

# SOME FUNNY THINGS HAPPENED WHEN WE GOT TO THE FORUM: STUDENT FEES AND STUDENT ORGANIZATIONS AFTER *SOUTHWORTH*

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## INTRODUCTION

The mandatory student fees imposed by colleges and universities for the support of student organizations, student newspapers, and student governments have long been a source of controversy and litigation. Predictably, given the broad array of student groups operating on campuses nationally and the wide range of ideologies and viewpoints they represent, some students have found the activities of some fee-funded student groups to be offensive. From the early 1970s through the 1990s, objecting students filed numerous lawsuits seeking to be exempted from paying for the support of student organizations and activities with which they disagreed.

In *Board of Regents v. Southworth (Southworth I)*,<sup>1</sup> however, the United States Supreme Court, applying principles drawn from cases involving access to limited public forums, held that colleges and universities are entitled to impose mandatory student fees to support the expressive activities of student organizations—without having to create refund or avoidance mechanisms for objecting students—so long as the fees are allocated in a viewpoint neutral manner. While the decision confirmed colleges' and universities' ability to maintain mandatory fees programs, the Court's extension of forum analysis and viewpoint neutrality principles to a forum consisting of money has proved difficult in practice, generating new and complex controversies.

In pre-*Southworth I* cases, objecting students had based their claims for fees exemptions on compelled speech cases involving mandatory union and bar association dues, where members were allowed to avoid paying those portions of their dues used in lobbying and other expressive activities not directly related to the organization's principal mission.<sup>2</sup> In *Southworth I*,

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1. 529 U.S. 217 (2000) (*Southworth I*).

2. See, e.g., *Keller v. State Bar*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of*

the Court declined to adopt this approach, instead expanding on forum analysis principles applied in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>3</sup> a case in which a religious student newspaper was denied access to mandatory fees funding.

Comparing the mandatory fees program in *Southworth I* to the “metaphysical” forum of funding for free expression in *Rosenberger*,<sup>4</sup> the Court determined that a college or university is entitled to impose a mandatory fee for the purpose of affording students the means to engage in a wide array of expressive activities.<sup>5</sup> While noting that a student fees fund is “not a public forum in the traditional sense of the term,”<sup>6</sup> the Court held that, as with other public forums, the institution could not prefer, in this context, some viewpoints over others.<sup>7</sup> So long as the fees were allocated in a viewpoint neutral manner, however, the institution could sustain its program.<sup>8</sup> The rights of objecting students, the Court concluded, would be adequately protected by the viewpoint neutral operation of the program, and there would be no need to exempt students from paying the fees: “The proper measure, and the principal standard of protection for objecting students, we conclude, is the requirement of viewpoint neutrality in the allocation of funding support.”<sup>9</sup>

The forum analysis framework and viewpoint neutrality requirements set forth in *Southworth I* initially appeared to offer a straightforward, workable means of assessing whether a college or university’s mandatory fees program operated properly and provided adequate protections for the First Amendment interests of all students. In practice, however, the application of forum analysis in the context of student fees programs has proved to be much more difficult, resulting in new disputes and further litigation.

Immediately following the Supreme Court’s decision, the *Southworth I* litigation was resumed on remand to the lower courts. The dispute in this phase<sup>10</sup> shifted to the meaning of viewpoint neutrality in the context of a student fees program.<sup>11</sup> Expanding on forum principles applicable in the

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Educ., 431 U.S. 209 (1977).

3. 515 U.S. 819 (1995).

4. “The SAF [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.” *Id.* at 830.

5. *Southworth I*, 529 U.S. at 233–34.

6. *Id.* at 230.

7. *Id.* at 234.

8. *Id.* at 221.

9. *Id.* at 233.

10. The *Southworth* litigation finally concluded with a third case involving the award of some attorneys fees to plaintiffs. *Southworth v. Bd. of Regents*, 376 F.3d 757 (7th Cir. 2004) (*Southworth III*).

11. Although the parties had originally stipulated that the university’s program was operated in a viewpoint neutral manner, the plaintiffs were permitted to withdraw their stipulation and proceed to trial on the question of whether the university’s fee program in fact satisfied the requirement of viewpoint neutrality. *Southworth v. Bd. of*

context of permits for the use of traditional, spatial public forums, the U.S. Seventh Circuit Court of Appeals incorporated into the viewpoint neutrality standard a prohibition on “unbridled discretion” in the allocation of student fees funds.<sup>12</sup> Avoiding unbridled discretion in the allocation of student fees, the court determined, required the adoption of elaborate procedural safeguards similar to those used by officials considering permit applications for parks, parades, news racks, and other physical public forums.<sup>13</sup>

The level of procedural protection thus required to prevent “unbridled discretion” has in practice made it virtually impossible to deny or impose limits on funding requests, thus encouraging more requests for support from a wider array of student groups and for a wider array of purposes. Student fees have become a readily available source of funding for student organizations, paving the way for aggressive efforts by student groups to claim a share of the monies. With these efforts have come new pressures and demands on fees programs, and new disputes involving difficult legal issues, competing constitutional interests, and conflicts between and among other state and federal laws.

Applications for fees support by student groups that had not previously sought funding, or had been excluded from access to fees funds,<sup>14</sup> have been particularly problematic. Requests for funding from religious student organizations have raised sensitive and complex questions about the interplay of competing constitutional principles and other legal and policy interests in the context of a forum of money.<sup>15</sup> Among these are potential conflicts between certain college or university requirements for recognition as a student organization (a prerequisite to access to fees funding) and the expressive activities of certain religious student organizations, as well as issues involving the Establishment Clause implications of providing state funds for specifically religious activities. Other difficult questions of state and federal law are posed by requests for fees funding for the activities of political student organizations. Further, some issues not fully resolved by *Southworth I*, such as the viability of certain fee allocation mechanisms, have continued to generate litigation.

In his concurring opinion in *Southworth I*, Justice Souter agreed that the university’s fees program was permissible, but presciently noted that he did

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Regents, 307 F.3d 566, 570 (7th Cir. 2002) (*Southworth II*).

12. *Id.* at 575.

13. *See id.* at 575–80.

14. Before *Rosenberger*, religious and political student organizations were often prohibited, under college and university policies, from receiving fees funding.

15. Ironically, the early opponents of mandatory fees programs were often, as in *Southworth I*, self-described conservatives and members of religious groups who opposed providing support for left-leaning groups. These are, however, often the groups that have been most active in seeking access to fees funding post-*Southworth I*, receiving benefits and pursuing litigation where funding has been denied.

“not believe that the Court should take the occasion to impose a cast-iron viewpoint neutrality requirement to uphold it.”<sup>16</sup> The controversies and lawsuits that have followed *Southworth I* illustrate the complexities of applying forum analysis and strict viewpoint neutrality principles in the context of a mandatory fees program. The expansion of principles governing traditional, spatial physical forums has proved awkward when applied to money forums, stimulating ongoing struggles over access to student fees, continued confusion about the processes for their allocation, and new conflicts between forum principles and other constitutional provisions. This article reviews the history of student fees litigation, including the development of forum analysis and the viewpoint neutrality standard, discusses recent litigation and related problems confronting colleges and universities in this area, and suggests the need for reconsideration of the extent to which forum analysis provides adequate guidance for resolving disputes arising in the metaphysical forum of money.

## I. HISTORY OF MANDATORY STUDENT FEES LITIGATION

### A. Early Cases: Compelled Speech and Agency-Shop Theories

Well before the *Southworth I* litigation, from the 1970s through the 1990s, legal challenges to mandatory student fees programs of public colleges and universities were common. A number of these earlier cases involved the imposition of fees to fund student newspapers whose editorial views were offensive to some students.<sup>17</sup> Other cases involved challenges to the use of mandatory fees for the support of student groups engaged in expressive activities with which some students disagreed.<sup>18</sup>

The plaintiffs in these pre-*Southworth I* matters—like the plaintiffs in *Southworth I*—relied on compelled speech precedents in support of their contention that being forced by a public college or university to fund speech with which they disagreed was an impermissible infringement on their First Amendment speech and associational rights. Compelled speech and compelled association had long been recognized as violating the First Amendment.<sup>19</sup> Objecting students relied on these precedents in claiming

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16. *Southworth I*, 529 U.S. 217, 236 (2000).

