 991 n.5 (D. Minn. 2019).

[125] *Id.*

[126] *Id.* at *9.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* (internal quotation marks omitted) (citing Cox v. New Hampshire, 312 U.S. 569, 577 (1941)).

policies.[131] This case was resolved when the plaintiffs settled with UC Berkeley for $70,000 to cover the plaintiff's attorney costs, as well as a revision of the campus policies for hosting speakers.[132] The school noted that the settlement was not a concession that the policies allowed for viewpoint discrimination.[133]

These recent security fee cases show that courts have tended to find the imposition of additional security fees on student groups who invite controversial speakers to be problematic, if not unconstitutional. Given the trend of universities settling these cases, universities may even agree.

IV. UNCONSTITUTIONAL IMPOSITION OF FEES

None of the First Amendment case law directly precludes a university from charging security fees; however, the fees must comport with constitutional requirements of content neutrality, lest they be subject to strict scrutiny. The cases discussed in Section III demonstrate that any fees based on audience reaction to a controversial speaker must pass strict scrutiny to avoid violating the First Amendment because audience reaction is not a content neutral way to assess fees.[134]

Professor Goldberg looked to some of the cases discussed in this Comment to address whether "[p]ublic 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."[135] She articulated the basic elements of a constitutional security fee as: "(1) risk-neutral and content-neutral standards for determining security fees; (2) explicit guidelines on how those fees are determined; and (3) a transparent process for student groups to appeal security fees that are larger than normal."[136] The problem is, assigning additional security costs to student groups who invite speakers who elicit violent reactions from protestors will necessarily fail prong (1) of this test.

With foresight, Professor Goldberg's article argued for extending *Forsyth* to apply in the limited public forum context of a university

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[131] *Id.* (footnote omitted).

[132] Sophia Brown-Heidenreich, *UC Berkeley to Settle Free Speech Lawsuit with Conservative Group*, DAILY CALIFORNIAN (Dec. 3, 2018), https://www.dailycal.org/2018/12/03/uc-berkeley-to-settle-free-speech-lawsuit-with-conservative-groups/ [https://perma.cc/NPH4-NB9Y].

[133] *Id.*

[134] *See, e.g.*, Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134 (1992).

[135] Goldberg, *supra* note 100, at 400.

[136] *Id.* at 400–01.

setting.[137] This not only complies with Supreme Court precedent,[138] but lower courts have also adopted this approach. The court in *Cauce* followed this approach when it relied on *Forsyth* to determine a security fee was unconstitutional.[139] However, in *Napolitano*, another federal district court relied on *Cox* to hold that government officials can impose security fees, consistent with the First Amendment.[140] The court in *Napolitano* did not find the policy to be unconstitutional itself, but was concerned that the security fee was being imposed inconsistently.[141] The fee policy itself may have been the issue, or it could have been that the policy was applied incorrectly, leading to the inconsistencies. It is hard to know, because in both of these district court cases, the parties settled before the courts resolved the controversies.[142] The Court in *Forsyth* stated that the difference in the fee policy invalidated in *Forsyth* and the fee upheld in *Cox* was that, in *Forsyth*, the county could impose an increased security fee in anticipation of a hostile audience.[143] However, there did not seem to be any real difference in the discretion given to the government in either case.[144]

Given the importance of the exchange of ideas on campus and the constitutional protection of students' speech, the cases discussed in Section III.B demonstrate that courts will not allow universities to charge student groups who invite controversial speakers to campus more for the security costs that they charge for other speakers. Additionally, a security fee structure that would allow a university to impose a security fee within a permissible range would not be workable. Given the exorbitant costs of security for these events, the range would be huge (e.g., a range from $0 to $500,000, in case Richard Spencer visits).[145] Not only would additional costs be unpayable by most student groups, but a range that spans thousands of dollars leaves more room for arbitrary enforcement than even the $1,000 range invalidated in *Forsyth*.

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[137] *Id.* at 400.

[138] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (citing Hague v. CIO, 307 U.S. 496, 515 (1939)) (discussing designated public forums).

[139] Coll. Republicans v. Cauce, No. C18-189-MJP, 2018 WL 804497, at *2 (W.D. Wash. Feb. 9, 2018) (citing Forsyth, 505 U.S. at 133–34).

[140] Young Am.'s Found. v. Napolitano, No. 17-CV-02255-MMC, 2018 WL 1947766, at *9 (N.D. Cal. Apr. 25, 2018) (citing Cox v. New Hampshire, 312 U.S. 569, 577 (1941)).

[141] *Id.*

[142] *See* Morley, *supra* note 5; Long, *supra* note 7.

[143] *Forsyth*, 505 U.S. at 136.

[144] *Compare id.* at 126–27 (the fee was to be determined as needed to "meet the expense incident to the administration of the Ordinance and to the maintenance of public order"), *with Cox*, 312 U.S. at 577 (the statute authorized a municipality to charge a permit fee of up to $300 intended to "meet the expense incident to the administration of the act and to the maintenance of public order").

[145] *See* Morley, *supra* note 5.

Universities might try to avoid hosting certain controversial speakers altogether by relying on *Thomas*, in which a park district did not violate the First Amendment by denying access to its facilities based on an ordinance that was "reasonably specific and objective."[146] It is conceivable that a university could set up a policy very similar to that in *Thomas* by requiring permits for invited speakers and making the permits subject to a set of limitations that would to allow it to withhold a permit in cases of danger.[147] Given case law in university settings, it is clear that universities cannot discriminate based on student organizations' viewpoints, which also precludes discrimination based on predicted audience reactions.[148] When Richard Spencer rented space from the University of Florida, the University was able to cancel his first reservation because there were imminent and legitimate dangers that it could point to.[149] However, the University acquiesced that absent extenuating circumstances, it was obligated to allow him use of the University as a public forum.[150] Whether relying on *Forsyth*, *Cox*, or *Thomas*, assigning additional security costs to student groups who invite controversial speakers will trigger strict scrutiny review, and the speakers cannot be turned away simply because of a hostile audience.

V. OTHER WAYS OF MANAGING SECURITY COSTS

Since public universities may not impose extra security fees on student groups who invite controversial speakers to campus and the costs stemming from hosting these speakers are becoming unmanageable, universities must figure out other ways to defray these costs.[151] In light of the analysis above, this section will address potential ways universities can decrease security costs that do not involve impermissible impositions of additional fees on student groups.

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[146] Thomas v. Chi. Park Dist., 534 U.S. 316, 324 (2002).

[147] *See id.* at 318 n.1.

[148] *See generally* Bd. of Regents v. Southworth, 529 U.S. 217 (2000); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

[149] *National Policy Institute's Richard Spencer Speaking Engagement Confirmed for Oct 19 at UF*, UNIV. OF FLA. NEWS, https://news.ufl.edu/for-media/media-advisories/archive/2017/10/national-policy-institutes-richard-spencer-speech-confirmed-for-oc.html [https://perma.cc/MR6B-Y7AR] (last visited Nov. 13, 2020).

[150] *Id.*

[151] *See generally* Wong, *supra* note 3 (noting that the Office of the President of the University of California system would pay for half of the four million dollar security costs incurred by UC Berkeley in 2017 due to the "extraordinary circumstances").

A. Use *Martinez* to Argue that Security Fee Allotments are a Subsidy

The most interesting approach a university might take to limit its security expenses would require it to change the student fee structure so that every RSO receives a set budget from the school to fund everything from printing newspapers to, say, covering the costs of security fees to host a controversial speaker. Universities may also try to set a baseline amount of money for security per event, available for all student groups, and any costs beyond that amount would be imposed on the group inviting the speaker or hosting the event.[152] A university might be able to frame the both the RSO budgets or the security fee as a subsidy and support their position along the same lines as the rationale in *Martinez*.[153] First, the *Martinez* Court framed access to school resources as a subsidy whereas, in the past, the Supreme Court had framed the issue as one of prior restraint.[154] In the past, courts viewed withholding student group recognition as a prior restraint on speech it limited their access to a limited public forum.[155] A university might try to argue that it is not withholding additional funding based on audience reaction, but that it is giving something equally to all student groups. Second, the all-comers policy in *Martinez* was determined to be "textbook viewpoint neutral" because it applied to everyone.[156] While the amount of money allotted to each student group would be equal, this approach would likely still be seen as a prior restraint on speech, because student groups that cannot afford to cover additional security fees for their speakers would not be able to invite them.[157]