17. See, e.g., *Carroll v. Blinken*, 42 F.3d 122 (2d Cir. 1994) (*Carroll II*); *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992); *Carroll v. Blinken*, 957 F.2d 991 (2d Cir. 1992) (*Carroll I*); *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985); *Kania v. Fordham*, 702 F.2d 475 (4th Cir. 1983); *Veed v. Schwartzkopf*, 353 F. Supp 149 (D. Neb. 1973), *aff'd* 478 F.2d 1407 (8th Cir. 1973); *Smith v. Regents*, 844 P.2d 500 (Cal. 1993) (en banc); *Lace v. Univ. of Vermont*, 303 A.2d 475 (Vt. 1973); *Good v. Associated Students of the Univ. of Wash.*, 542 P.2d 762 (Wash. 1975) (en banc).

18. See, e.g., *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996); *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982); *Uzzell v. Friday*, 547 F.2d 801 (4th Cir. 1977).

19. See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that state could

their constitutional rights were violated by the payment of mandatory fees.

As a remedy for the claimed infringement on their rights, the students, citing “agency-shop” precedents, sought exemption from paying that part of the mandatory fee that supported organizations whose viewpoints they found offensive. The agency-shop cases involved complaints by union and bar association members about the use of compulsory dues for lobbying and other activities with which the members disagreed. Although the courts in these cases had affirmed the government’s ability to compel the payment of dues, they also recognized the constitutional implications of such compelled funding systems. To protect the constitutional rights of objecting members, courts approved “opt-out” and refund mechanisms that allowed members to avoid paying that part of their dues funding potentially offensive activities, while requiring them to pay for activities “germane” to the organization’s mission, justified by important governmental policy interests, and not constituting a significant burden on speech.<sup>20</sup> Challengers to mandatory student fees programs urged the adoption of similar protections in the college and university fees context.

Prior to *Southworth I*, consideration of the compelled speech and agency-shop theories in the context of fees litigation had produced varying interpretations of the First Amendment interests involved, and mixed practical results in terms of the appropriate means of protecting those interests. In the earliest cases, the plaintiffs had little success in persuading courts that their constitutional rights were infringed, or infringed to a degree that required any special protection.<sup>21</sup> In *Kania v. Fordham*,<sup>22</sup> sustaining the use of mandatory fees to support a student newspaper, the court noted that government may abridge incidentally rights of free speech and association when engaged in furthering the constitutional goal of “uninhibited, robust, and wide-open expression.”<sup>23</sup>

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not compel an objecting citizen to display the state’s motto “Live Free or Die” on license plates); *Elrod v. Burns*, 427 U.S. 347 (1976) (holding that dismissal of Republican employees by a Democratic sheriff violated the employees’ protected freedom of association); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that state could not compel civil servants to affirm a belief in God); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that public school student could not be required to salute the flag).

20. See, e.g., *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507 (1991); *Keller v. State Bar*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

21. See, e.g., *Veed*, 353 F. Supp. 149 (upholding use of student fees to support a student newspaper, a student association, and a speaking program); *Lace*, 303 A.2d 475 (holding that there was no justiciable controversy presented by plaintiffs’ claims that their rights of free association were violated where fees were used to support expression of views with which they disagreed); *Good*, 542 P.2d 762 (finding that university could properly impose mandatory activities fees, so long as the fees were used in accordance with the purposes specified in the state statute authorizing the fees).

22. *Kania*, 702 F.2d 475.

23. *Id.* at 480 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Cf. *Southworth I*, 529 U.S. 217, 236 (2000) (Souter, J., concurring)

In somewhat later cases, however, greater deference was accorded to the interests of objecting students, and the courts established more extensive protections for them. In *Galda v. Rutgers*,<sup>24</sup> for example, the court held that the university had failed to demonstrate a compelling interest in funding the New Jersey Public Interest Research Group (PIRG) that would override plaintiffs' First Amendment rights, and enjoined the collection of a mandatory fee.<sup>25</sup> Similarly, the court in *Carroll I* concluded that the institution could constitutionally allocate mandatory fees to groups whose speech some students found offensive, but required that the groups receiving the fees spend the monies on campus, rather than on activities that took place elsewhere, like lobbying the state legislature.<sup>26</sup> Later, clarifying *Carroll I*, the court in *Carroll II* determined that, while student fees for the New York PIRG did not have to be expended on the campus in a geographic sense, they had to be used to foster the marketplace of ideas at the campus, to provide students with hands-on educational experiences, and to fulfill the institution's educational objectives.<sup>27</sup> In *Smith v. Regents of the University of California*,<sup>28</sup> the California Supreme Court acknowledged the institution's compelling interest in supporting student activities with a mandatory fee, but held that the rights of dissenting students required protection in the form of refund procedures.<sup>29</sup>

#### B. *Southworth I* and Forum Analysis

The *Southworth I* plaintiffs sought to build on the compelled speech and agency-shop precedents in bringing their challenge to the mandatory student fees program of the University of Wisconsin System. The original plaintiffs, three University of Wisconsin Law School students and self-described conservatives, objected to the allocation of mandatory fees for the support of several liberal student organizations with whose political and ideological views they disagreed. Among the groups plaintiffs found objectionable were Wisconsin PIRG ("WISPIRG"); UW Greens; the Lesbian, Gay, Bisexual Campus Center; and the Madison AIDS Support Network.<sup>30</sup> The students requested that the institution refund that portion of their student fees they calculated had been used to fund these and other named organizations (approximately \$12 per semester). When the fees

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(suggesting that the First Amendment interest claimed by the students was insufficient to merit anything more than the kind of protection then being provided by the university).

24. 772 F.2d 1060 (3d Cir. 1985).

25. *Id.* at 1068.

26. *Carroll v. Blinken*, 957 F.2d 991, 1002-03 (2d Cir. 1992).

27. *Carroll v. Blinken*, 42 F.3d 122, 128 (2d Cir. 1994).

28. 844 P.2d 500 (Cal. 1993).

29. *Id.*

30. *Southworth v. Grebe*, 151 F.3d 717, 720-21 (7th Cir. 1998).

were not refunded, they filed suit, demanding that they be exempted from payment of fees to the organizations with which they disagreed.

Although the institution maintained that its mandatory fees program could be sustained even under the compelled speech and agency-shop decisions, it also looked to a different line of cases on which to ground its defense. The year before *Southworth I* was commenced, the United States Supreme Court had decided *Rosenberger*, a challenge to the University of Virginia's denial of student fee funding to a religious student newspaper on grounds that such funding would violate the Establishment Clause of the First Amendment.<sup>31</sup>

Reviewing the University of Virginia's action in *Rosenberger*, the Supreme Court determined that the denial of funding violated the newspaper's right of free speech and was not justified by the university's concern that granting the funds would offend the Establishment Clause.<sup>32</sup> The Court characterized the University of Virginia's fees fund as a kind of forum for free expression and analyzed the denial of funding under the principles applicable to government-created limited public forums.<sup>33</sup> Once a state has opened a limited forum, the Court noted, it "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 . . ." <sup>34</sup> In this case, the university had engaged in unlawful viewpoint discrimination by refusing to fund a newspaper expressing religious views, while allowing funding for newspapers expressing other viewpoints.<sup>35</sup>

Moreover, the Court held, the institution's concerns about contravening the Establishment Clause did not provide a basis for the denial of funding.<sup>36</sup> Discussing *Widmar v. Vincent*<sup>37</sup> and other cases involving the use of college and university facilities by religious student groups,<sup>38</sup> the

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

32. *Id.* at 845–46.

33. For cases analyzing government-created limited public forums, see, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (access to public school facilities), *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985) (access to government-operated charitable contribution program), and *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983) (access to public school mail system).

34. *Rosenberger*, 515 U.S. at 829 (internal citations omitted).

35. *Id.* at 837.

36. *Id.* at 845–46.

37. 454 U.S. 263 (1981).

38. In *Widmar*, the Supreme Court held that when the institution creates a physical forum for the expression of views, it cannot discriminate against student organizations seeking to use the forum on the basis of the viewpoints they express, even when such expressive activities might include prayer or worship. See also *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–72 (1988).

Court in *Rosenberger* held that the Establishment Clause is not violated when a public college or university grants access to its resources on a viewpoint neutral basis to a wide array of student groups, including sectarian groups.<sup>39</sup>

Although *Rosenberger* involved a *denial* of funding to a specific student organization, as opposed to the *required* funding of a number of organizations at issue in *Southworth I*, the forum analysis approach of *Rosenberger* suggested an additional ground for sustaining the institution's fees program in *Southworth I*. That is, if a mandatory fees program could be analogized to a limited forum for the support of the expressive activities of a variety of groups of all political and ideological persuasions, then contributing to the fund supporting such an array of activities would not result in forced support for any particular activities, and so would not violate the First Amendment rights of the contributors.