B. Educate and Train Students Before Conflicts Arise

Universities can institute First Amendment education and/or training for students, similar to that used for Title IX training.[158]

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[152] *See, e.g.*, Susan Kelly, *Cornell to Cover Security Fees for Student Events*, CORNELL CHRON. (Apr. 30, 2019), https://news.cornell.edu/stories/2019/04/cornell-cover-security-fees-student-events [https://perma.cc/8GT3-9XSS]. Cornell, a private university, recently instituted a security fee policy, eliminating security fees for most student organizations and student sponsored events. The University agreed to cover security costs up to $8,000 per event. *Id.*

[153] *See generally* Christian Legal Soc. v. Martinez, 561 U.S. 661 (2010).

[154] *Id.* at 683.

[155] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 264 n.5 (1981).

[156] *Id.* at 694–95.

[157] *See* Coll. Republicans v. Cauce, No. C18-189-MJP, 2018 WL 804497, at *3 (W.D. Wash. Feb. 9, 2018). The court found that imposing a fee *after* the event was nonetheless a prior restraint on speech. *Id.* The court noted that student groups, knowing they may be stuck with a large security fee, could be discouraged from bringing in a speaker if they won't be able to afford the fee. *Id.*

[158] *See, e.g.*, Jamie D. Halper, *College Title IX Training Becomes Mandatory, Tied to Course Enrollment*, HARV. CRIMSON (June 30, 2018), https://www.thecrimson.com/article/2018/6/30/title-

Informing students in a direct and clear way of the importance of free speech on campus and outlining responses to speakers with whom students do not agree may lead to more tolerance on campus. While the University of Florida did spend over $500,000 when Richard Spencer came to campus, the protests did not rise to the level of those at UC Berkeley, which paid similarly large security fees for a similar event.[159] One reason for this may be the way the University of Florida handled the event. The University took a direct and transparent approach to hosting Richard Spencer, who was not invited by a student group,[160] by dedicating a webpage which explained their responsibilities under the First Amendment[161] and advocated that students not give Spencer the spotlight by staying away from the event.[162] The University of Florida made clear the reasons Spencer was coming to campus and how much he paid to rent the space.[163] In short, universities can reduce spikes in security costs by investing in both conflict prevention geared towards the event and general tolerance education.

The University of Chicago provides another example of a university clearly stating expectations for student conduct.[164] In 2016, the private university sent a letter to all incoming freshmen informing them of the University's commitment to free speech and its refusal to compromise on its values.[165] When former chairman of a conservative media outlet and Trump advisor Steve Bannon was invited to campus in 2018, protests erupted but did not escalate to violence, though Bannon never set a date to speak.[166] Additionally, the University of Chicago serves as an

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ix-training-mandatory/ [https://perma.cc/FQ2W-FGWF].

[159] *See* Belkin, *supra* note 2; *see also* Jeremy Bauer-Wolf, *Lessons from Spencer's Florida Speech*, INSIDER HIGHER ED (Oct. 23, 2017), https://www.insidehighered.com/news/2017/10/23/nine-lessons-learned-after-richard-spencers-talk-university-florida [https://perma.cc/TW2N-5VJ6].

[160] *See* UNIV. OF FLA. NEWS, *supra* note 149 ("Despite not being invited by the University of Florida, National Policy Institute's President Richard Spencer is scheduled to speak on October 19 on campus . . . . The [National Policy Institute] has rented space for an event . . . on the UF campus in Gainesville.").

[161] *See Frequently Asked Questions About the First Amendment*, UNIV. OF FLA., https://freespeech.ufl.edu/qa-for-1019-event/ [https://perma.cc/24A4-NFEP] (last visited Nov. 13, 2020).

[162] W. Kent Fuchs (@PresidentFuchs), TWITTER (Oct. 16, 2017, 8:55 AM) https://twitter.com/PresidentFuchs/status/919924840529846273.

[163] *See* Annalisa Merelli, *The University of Florida is Allowing Richard Spencer to Speak Because it Has To*, QUARTZ (Oct. 17, 2017), https://qz.com/1103619/the-university-of-florida-is-allowing-richard-spencer-to-speak-because-it-has-to/ [https://perma.cc/Y7Z4-363W].