This theory proved unpersuasive at the initial stages of the *Southworth I* litigation, where the lower courts applied the compelled speech and agency-shop precedents to conclude that the institution's fees program was not germane to its mission, did not further a vital policy interest, and unduly burdened the plaintiffs' First Amendment rights. Based on this analysis, the Seventh Circuit, in *Southworth v. Grebe*,<sup>40</sup> enjoined the institution from requiring objecting students to pay that part of the fee used to fund organizations engaged in political or ideological expression.<sup>41</sup>

The Seventh Circuit's decision, however, created a conflict with the Ninth Circuit's decision in *Rounds v. Oregon State Board of Higher Education*.<sup>42</sup> The court in *Rounds*, building on *Rosenberger*, had applied forum analysis in holding that the institution's mandatory fee program created a limited public forum, and the distribution of funds to a PIRG in that context did not violate the First Amendment speech rights of students objecting to the PIRG's views.<sup>43</sup> The conflict between the Seventh and Ninth Circuits, as well as the conflicting precedents from earlier student fee litigation, led to the Supreme Court's grant of certiorari in *Southworth I*.<sup>44</sup>

Addressing the constitutionality of the fees program at issue in *Southworth I*, the Supreme Court turned to *Rosenberger* for the proper analytical framework. Recognizing that objecting students are entitled to certain safeguards with respect to the expressive activities that they are required to support with their student fees, the Court held that the standard of viewpoint neutrality found in the public forum cases provides the means of protecting the constitutional interests of students in a mandatory fees

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39. *Rosenberger*, 515 U.S. at 834.

40. 151 F.3d 717 (7th Cir. 1998), *rev'd* 529 U.S. 217 (2000).

41. *Id.* at 735.

42. 166 F.3d 1032 (9th Cir. 1999).

43. *Id.* at 1039.

44. *Bd. of Regents v. Southworth*, 526 U.S. 1038 (1999).



program:

While *Rosenberger* was concerned with the rights a student has to use an extracurricular speech program already in place, today's case considers the antecedent question, acknowledged but unresolved in *Rosenberger*: whether a public university may require its students to pay a fee which creates the mechanism for the extracurricular speech in the first instance. When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others. There 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. We conclude that the University of Wisconsin may sustain the extracurricular dimensions of its programs by using mandatory student fees with viewpoint neutrality as the operational principle.<sup>45</sup>

The Court also determined that, while the institution might choose to create a refund or "opt-out" mechanism for student fees, such a system is not constitutionally required.<sup>46</sup>

On a related issue, the Court briefly addressed the use of referenda to allocate mandatory fee funds, a practice sometimes followed by the University of Wisconsin.<sup>47</sup> The Court noted that the record was not fully developed on that point, but suggested that such a process was not likely to afford adequate protection for viewpoint neutrality since a referendum, by its nature, substituted majority determinations for viewpoint neutrality.<sup>48</sup>

Having established forum analysis as the correct basis for reviewing the constitutionality of mandatory student fees programs, the Court remanded the case for further proceedings on the referendum question in light of the other principles discussed in its decision.<sup>49</sup>

## II. FORUM FALL-OUT: NEW PROBLEMS, UNRESOLVED ISSUES

Concurring in the judgment in *Southworth I*, Justice Souter agreed that the institution's fee system was permissible, but expressed concern about imposing a rigid viewpoint neutrality requirement to uphold it.<sup>50</sup> Events following *Southworth I* soon proved his point well-taken. The *Southworth I*

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45. *Southworth I*, 529 U.S. 217, 233–34 (2000).

46. *Id.* at 232.

47. *Id.* at 235.

48. *Id.*

49. *Id.* at 236.

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

decision led immediately to further litigation between the parties over the meaning of the viewpoint neutrality standard, and whether the institution's fee system was in fact viewpoint neutral.<sup>51</sup> And, in a series of more recent disputes and cases, new issues have arisen involving eligibility for access to funding from the "forum of fees," requirements for recognition as a student organization (the usual prerequisite for access to the fees forum), funding requests from religious organizations for the support of religious activities, and funding for campaign activities of student political groups. In addition, lingering questions have remained as to when, if ever, it might be appropriate to use a referendum as a means of allocating fees. As these ongoing concerns demonstrate, in the context of a limited metaphysical forum of money, forum analysis with strict viewpoint neutrality as the operational principle has been fraught with problems. The analytical approach adopted in *Southworth I* and expanded upon in *Southworth II* has not only failed to prevent further controversies, but has actually spurred an increase in fees disputes and litigation.

#### A. *Southworth II* and the Meaning of Viewpoint Neutrality

The parties in *Southworth I* had stipulated that the institution's fees program operated in a viewpoint neutral manner. The Supreme Court remanded the case, however, to deal with the question whether a referendum could be used to allocate fees, and for reconsideration "in light of the principles we have discussed."<sup>52</sup> Following the Supreme Court's decision, the institution amended its policies to prohibit the use of the referendum as a basis for the allocation of student fees.<sup>53</sup> Based upon the stipulation and the institution's action on the referendum matter, the case might have been concluded at this stage.<sup>54</sup> The plaintiffs, however, immediately sought and were granted relief from the viewpoint neutrality stipulation, and a new phase of the litigation began over the meaning of viewpoint neutrality, and whether the institution's system for the allocation of student fees was, in fact, viewpoint neutral.

Looking to forum cases for guidance, the appeals court in *Southworth II* relied on precedents involving permitting and licensing schemes for the use of traditional, spatial public forums.<sup>55</sup> In such cases, the courts had held

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

52. *Southworth I*, 529 U.S. at 236.

53. University of Wisconsin System Administrative and Financial Policies F20 and F37 (2000) [hereinafter Wisconsin Policies] (revised and renumbered as Policy F50, effective December 2007) (on file with author), available at <http://www.uwsa.edu/fadmin/fppp/fppp50.htm>.

54. As stated by the majority in *Southworth I*, "The parties have stipulated that the program . . . respects the principle of viewpoint neutrality. If the stipulation is to continue to control the case, the University's program in its basic structure must be found consistent with the First Amendment." *Southworth I*, 529 U.S. at 234.

55. See, e.g., *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002) (addressing park

that viewpoint neutrality in granting access to spatial public forums is threatened where decision-makers have “unbridled discretion” in deciding who should receive access.<sup>56</sup> Such “unbridled discretion” in the hands of decision-makers creates either a risk of self-censorship on the part of those seeking access to the forum, or a risk that the decision-maker might use its authority to favor or disfavor speech based on its viewpoint or content. Noting that unbridled discretion in the allocation of student fee funds poses the same type of threat to viewpoint neutrality, the court of appeals in *Southworth II* concluded that the unbridled discretion standard was a part of the viewpoint neutrality requirement applicable to an institution’s mandatory student fees program and reviewed the institution’s fee distribution system against this standard.<sup>57</sup>

The institution opposed including a prohibition on unbridled discretion as part of the viewpoint neutrality standard, arguing that a simple standard of actual nondiscrimination in the operation of its program was the proper measure of viewpoint neutrality in the limited forum of a fees fund. The court of appeals, however, emphasized that the issue was not whether there were actual *incidents* of viewpoint discrimination, but rather whether the fees *system* itself satisfied the viewpoint neutrality requirement. Although the court sustained the institution’s program, it based its decision on the numerous procedural protections for those seeking access to the fees afforded under institutional policies, including specific criteria for fee allocation decisions, a requirement to provide written reasons for funding denials, and an elaborate appeals process.<sup>58</sup> Based on these protections, the court concluded that the institution’s program curtailed the discretion of the student government in the allocation of fees sufficiently to meet the unbridled discretion standard.<sup>59</sup> Stating that the unbridled discretion standard does not require the elimination of *all* discretion in regulating access to a forum, the court of appeals found that the institution’s

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permits); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (addressing parade permits); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (addressing permits for news-racks).

56. *See Southworth II*, 307 F.3d at 575–80.

57. *Id.* at 578–79. Indeed, the Seventh Circuit went on to suggest that the unbridled discretion standard could stand as a constitutional requirement separate and distinct from the viewpoint neutrality requirement. *See id.* at 580.

58. Following the trial in *Southworth II*, university administrators and student government leaders worked together to make additional policy modifications that further narrowed the discretion available to student government in the allocation process. These amendments required the student government to develop written criteria for the allocation of student fee funds, to take an oath promising to allocate funds in a viewpoint neutral manner, to set minimum base funding levels for all eligible student organizations, to provide written reasons for the denial of funding, and to clarify the appeals process, at all levels, from the student government to the campus administration and the Board of Regents. *See id.* at 581–87.