[164] Though a private university, the University of Chicago is considered a leader in protecting free speech on campus. *See generally* Tom Lindsay, *35 Universities Adopt 'The Chicago Statement' On Free Speech*, FORBES (Feb. 28, 2018), https://www.forbes.com/sites/tomlindsay/2018/02/28/35-universities-adopt-the-chicago-statement-on-free-speech-1590-to-go/#1445c48c771b [https://perma.cc/JC8Q-KPAV].

[165] *See* Scott Jaschik, *U Chicago to Freshmen: Don't Expect Safe Spaces*, INSIDER HIGHER ED (Aug. 25, 2016), https://www.insidehighered.com/news/2016/08/25/u-chicago-warns-incoming-students-not-expect-safe-spaces-or-trigger-warnings [https://perma.cc/HB8L-WDVM].

[166] Lynne Marek, *Will Steve Bannon Speak at U of Chicago, or Won't He?*, CRAIN'S CHI. BUS.

example of general tolerance education: the University sought to design a more robust education program to educate students on the rights and responsibilities that come with participating in the university community, including "targeted outreach measures for students and recognized student organizations, which build on existing student-centered programs and resources but are coordinated by the Office of Campus and Student Life and developed with the faculty."[167]

C. Institute Physical Security Best Practices

Universities can institute best practices in securing these events to decrease costs. Some have questioned whether the security fees for these events needed to be as high as they were. For example, Ben Shapiro's visit to the University of Tennessee cost the University less than $4,000, in sharp contrast with the hundreds of thousands spent by other universities.[168] To prepare for the event, the University instituted a "clear bag policy" for attendees, prohibited signs and large bags, and did not allow for re-admittance to the event.[169] Similarly, the University of Florida was credited for its successful strategy of separating Spencer's supporters from protestors with physical barriers.[170] As universities cannot pass on increased costs of security due to audience response to a controversial speaker, they would be well-advised to consider instituting measures like these to help decrease their security costs.

D. More Aggressive University Response to Hecklers

Universities may decide to crack down harder on disruptive protestors to discourage conduct that infringes on the speech rights of others. In 2017, the University of Chicago formed a committee to look into what could be done about disruptive conduct on campus in response to controversial speakers.[171] The committee recommended that the University work to reduce the chances that disrupters prevent others from

(Oct. 1, 2018), https://www.chicagobusiness.com/news/will-steve-bannon-speak-u-chicago-or-wont-he [https://perma.cc/57H9-6SJK]; *see also* Grace Hauck, *Rally to Disinvite Bannon Draws Counter-Protests*, CHI. MAROON (Feb. 4, 2018), https://www.chicagomaroon.com/article/2018/2/4/rally-disinvite-bannon-draws-counter-protests/ [https://perma.cc/H9BY-USM3].

[167] Colleen Flaherty, *Dealing with Disrupters*, INSIDE HIGHER ED (Mar. 22, 2017), https://www.insidehighered.com/news/2017/03/22/u-chicago-committee-proposes-ways-dealing-those-who-shout-down-invited-speakers [https://perma.cc/G38L-FW3B].

[168] Rachel Ohm, *Shapiro's University of Tennessee Visit Didn't Cost a Fortune*, KNOX NEWS (Nov. 6, 2017), https://www.knoxnews.com/story/news/education/2017/11/06/shapiros-university-tennessee-visit-didnt-cost-fortune-why-and-why-does-matter/818833001/ [https://perma.cc/ER52-MNP2].

[169] *Id.*

[170] *See* Bauer-Wolf, *supra* note 159.

[171] *See* Flaherty, *supra* note 167.

speaking by instituting a "free speech deans on call" program that would allow for the designation and training of faculty to deal with disruptive conduct as it happens.[172] The centralized punishment apparatus would be made up of five members consisting of faculty and students and dole out punishment on a case-by-case basis.[173] Punishment need not be harsh to be effective, but punishing disrupters more seriously could lead to a decrease in disruptive activity for fear of repercussions. However, the speaker and the protestor have a First Amendment right to free speech. The issue addressed by this Comment is the high costs of security for controversial speakers given a hostile audience reaction. The goal is not to prevent protests but to ensure both the rights of the speaker and the protester are protected. To help ensure that the rights of protestors are protected, the University of Chicago committee gave examples of what would constitute "disruptive"[174] and "nondisruptive"[175] conduct to ensure students would know they still have the ability to protest speakers with whom they disagree.