59. *Id.* at 587.

narrowing of the discretionary elements of the fees allocation process was adequate to withstand constitutional scrutiny.<sup>60</sup>

Despite the court's approval of the fees program and its acknowledgment that some discretion in the administration of fees is permissible, the unbridled discretion standard has in practice greatly limited the ability to deny or limit funding requests. The extensive process protections required to bridle discretion not only add administrative complexity to the operation of fees programs, but also encourage lengthy disputes and appeals if funding is denied or restricted.<sup>61</sup> As a consequence, there is considerable pressure on students and staff charged with managing the funds to grant virtually all funding requests, rather than face further internal controversy or litigation. This ready availability of fees has, in turn, encouraged more aggressive demands for support from an ever-expanding number of student organizations.<sup>62</sup>

#### B. Access to the Forum: Recognition as a Student Organization

With the easier availability of fees funding made possible by the unbridled discretion standard have come new requests for fees support. In addition, the number of groups eligible to seek funding has grown, as a result of the elimination of earlier prohibitions on access to fees funds by religious and political student groups. Before *Rosenberger*, religious and political student organizations were commonly prohibited by institutional policies from receiving fees. *Rosenberger*, however, suggested that such blanket funding prohibitions could constitute viewpoint discrimination under forum analysis, and led to the elimination of such restrictions at many institutions.<sup>63</sup> While some of these student organizations had not

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60. *Id.* at 592.

61. See also *Child Evangelism Fellowship v. Anderson School District Five*, 470 F.3d 1062 (4th Cir. 2006), and *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006), for cases applying the unbridled discretion standard in the context of public school restrictions on access to "forums" for the distribution of organization flyers and facility fee-waivers, respectively. Both cases follow *Southworth II*, emphasizing that not only must school practices be free of viewpoint discrimination, but also that school policies must ensure viewpoint neutrality by adequately bridling discretion.

62. This problem may be further exacerbated if a fees program does not include any limit or cap on the total amount of the fees that may be available for distribution to student organizations, but rather determines the total amount needed to fund all approved requests and then assesses that sum to the students.

63. At the time *Southworth I* went to the United States Supreme Court, the University of Wisconsin had in place such a policy, but had not enforced it following *Rosenberger*. Although plaintiffs in *Southworth I* suggested that this policy would render the fees program not viewpoint neutral, the Court did not address the issue, based on the parties' stipulation that the program was administered in a viewpoint neutral manner. Subsequent to the Court's decision in *Southworth I*, the policy was repealed. See *Southworth I*, 529 U.S. 217, 225–26 (2000); Wisconsin Policies, *supra* note 53. Similar policies have since been challenged. See *Sklar v. Clough*, No. 1:06-

sought funding prior to *Rosenberger* or *Southworth I* because they disapproved of mandatory fees generally or were simply unfamiliar with the programs, they have since become active participants in the funding forum.

Requests for support from student religious organizations have proved to be especially problematic in this new environment. Difficult questions have arisen over eligibility for official recognition as a student organization, the prerequisite for access to fees funding. Requirements that student organizations comply with institutional policies prohibiting discrimination on the basis of protected characteristics have become the focus of numerous disputes. In a coordinated national effort,<sup>64</sup> religious student organizations have challenged such requirements, arguing that they cause viewpoint discrimination in the forum, violate constitutionally protected organizational interests in expressive association, and infringe on other First Amendment rights. A series of recent cases illustrates the difficulties of applying forum analysis and viewpoint neutrality principles in this context, while assuring that other important legal and policy interests are protected.

Recognition or registration<sup>65</sup> as a student organization has long been the sine qua non of eligibility for funding from student fees. Failure to satisfy recognition requirements means, in effect, denial of funding, as well as other important benefits.<sup>66</sup> Although recognition may appropriately be

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CV-0627 (N.D. Ga. dismissed July 25, 2008); *Christian Legal Soc'y v. Sorenson*, No. 3:08-CV-00701 (D.S.C. dismissed June 24, 2008). In *Sklar*, the university defendants argued that it is constitutionally permissible to prohibit funding of religious and political activities. Although the court there did not reach the issue, its opinion suggested that the policy would not likely withstand constitutional scrutiny under *Rosenberger* or *Southworth I*.

64. The Alliance Defense Fund and the Christian Legal Society have spearheaded this effort, leading many of the challenges that have been brought. See, e.g., *Christian Legal Soc'y v. Sorenson*, No. 3:08-CV-00701 (D.S.C. dismissed Jun. 24, 2008); *Christian Legal Soc'y v. Eck*, No. 9:07-CV-00154 (D. Mont. filed Dec. 14, 2007); *DiscipleMakers, Inc. v. Spanier*, No. 4:04-CV-02229 (M.D. Penn. dismissed Oct. 3, 2005); *Christian Legal Soc'y v. Crow*, No. 2:04-CV-02572, 2006 U.S. Dist. LEXIS 25579 (D. Ariz. dismissed Sept. 7, 2005); *Christian Legal Soc'y v. Farley*, No. 5:04-CV-04120 (D. Kan. dismissed Apr. 6, 2005); *Christian Legal Soc'y v. Ohio State Univ.*, No. 2:04-CV-00197 (S.D. Ohio dismissed Nov. 19, 2004). Additional information on the work of these national organizations is published through such websites as Alliance Defense Fund: Defending Our First Liberty, University Life, [www.alliancedefensefund.org/issues/ReligiousFreedom/UniversityLife.aspx](http://www.alliancedefensefund.org/issues/ReligiousFreedom/UniversityLife.aspx) (last visited Oct. 31, 2008), and Press Release, Christian Legal Society, Center for Law & Religious Freedom Sues Ohio State University Over Discriminatory "Non-Discrimination" Policy (Mar. 12, 2004), available at [http://www.clsnet.org/clrfPages/pr\\_2004-03-12.php](http://www.clsnet.org/clrfPages/pr_2004-03-12.php).

65. For ease of reference, the term "recognition" is used here to include registration and similar designations that indicate a student organization has been deemed eligible to receive funding and other benefits from the institution.

66. See *Southworth I*, 529 U.S. 217; *Rosenberger v. Rector & Visitors of the Univ.*

conditioned on an organization's affirmation of intent to comply with institutional policies, when recognition is denied, the school bears a "heavy burden" to demonstrate that the denial is appropriate.<sup>67</sup> While most recognition requirements are noncontroversial,<sup>68</sup> student religious organizations have frequently challenged institutional enforcement of nondiscrimination policies, seeking to be excused from conditions on recognition that require adherence to certain aspects of such policies.

Adopted to assure compliance with state and federal anti-discrimination laws and institutional policies, nondiscrimination requirements for student organizations are common at colleges and universities.<sup>69</sup> The list of protected characteristics under such policies typically includes age, race, color, national origin, disability, religion, sex, and sexual orientation. Some student religious organizations, however, maintain membership and leadership requirements that discriminate, or might be considered to discriminate, on the basis of religion or sexual orientation, in violation of institutional policies. These organizations may require that their members or leaders be members of their religion, thus conflicting with policies prohibiting religion-based discrimination. Less directly, religious groups may require their members and leaders to agree to adhere to a faith statement that would effectively preclude approval of sex outside of marriage, including homosexuality, or engaging in homosexual conduct. Such required faith statements might be construed to conflict with policies

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of *Va.*, 515 U.S. 819 (1995); *Healy v. James*, 408 U.S. 169 (1972). In addition to the ability to seek student fee funding, official recognition typically provides a student organization with such benefits as the opportunity to describe itself as officially recognized and affiliated with the college or university, access to college or university facilities, and such office resources as telephones and computers.

67. *Healy*, 408 U.S. at 182, 184, 193. In *Healy*, a college president refused to grant official recognition to a student organization based on his view that the organization's philosophy was "antithetical" to the school's policies. Noting that denial of recognition to a student organization may abridge the right of expressive association, the Court held that the university had the burden of demonstrating that its denial was appropriate. While finding the denial of recognition on the facts presented in *Healy* was not justified, the Court did note that restrictions on an organization's activities—as opposed to its views—could be sustained upon a proper factual showing, and further that a college or university might require, as a condition of recognition, that a group affirm its intention to comply with reasonable campus regulations. *Healy*, 408 U.S. at 193–94.

68. E.g., requirements that student organizations be comprised of and directed by students, that their activities and services be made widely available to the campus community, and that there be some minimal level of institutional supervision, such as a faculty or staff advisor. See, e.g., UW-Madison Student Organization Office Handbook: Student Organization Eligibility & Registration, [http://soo.studentorg.wisc.edu/handbook/08-09/eligibility\\_and\\_registration.html](http://soo.studentorg.wisc.edu/handbook/08-09/eligibility_and_registration.html) (last visited Oct. 31, 2008).

69. See, e.g., WIS. STAT. § 36.12 (2005); University of Wisconsin Board of Regents, Policy Document 30-6, <http://www.uwsa.edu/bor/policies/rpd/rpd30-6.htm> (last visited Oct. 31, 2008).

prohibiting sexual orientation discrimination.<sup>70</sup>

Faced with actual or threatened denial of recognition and funding because of failure to comply with institutional nondiscrimination policies, religious student groups have lodged complaints and brought suits contending that the policies violate various constitutional rights, including the First Amendment rights of free speech, expressive association, and free exercise of religion. The plaintiffs in these cases contend, relying on forum analysis principles, that the nondiscrimination policies violate viewpoint neutrality by effectively depriving them of access to the forum because of their religious views. Additionally, the organizations argue that the forced inclusion of certain individuals in their leadership or membership undermines their ability to communicate their own messages, infringing on their right of expressive association as articulated in such cases as *Boy Scouts of America v. Dale*,<sup>71</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*,<sup>72</sup> and *Roberts v. United States Jaycees*.<sup>73</sup>

Several of these disputes over recognition have been resolved before being fully litigated, with the adoption of modified institutional nondiscrimination policies that attempt to accommodate the desires of student organizations to maintain belief requirements for members and leaders, while still banning discrimination on the basis of protected statuses or characteristics. In *Alpha Iota Omega Christian Fraternity v. Moeser*,<sup>74</sup> for example, a religious organization complained that the University of North Carolina's nondiscrimination policy imposed a condition on its receipt of benefits that was not imposed on non-religious organizations, thus violating its constitutional rights. The trial court granted a preliminary injunction against the institution's enforcement of its nondiscrimination policy, and the institution subsequently amended its policy to resolve the matter. The revised policy, in effect, allows student organizations to require commitment to a set of *beliefs* as a condition of membership or participation, but continues to prohibit discrimination on the basis of *status*, including sexual orientation. The policy provides:

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70. While homosexuality or homosexual conduct is of particular concern to these student religious groups, in at least one case the focus was on gender discrimination. See *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of New York*, 443 F. Supp. 2d 374 (E.D.N.Y. 2006).

71. 530 U.S. 640 (2000) (holding that admission of an avowed homosexual as a scout leader prevented the Boy Scouts organization from expressing its message). Other potential claims involve violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

72. 515 U.S. 557 (1995) (holding that requiring private organizers of a parade to include a homosexual group violated the organizers' First Amendment right to free expression).

73. 468 U.S. 609 (1984) (applying state human rights law to all male charitable organization to compel admission of women to membership did not violate male members' First Amendment right to freedom of association).

74. No. 1:04-CV-00765, 2005 WL 1720903 (M.D.N.C. dismissed May 4, 2006).

Student organizations that select their members on the basis of commitment to a set of beliefs (e.g., religious or political beliefs) may limit membership and participation in the organization to students who, upon individual inquiry, affirm that they support the organization's goals and agree with its beliefs, so long as no student is excluded from membership or participation on the basis of his or her age, race, color, national origin, disability, religious status or historic religious affiliation, veteran status, sexual orientation, or, unless exempt under Title IX, gender.<sup>75</sup>

A similar approach was taken in *Intervarsity Christian Fellowship v. Walsh*,<sup>76</sup> in which application of the University of Wisconsin System's nondiscrimination policy to the InterVarsity Christian Fellowship, a religious student group at the University of Wisconsin-Superior campus, was challenged. The institution amended its policy following the North Carolina model and the case was settled.<sup>77</sup> Other colleges and universities, too, have resolved litigation or threats of litigation by making these kinds of policy changes.<sup>78</sup>

Whether these changes to nondiscrimination policies are legally required or adequately address the competing constitutional interests involved, however, remains unsettled. Two recent cases considering these issues in some detail, *Christian Legal Society v. Kane*<sup>79</sup> and *Christian Legal Society v. Walker*,<sup>80</sup> have reached conflicting results, in one instance supporting the institution's ability to require compliance with its nondiscrimination policy,<sup>81</sup> and in the other finding—in the context of a request for a preliminary injunction—that the plaintiff religious organization would likely succeed on its claimed First Amendment rights violations.<sup>82</sup> Both cases are somewhat problematic as precedents, since one is not officially reported and the other was the result of a ruling on a preliminary injunction

75. University of North Carolina Policy on Nondiscrimination, <http://www.unc.edu/campus/policies/studentorgnondiscrim.html> (last visited Oct. 31, 2008).

76. Agreed Order of Settlement, No. 06-C-0562-S (W.D. Wis. Apr. 11, 2007) available at <http://www.telladf.org/UserDocs/UWSuperiorSettlement.pdf>.

77. *Id.* See also Univ. of Wisconsin-Madison Roman Catholic Found. v. Walsh, No. 3:06-CV-00649 (W.D. Wis. dismissed May 03, 2007), which raised similar questions about application of the university's nondiscrimination policy, as well as the student organization's failure to satisfy an additional university recognition requirement that the organization be directed and controlled by students. This case was also settled.

78. See, e.g., *Christian Legal Soc'y v. Crow*, No. 2:04-CV-02572, 2006 U.S. Dist. LEXIS 25579 (D. Ariz. dismissed Sept. 7, 2005).

79. No. C 04-04484, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006), *appeal docketed*, No. 06-15956 (9th Cir. May 17, 2006)

80. 453 F.3d 853 (7th Cir. 2006).

81. See *Kane*, 2006 WL 997217.

82. See *Walker*, 453 F.3d 853.



motion.<sup>83</sup> They do, however, reflect the divergent analytical approaches that might be applied where compliance with nondiscrimination policies is a condition of recognition as a student organization. The results in these cases reflect the complexities associated with applying forum analysis principles in the context of fees requests by religious organizations, and suggest that disputes over these issues are far from over.<sup>84</sup>

### 1. Christian Legal Society v. Kane

In *Christian Legal Society v. Kane*,<sup>85</sup> plaintiff Christian Legal Society (“CLS”) sued the Hastings Law School, asserting, among other claims,<sup>86</sup> that its rights to freedom of expressive association and free speech were violated when Hastings refused to grant it recognition as a student organization. Hastings prohibits discrimination on the basis of race, color, religion, national origin, ancestry, disability, age, sex, or sexual orientation in admission, access, and treatment in Hastings-sponsored programs and activities.<sup>87</sup> Recognized student organizations are required to abide by this policy and must allow any student to participate, become a member, or seek a leadership position, regardless of status or beliefs.<sup>88</sup>

CLS requires its members to sign a statement of faith and prohibits

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83. See *id.* (result of a preliminary injunction); *Kane*, 2006 WL 997217 (not officially reported).

84. Compare Charles J. Russo & William E. Thro, *The Constitutional Rights of Politically Incorrect Groups: Christian Legal Society v. Walker as an Illustration*, 33 J.C. & U.L. 361, 386 (2007) (concluding the “constitutional rights of the politically incorrect student organizations largely trump a public college or university’s desire to prevent student groups from engaging in discrimination”), and Mark Andrew Snider, *Viewpoint Discrimination by Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies*, 61 WASH. & LEE L. REV. 841, 882 (2004) (concluding that U.S. Supreme Court jurisprudence suggests that “a public university may not use its nondiscrimination policy to derecognize a student religious organization that chooses its members based on its religious beliefs”), with Ralph D. Mawdsley, *Student Organizations and Nondiscrimination Policies in Higher Education: How Much “Play in the Joints” Is Permissible Under the Free Speech Clause?*, 215 ED. LAW REP. 203, 225–26 (2007) (noting that “[h]ow forum and viewpoint discrimination analyses will apply to viewpoint neutral nondiscrimination policies is not yet clear,” and that “courts will have to determine how much ‘play in the joints’ is necessary under the First Amendment to both allow a university to fulfill its mission of providing nondiscriminatory educational opportunities and to permit divergent student organization perspectives that seem to be at odds with that mission”).

85. 2006 WL 997217, *appeal docketed*, No. 06-15956 (9th Cir. May 17, 2006). Oral argument in *Kane* is postponed pending the Ninth Circuit’s en banc review of *Truth v. Kent School Dist.*, 499 F.3d 999 (9th Cir. 2007), *superseded* by 524 F.3d 957 (9th Cir. 2008).

86. Plaintiffs also contended that their rights to the free exercise of religion and equal protection were violated. *Kane*, 2006 WL 997217 at \*4.

87. *Id.* at \*2.