The heart of the problem addressed by this Comment is the conduct of hecklers on campus, not the hecklees. Imposing additional security costs on student groups who invite controversial speakers can make it cost prohibitive for their voices to be heard. But, it should not be overlooked that there are important speech interests on both sides. The solutions discussed in this Section attempt to balance the rights of a speaker with dissenters' rights to object. Both parties have a right to free speech and these solutions attempt to protect both parties' speech interests.

VI. COUNTERARGUMENTS

There are a number of counterarguments to the conclusion that universities cannot impose additional security fees onto the student groups who invite controversial speakers to campus. Most of the counterarguments suggest approaches that target a speaker's ability to speak in the first place. Whether a university can exclude these speakers altogether plays into the issue of security fees because there is a fear that putting the security costs on the speaker or, in this case, the student group who invites the speaker, will chill speech if the student

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[172] *Id.*

[173] *Id.*

[174] *Id.* ("Disruptive protests . . . include blocking access to an event or to a university facility and shouting or otherwise interrupting an event or other university activity with noise in a way that prevents the event or activity from continuing in its normal course.") (internal quotation marks omitted).

[175] *Id.* ("'Nondisruptive protests include: marches that do not drown out speakers; silent vigils; protest signs at an event that do not block the vision of the audience; and boycotts of speakers or events,' the [committee's] report says.").

group cannot afford the fees.[176] Because these speakers cannot be excluded based on audience reaction, this Section will show that the counterarguments cannot resolve the question of who should pay the speaker fees.

A. Students' Free Speech Rights are Not Being Infringed Upon

One might argue that students' free speech rights are not implicated when a university imposes security costs on a student group who invites an outside speaker. The argument would be that the speaker's rights are stifled, but not the rights of the students who invited the speaker. Professor Goldberg persuasively argues that students' free speech rights are implicated in a number of ways. First, the fees infringe on a student group's First Amendment right to receive information.[177] Further, the non-student speech is attributable to the student group who invited the speaker, and the "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."[178] Although the imposition of security fees do not prevent students themselves from speaking, their free speech rights are impeded nonetheless when they cannot afford to invite speakers to campus.

B. Controversial Speakers Should Not be Brought to Campus

Another foreseeable counterargument is that nobody should pay the security fees because these controversial speakers should not be invited to campus in the first place. This argument would be strong-er against speakers like Richard Spencer or Milo Yiannopoulos, who are widely considered to be more showmen than speakers of sub-stance. The speech being offered may not seem to contribute to civil discourse, however, the First Amendment protects even hateful and offensive speech[179]

A stronger argument for excluding these speakers comes from Professor Robert Post of Yale University, who argues that there is no First Amendment right to free speech on university campuses.[180] If he is

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[176] *See, e.g.*, Coll. Republicans v. Cauce, No. C18-189-MJP, 2018 WL 804497, at *3 (W.D. Wash. Feb. 9, 2018).

[177] *See* Goldberg, *supra* note 100, at 383 ("Given a willing speaker, freedom of speech protects both the source and the recipients of the communication") (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756, 773 (1976)).

[178] *Id.* at 386 (citing Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 836 (1995)).

[179] Elisabeth E. Constantino, Comment, *Free Speech, Public Safety, & Controversial Speakers: Balancing Universities' Dual Roles After Charlottesville*, 92 ST. JOHN'S L. REV. 637, 639 (2018) (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)).