88. *Id.*

students who do not sign from becoming members or officers.<sup>89</sup> It also bars from membership or leadership posts those who engage in homosexual conduct or belong to religions having tenets differing from the CLS statement of faith.<sup>90</sup> Hastings concluded that CLS's requirements did not comply with the nondiscrimination policy and denied recognition.<sup>91</sup> CLS sued, claiming violations of its constitutional rights, including the First Amendment rights to free speech and expressive association.<sup>92</sup>

The trial court granted summary judgment to Hastings on all issues.<sup>93</sup> The court framed the central question in the case as whether a religious student organization may compel a public college or university to fund its activities and allow it to use the institution's name and facilities, even though the organization admittedly discriminates in its membership and leadership on the basis of religion and sexual orientation.<sup>94</sup>

The *Kane* court characterized the school's nondiscrimination policy as a regulation of conduct having only an incidental, rather than direct, effect on speech.<sup>95</sup> As a result, the court applied the test of *United States v. O'Brien*<sup>96</sup> to analyze whether the policy infringed CLS's free speech rights.<sup>97</sup> Under *O'Brien*, a government regulation of conduct is valid, even where it incidentally restricts speech, if (1) the regulation is within the constitutional power of the government; (2) it furthers an important or substantial government interest; (3) the interest is unrelated to the suppression of free expression; and (4) the incidental restriction on speech is no greater than is essential to furtherance of the governmental interest.<sup>98</sup> The court concluded that the Hastings nondiscrimination policy was within the authority of the institution to adopt, that it furthered an important governmental interest, and was narrowly drawn to achieve the goal of eliminating discrimination.<sup>99</sup> Thus, under the *O'Brien* test, the policy did not violate CLS's freedom of speech.<sup>100</sup>

Alternatively, the court reviewed the nondiscrimination policy as a direct regulation of speech.<sup>101</sup> Here, too, the court determined that the nondiscrimination policy did not violate CLS's speech rights.<sup>102</sup> Relying

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89. *Id.* at \*3.

90. *Id.*

91. *Id.*

92. *Id.* at \*3–\*4.

93. *Id.* at \*27.

94. *Id.* at \*5.

95. *Id.* at \*8.

96. 391 U.S. 367 (1968) (involving a prosecution for draft-card burning).

97. *Kane*, 2006 WL 997217 at \*8.

98. *O'Brien*, 391 U.S. at 377.

99. *Kane*, 2006 WL 997217 at \*10.

100. *Id.*

101. *Id.*

102. *Id.*

on *Southworth I*, *Rosenberger*, and *Rounds*, the court found that Hastings had created a limited public forum with its student fees fund.<sup>103</sup> The level of scrutiny to be applied to restrictions on forum access depends on the type of forum.<sup>104</sup> Restrictions on speech in traditional public forums, such as streets and parks, must be narrowly drawn to achieve a compelling state interest. For a limited public forum, however, restrictions on access may be sustained if they are viewpoint neutral and reasonable in light of the purpose served by the forum. Because nondiscrimination statutes have been held to be viewpoint neutral,<sup>105</sup> the court concluded that the Hastings policy was likewise neutral and did not discriminate against the religious viewpoints expressed by CLS.<sup>106</sup> The policy was, moreover, reasonable and consistent with the school's educational mission and interest in complying with federal and state laws prohibiting discrimination.<sup>107</sup> As a result, under forum analysis and viewpoint neutrality principles, the policy did not infringe on CLS's freedom of speech.<sup>108</sup>

With regard to CLS's contention that the policy violated its freedom of expressive association, the court again sustained the institution.<sup>109</sup> The court first noted that *Healy* is the most instructive precedent for analyzing CLS's claim in this regard.<sup>110</sup> Under *Healy*, the measure for whether a restriction on student organization recognition passes constitutional scrutiny is the substantial interest standard for conduct regulations having only an incidental effect on speech set forth in *O'Brien*.<sup>111</sup> Since the court had already determined that the Hastings nondiscrimination policy did not violate CLS's speech rights under *O'Brien*, it reached the same conclusion with regard to its expressive association interests.<sup>112</sup> Moreover, the court held, the institution had sufficiently justified its denial of recognition to be consistent with *Healy*, rejecting CLS's argument that denial of recognition is per se an unconstitutional infringement of associational rights under *Healy*.<sup>113</sup>

Addressing CLS's argument that the correct framework for analysis was

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103. *Id.*

104. *Cf.* *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006). The courts use a sometimes confusing variety of terms to differentiate types of public forums and determine the level of scrutiny to be applied to restrictions on access.

105. *See, e.g., Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984); *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003).

106. *Kane*, 2006 WL 997217 at \*13.

107. *Id.* at \*14.

108. *Id.*

109. *Id.* at \*16.

110. *Id.*

111. *Healy v. James*, 408 U.S. 169, 189 n.20 (1972).

112. *Kane*, 2006 WL 997217 at \*16.

113. *Id.* at \*18–19.

that applied in expressive association cases such as *Dale* and *Roberts*, the court further held that even under those precedents, the nondiscrimination policy was constitutional.<sup>114</sup> *Dale* established a three-part test for determining whether the right of expressive association has been violated: (1) an organization must engage in expressive association; (2) the state action challenged must significantly affect the group's ability to advocate its viewpoints; and (3) the court must determine whether the state's interest justifies the infringement on expressive association.<sup>115</sup> In the court's view, there was no dispute that CLS engaged in expressive association.<sup>116</sup> The court found, however, that compliance with the institution's nondiscrimination policy would not significantly impair CLS's ability to express its views and that any incidental intrusion on its rights was justified by the importance of the nondiscrimination policy.<sup>117</sup>

Although *Kane* is a district court decision and is not reported, the trial court's application of forum analysis and viewpoint neutrality principles is similar to the analytical approach taken recently by the Ninth Circuit Court of Appeals in *Truth v. Kent School District*.<sup>118</sup> At issue in *Truth* was a public school district's denial of recognition to a student Bible club based on the conflict between the club's membership requirements, which effectively excluded non-Christians from general membership, and the district's nondiscrimination policies.<sup>119</sup> The court of appeals concluded that the school's program on access to recognition, and thus funding, qualified as a limited public forum.<sup>120</sup> Relying on *Rosenberger*, the court framed the question before it as whether the policy of restricting access to the forum based on compliance with nondiscrimination policies was viewpoint neutral and reasonable in light of the purposes of the forum.<sup>121</sup> The court found that the purpose of the funding program was to advance the school's basic pedagogical goals, and determined that the decision to restrict access to the program based on compliance with nondiscrimination policies was reasonable in light of the purposes of the forum.<sup>122</sup> The court then considered whether the restriction was viewpoint neutral, holding that a regulation on access to a forum is not viewpoint neutral if it is "an effort

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114. *Id.* at \*20.

115. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648–49 (2000).

116. *Kane*, 2006 WL 997217 at \*20.

117. *Id.* at \*24.

118. 524 F.3d 957 (9th Cir. 2008) (*Truth II*), amended and superseded by 542 F.3d 634 (9th Cir. 2008). A previous decision by the Ninth Circuit, *Truth v. Kent School District*, 499 F.3d 999 (9th Cir. 2007) (*Truth I*), superseded by 524 F.3d 957 (9th Cir. 2008), was withdrawn and replaced by this decision, which also rendered moot a petition for rehearing en banc.

119. *Truth II*, 524 F.3d at 960–63.

120. *Id.* at 970.

121. *Id.* at 972.

122. *Id.* at 972–73.

to suppress expression merely because public officials oppose the speaker's view."<sup>123</sup> Because the school did not deny access to the forum based solely on the organization's religious viewpoint, the court held that it had not engaged in viewpoint discrimination.<sup>124</sup> The case was remanded, however, because there remained a triable issue of fact as to whether the school granted exemptions to the nondiscrimination policy based on the content of the speech of certain groups.<sup>125</sup>

As noted above,<sup>126</sup> *Kane* is currently on appeal to the Ninth Circuit. The decision in the *Truth II* case suggests that the result in *Kane* is likely to be sustained, although the analytical framework that will be approved may vary from that of the trial court.

## 2. Christian Legal Society v. Walker

In contrast to the *Kane* decision and the approach suggested by *Truth*, the court of appeals in *Christian Legal Society v. Walker*,<sup>127</sup> concluded that the plaintiff student organization there was likely to prevail on its claims that its rights were violated by application of the nondiscrimination policy in place at the Southern Illinois University School of Law.<sup>128</sup> The CLS chapter at Southern Illinois had its recognition revoked following complaints that its membership and leadership requirements precluded homosexuals from becoming voting members or officers of the organization, contrary to the school's nondiscrimination policy.<sup>129</sup> CLS brought suit alleging that de-recognition violated its constitutional rights of expressive association, free speech, and free exercise of religion, and seeking a preliminary injunction.<sup>130</sup>

The trial court denied the injunctive relief, but the court of appeals reversed.<sup>131</sup> Addressing the claimed violation of the First Amendment right of expressive association, the court applied the *Dale* test, concluding that forced inclusion of those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of

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123. *Id.* at 973 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)) (internal citations omitted).