[180] *See* Robert C. Post, *There is No 1st Amendment Right to Speak on a College Campus*, VOX (Dec. 31, 2017), https://www.vox.com/the-big-idea/2017/10/25/16526442/first-amendment-college-

correct, then the solution to the escalating costs of security fees can be avoided by preventing the controversial speakers from coming to campus in the first place. Professor Post argues that universities' dual missions of "education and the creation of knowledge" take them outside the realm of public discourse and therefore, allow universities to engage in content discrimination.[181] In support of his argument, he lists examples of this acceptable "content discrimination": professors are prohibited from engaging in personal abuse of their students, professors hired to teach mathematics must teach mathematics, and professors engage in content discrimination when grading exams.[182] Dean Erwin Chemerinsky of UC Berkeley published a response to Professor Post's article, saying that Professor Post argues for what he thinks that law should be, instead of what the law is.[183] Dean Chemerinsky points out the fatal flaw in Professor Post's argument: the idea that because free speech principles do not always apply on campus, they can never apply.[184] When a public university creates a limited public forum, it does not follow that the entire university becomes a public forum.[185] As described in Section III, the law is on Dean Chemerinsky's side.[186]

C. It Is A Waste of Money to Host Controversial Speakers

One might also argue that the huge security costs required to host these speakers are a waste of money for everyone involved because it is so rare these speakers even get to actually speak. "Shouting down" controversial speakers has become a common response to speakers on campus, in which the speaker has a platform but cannot convey his message.[187] This Comment does not argue that universities will always be successful in protecting First Amendment rights, but the fact that it is difficult to protect free speech rights does not mean universities do not have the responsibility to try. Instituting some of the solutions

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campuses-milo-spencer-protests [https://perma.cc/G9VD-8BWA].

[181] *Id.*

[182] *Id.* Professor Post states: "I subject my students to constant content discrimination. If I am teaching a course on constitutional law, my students had better discuss constitutional law and not the World Series." *Id.*

[183] *See* Erwin Chemerinsky, *Hate Speech is Protected Free Speech, Even on College Campuses*, VOX (Dec. 26, 2017), https://www.vox.com/the-big-idea/2017/10/25/16524832/campus-free-speech-first-amendment-protest [https://perma.cc/BCT9-JN55].

[184] *Id.*

[185] *Compare* Bowman v. White, 444 F.3d 967, 976–77 (8th Cir. 2006) (explaining that a university classroom is a non-public forum), *with* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995) (holding that the university had created a limited public forum by funding the printing costs of student publications).

[186] *See supra* Section III.B.

[187] Charles S. Nary, *The New Heckler's Veto: Shouting Down Speech on University Campuses*, 21 U. PA. J. CONST. L. 305, 306 (2018).

described in Section V may not only lower security costs to the university, but may also increase the likelihood these speakers can actually use the platform the university is protecting.[188]

VII. CONCLUSION

The University of Florida had to pay $500,000 for security when Richard Spencer came to the campus, uninvited.[189] If a university has to foot the bill when speakers are not invited to campus by student groups, the justifications for requiring them to pay the security fees are even stronger when students are actually interested in what a speaker has to say.[190] On the other hand, if universities do not find a way to get security fees under control, the community could lose out on the university as a forum altogether. The line of cases about the relationship between universities and students makes it clear that universities provide limited designated public forums for students to invite speakers.[191] These designated public forums are only treated as such as long as they are open to the public.[192] Universities may decide the costs are too high to allow outside speakers in if they are consistently having to pay millions of dollars per year on security fees alone. While it may be the case that less harm would come to speech on campus by charging a fee as opposed to not having speakers on campus altogether, the First Amendment forbids universities from imposing additional security costs onto the student groups who invite controversial speakers to campus. In an effort to preserve the university as a marketplace of ideas that universities have come to serve as, universities and scholars must continue to develop methods of coping with exorbitant security costs when controversial speakers come to campus.

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[188] *See, e.g.*, *supra* Section V.B (discussing how instituting free speech training for students may decrease the amount of heckling that occurs in response to controversial speakers).

[189] Belkin, *supra* note 2.

[190] *See* Padgett v. Auburn Univ., No. 3:17-CV-231-WKW, 2017 WL 10241386, at *1 (M.D. Ala. Apr. 18, 2017). The court sided with a student who invited Richard Spencer to campus after the university cancelled the event due to security concerns. *Id.* The court granted a temporary restraining order against the university to enjoin it from cancelling the event. *Id.*; *see also* Jeremy Bauer-Wolf, *Auburn University Lawsuit Settled*, INSIDE HIGHER ED (May 16, 2017), https://www.insidehighered.com/quicktakes/2017/05/16/auburn-university-lawsuit-settled [https://perma.cc/E7G5-UUYL].

[191] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[192] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983) (citing Hague v. CIO, 307 U.S. 496, 515 (1939)).