124. *Id.*

125. *Id.* at 973–74. Compare with the court's earlier decision, *Truth I*, 499 F.3d 999 (9th Cir. 2007), which more closely parallels the trial court's analysis in *Kane*.

126. *See supra* note 85.

127. 453 F.3d 853 (7th Cir. 2006).

128. *Id.* at 867. The *Truth I* court acknowledged that Walker had applied the forced-inclusion cases to a similar set of facts, but declined to express an opinion on whether the Seventh Circuit employed the appropriate legal framework. *Truth I*, 499 F.3d at 1015.

129. *Walker*, 453 F.3d at 858.

130. *Id.*

131. *Id.* at 867.

homosexual activity, and so violated its rights.<sup>132</sup> Further, the court held, the university's interest in preventing discrimination did not outweigh CLS's interest in expressing its views.<sup>133</sup> In order to justify interfering with CLS's freedom of expressive association, the university's policy would have to serve a compelling state interest not related to the suppression of speech.<sup>134</sup> While acknowledging the university's interest in eliminating discrimination, the court could find no basis for forcing CLS to accept members whose activities violated its creed, except a desire to induce CLS to modify the content of its expression.<sup>135</sup> This, in the court's view, was insufficient to justify de-recognition of CLS.<sup>136</sup>

While—as in *Kane*—the court invoked the *Healy* case, finding it to be “legally indistinguishable,” it reached the opposite conclusion from the *Kane* court.<sup>137</sup> Suggesting that CLS, like the plaintiff student organization in *Healy*, was denied recognition by reason of policies directed at advocacy or philosophy, rather than conduct or activities, the court concluded that CLS was likely to prevail on its claimed violation of expressive association rights.<sup>138</sup>

With respect to forum analysis, the court determined that the otherwise viewpoint neutral nondiscrimination policy had not been applied to CLS in a viewpoint neutral manner.<sup>139</sup> CLS presented evidence that other student organizations had contravened the nondiscrimination policy, but had not been de-recognized.<sup>140</sup> This, the court determined, constituted viewpoint discrimination.<sup>141</sup> Based upon its analysis of all the issues, the court remanded the case to the trial level for entry of a preliminary injunction against the university.<sup>142</sup> The university did not appeal entry of the injunction, and the case was settled.

The different outcomes in *Kane* and *Walker* reflect divergent analytical approaches to the legal issues presented where forum and viewpoint neutrality principles, expressive association rights, and other First Amendment interests conflict with important institutional policies

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132. *Id.* at 863.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Compare id.* at 864 (holding that the plaintiff has a reasonable likelihood of success against the dean of the law school for violating its right of expressive association), with *Christian Legal Soc'y v. Kane*, No. C 04-04484, 2006 WL 997217, at \*24 (N.D. Cal. Apr. 17, 2006) (holding that the law school did not infringe on the plaintiff's right to expressive association by denying its request for funding).

138. *Walker*, 453 F.3d at 864.

139. *Id.* at 866.

140. *Id.*

141. *Id.* at 867.

142. *Id.*

governing fees programs. The contrary results can be explained in part by the different postures of the two cases (the preliminary injunction in *Walker*, as opposed to the fuller record in *Kane*), as well as by key factual differences (the differential treatment of student organizations in *Walker*, as opposed to the consistent application of the nondiscrimination policy in *Kane*). There remain, however, fundamental differences in the analyses applied, including how to frame the fundamental issue for determination, whether to focus primarily on expressive association concerns or forum principles, what level of scrutiny to apply to conditions on recognition as a student organization, whether to characterize nondiscrimination policies as conduct regulations or direct regulations of speech, and whether the fees funding constitutes a limited public forum.

The uncertainty resulting from such competing analytical approaches assures continuing controversies over eligibility for recognition as a student organization, and thus for fee funding. Until these differences are resolved, administrators of fees programs will struggle to find practical means of balancing college and university interests in compliance with nondiscrimination and other policies against the asserted constitutional rights of student groups seeking official recognition and financial support for the expression of their views.

### C. Funding Requests: Establishment Clause Issues and Other Problems with a “Forum” of Public Funds

In addition to the problems presented by college and university requirements for recognition as a student organization, specific requests for funding by officially recognized organizations may raise complex legal issues. Requests from religious student organizations for the financial support of their religious activities have been of particular concern given the Establishment Clause issues they raise. The requests of student political organizations, however, also hold the potential for controversy under state campaign and election laws.

#### 1. Establishment Clause Issues

*Rosenberger* made clear that the Establishment Clause is not violated where a college or university grants access to funding on a viewpoint neutral basis to a wide array of student organizations, including those expressing religious viewpoints.<sup>143</sup> Not addressed in the case, though, was the question whether fees could be used for the direct support of overtly religious activities or expenses. Noting the “special Establishment Clause dangers” where the government makes direct money payments to sectarian institutions, the *Rosenberger* Court stated: “We do not confront a case

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143. *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995).

where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity . . . . [N]o public funds flow directly to [the student newspaper's] coffers."<sup>144</sup>

Although *Southworth I* built on the forum analysis principles of *Rosenberger*, the case did not involve specific expenditures of fee funds, but rather the question whether students could be compelled to contribute to the support of the expressive activities of student organizations.<sup>145</sup> As a result, *Southworth I* provided little direct guidance on the Establishment Clause implications of making direct money payments to student religious groups.<sup>146</sup>

The increased participation of student religious organizations in college and university fees programs since *Southworth I*, however, inevitably raises complex questions about the applicability of Establishment Clause principles in the context of a forum of fees, and about how to address the question left unanswered by *Rosenberger*.

Establishment Clause jurisprudence teaches that government financial support for religion is prohibited. Intended to protect against state sponsorship of, financial support for, or active involvement in religious activity,<sup>147</sup> the Establishment Clause means "at least this: . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."<sup>148</sup> As emphasized by the court in *School District of City Grand Rapids v. Ball*,<sup>149</sup> while characterized by few

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144. *Id.* The Court further stated, "It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse." *Id.* at 844. Justice O'Connor's concurring opinion in *Rosenberger* also emphasized that state funding of religious activities is constitutionally prohibited, but suggested that the fees fund there was "a fund that simply belongs to the students." *Id.* at 851 (O'Connor, J., concurring).

145. *Southworth I*, 529 U.S. 217, 221 (2000).

146. It was clear on remand, however, that questions about the application of the Establishment Clause in the context of the fees forum would arise. *Southworth II*, 307 F.3d 566, 591 (7th Cir. 2002). Plaintiffs in *Southworth II* were concerned that the university's fee system made it possible to discriminate against religious organizations. *Id.* They pointed to a meeting between university officials and student government representatives in which the students were directed to contact legal counsel if they had concerns about funding religious activities. *Id.* at 591–92. The court of appeals was quick to dismiss this argument, noting that this sort of consultation did not constitute viewpoint discrimination, and would actually serve as another check on the student government's discretion in the allocation of funds. *Id.* at 592. The court went no further, though, on the subject of funding for religious organizations, and offered no suggestions related to the Establishment Clause implications of state funding for the religious activities of religious groups.

147. See *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

148. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

149. 473 U.S. 373 (1985).



absolutes, the Establishment Clause “does *absolutely* prohibit government-financed . . . indoctrination into the beliefs of a particular religious faith.”<sup>150</sup>

Consistent with these principles, courts have prohibited, on Establishment Clause grounds, direct governmental subsidies for religious activities and institutions. Government aid that is distributed to a religious organization through the single choice of government with the effect of providing a direct subsidy to the organization is forbidden.<sup>151</sup> In contrast, those types of indirect support that may result from the provision of governmental resources that benefit both secular and religious organizations have been allowed.<sup>152</sup> Also permitted have been the kinds of indirect benefits that flow to religious organizations through the “genuinely independent and private choices of aid recipients.”<sup>153</sup>

In the context of participation in public forums for the purpose of engaging in speech from a religious viewpoint, the courts have acknowledged that a state’s interest in avoiding Establishment Clause violations may be compelling enough to justify a content-based limitation on access.<sup>154</sup> Indeed, such content-based distinctions in spatial public forums have recently been sustained in two cases where churches were denied the use of public school facilities for worship services.<sup>155</sup> In addition, *Lamb’s Chapel v. Center Moriches Union Free School District*<sup>156</sup> and *Good News Club v. Milford Central School District*<sup>157</sup> suggest that there is an open question as to whether, or to what degree, the state’s interest in avoiding an Establishment Clause violation can justify viewpoint discrimination in a limited public forum.<sup>158</sup>

Nevertheless, applying First Amendment speech principles and forum

150. *Id.* at 385 (emphasis added).

151. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002); *Mitchell v. Helms*, 530 U.S. 793, 888 (2000).

152. *See, e.g., Walz*, 397 U.S. at 672–73 (tax exemptions for nonprofit entities, including churches); *Everson*, 330 U.S. at 18–19 (transportation benefits provided to public and private school students, including religious school students).

153. *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 (1986); *see also* *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 611–12 (7th Cir. 2001).

154. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–13 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

155. *See Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 131 (2d Cir. 2007); *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 918 (9th Cir. 2007).

156. *Lamb’s Chapel*, 508 U.S. 384.

157. *Good News Club*, 533 U.S. 98.

158. *Lamb’s Chapel* and *Good News Club* point out that it is not clear whether the interest in avoiding an Establishment Clause violation can justify viewpoint discrimination. *Id.* at 113; *Lamb’s Chapel*, 508 U.S. at 394–95.

analysis, courts have frequently sustained the use of public resources to support the expression of religious viewpoints in public forums. Characterizing various religious activities as constituting speech, and emphasizing the need to avoid discrimination against speech from a religious viewpoint in forums otherwise open to a variety of speakers and expressive activities, courts have permitted religious organizations broad access to spatial public forums, and to the mechanisms for gaining access to other public resources.<sup>159</sup> Governmental agencies denying access to such resources based on the Establishment Clause have been generally unsuccessful when challenged.<sup>160</sup> The courts considering these issues have minimized Establishment Clause concerns, concluding that no Establishment Clause violation occurs where the government program at issue is overall neutral toward religion, there is no endorsement—or perceived endorsement—of religion on the part of the state entity, the program is available to a wide variety of groups, and events sponsored under the program are open to members of the public as well to the sponsoring group.<sup>161</sup>

The fact patterns in these cases, however, did not involve providing

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159. See, e.g., *Good News Club*, 533 U.S. at 108 (use of school room for meetings of religious club); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842–43 (1995) (access to student newspaper funds); *Lamb's Chapel*, 508 U.S. 384 (use of school room after hours to show film on family values reflecting Christian viewpoint); *Widmar v. Vincent*, 454 U.S. 263, 277 (1981) (use of university facilities for prayer and worship meetings of recognized student organization).

160. In this connection there remains a further question whether worship, proselytizing, and faith inculcation activities are simply speech from a religious viewpoint, or belong to a different category of religious activity that is not speech or is not protected speech, and so may be treated differently from other kinds of expressive activities in a limited public forum. Compare Justice Stevens's dissent in *Good News Club*, 533 U.S. at 130 (Stevens, J., dissenting), discussing three categories of religious speech: speech about a particular topic from a religious point of view; speech that is simply worship; and an "intermediate category" that includes proselytizing or inculcating belief in a particular religious faith. *Id.* Justice Stevens suggests that the different classes of religious speech may justify different treatment in terms of access to limited public forums. *Id.* at 130–34. In contrast, Justice Scalia has opined that religious expression cannot violate the Establishment Clause where it is purely private and occurs in a traditional or designated public forum. See *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Good News Club*, 533 U.S. at 121–22 (Scalia, J., concurring).

161. In *Widmar*, for example, the Court found no Establishment Clause problem because the university's forum was already available to a wide variety of student groups and there could be no danger that the public would perceive there was any endorsement by the university of a particular religion or creed. *Widmar*, 454 U.S. at 274–75. Similarly, in *Lamb's Chapel*, the Court found that showing the film series in question would not have occurred during school hours, would have been open to the public and not just church members, and was not sponsored by the school, thus creating no impression that the school endorsed the viewpoints being expressed. *Lamb's Chapel*, 508 U.S. at 395. *Good News Club* was decided on virtually identical grounds. *Good News Club*, 533 U.S. at 113–14.

direct payments of public funds to religious groups for religious activities in the context of a student fees forum. As a result, the courts in these matters did not have occasion to address the Establishment Clause issue left unresolved by *Rosenberger*. This issue has been presented in a case currently being litigated, *Roman Catholic Foundation v. Regents (RCF)*.<sup>162</sup> In that case, the University of Wisconsin-Madison denied the requests of a student organization, the Roman Catholic Foundation, UW-Madison (“RCF”) to fund activities conceded to be religious in nature, including worship, proselytizing, and faith inclusion.<sup>163</sup> The university based its denial on its conclusion that providing state funds for these activities would violate the Establishment Clause, and further that the activities were not consistent with the purposes of the fees funding forum, identified in *Southworth* as the stimulation of open dialogue and the free exchange of ideas.<sup>164</sup> Relying on forum analysis and the viewpoint neutrality principles of *Rosenberger* and *Southworth*, and characterizing its religious activities as speech from a religious perspective, RCF filed suit alleging that the denial of its requests<sup>165</sup> violated its rights to free speech, expressive association, and free exercise of religion.<sup>166</sup>

Because the student fees in *RCF* are state funds—collected by the university and exacted from students in a manner similar to taxation,<sup>167</sup> deposited in the state treasury, and appropriated to the university for expenditure in accordance with state law—and were sought to be paid directly to a religious organization for the support of its religious activities, the case presented the Establishment Clause question left unanswered by *Rosenberger* and *Southworth*. Ruling on the parties’ cross-motions for summary judgment, the court noted that there is no simple way of distinguishing between speech from a religious viewpoint and worship, proselytizing or sectarian instruction, and emphasized that the government

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162. No. 07-C-0505, 2008 WL 4378466 (W.D. Wis. Sept. 24, 2008) (*RCF*).

163. *Id.* at \*1. The specific activities included an Alpha-Omega worship and praise service, an Evangelical Catholic Institute Catholic ministry training and worship event, the publication of Lenten booklets, the publication of pamphlets on how to pray the rosary, vocational, and spiritual guidance sessions, and guided prayer and counseling retreats. *Id.* at \*2. Plaintiffs admitted that these were religious activities. *Id.*

164. *Id.* at \*9.

165. The funding denials apply to two academic years, 2006–2007 and 2007–2008. For the 2006–2007 year, the university denied RCF requests for reimbursement of the activities; for 2007–2008, the university refused, prospectively, to include the requested support in the budget. The denial of reimbursements for past activities has led to claims in this litigation of a breach of the settlement agreement reached in *RCF v. Walsh, et al.* *Id.* at \*17.

166. *See id.* at \*4–\*12.

167. Compare Justice Souter’s concurring opinion in *Southworth*: “[T]he university fee at issue is a tax. The state university compels it; it is paid into state accounts; and it is disbursed under the ultimate authority of the State.” *Southworth I*, 529 U.S. 217, 241 (2000) (Souter, J., concurring).

does not violate the Establishment Clause when it grants religious groups equal access to a public forum, even when the religious activity in the forum can be described as worship.<sup>168</sup> The court thus concluded that the Establishment Clause “does not compel the University to categorically exclude worship, proselytizing or sectarian religious instruction from its segregated fee forum.”<sup>169</sup>

The court went on, however, to determine that “nothing in the Constitution requires the University to fund all such activities.”<sup>170</sup> In this regard, the court pointed out that the University need not open its forum to every conceivable student activity, and that it may create content-based restrictions on access to the fees forum that are reasonable in light of the forum’s purposes. Further, the court held, the university may decide that some activities are more valuable than others in light of the forum’s purposes, and on that basis restrict access to funding.<sup>171</sup> While finding that the university’s content-based decision to deny funding to the specified activities in issue in the case was not required by the Establishment Clause and was not reasonable in light of the stated purposes of the forum,<sup>172</sup> the court concluded that the denial of funding did not constitute viewpoint discrimination, since there was no evidence that the university excluded religious viewpoints from its forum.<sup>173</sup>

It is unclear whether the trial court’s decision will be the final ruling in this matter. While providing some guidance on issues related to forum access, the decision raises a new series of questions regarding what are appropriate content-based limitations on forum access, how to define the purposes of a student fees forum, and how to manage inherently subjective determinations on the value of certain activities to the forum without violating the *Southworth* requirement of viewpoint neutral administration of funds. Would it be possible, for example, to exclude worship, proselytizing, or faith inculcation activities if none of them serve some narrowly re-defined purpose for a forum? How would the relative value of such activities be assessed, as against the forum’s stated purposes of stimulating the free exchange of ideas and open dialogue? These and similar questions illustrate the practical difficulties of applying the principles announced by the court, and may lead to the parties to seek further guidance on appeal.

At a minimum, however, the *RCF* case reflects the complex and difficult legal problems that lie at the intersection of forum analysis and Establishment Clause principles in the student fees context. Until the case

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168. *RCF*, 2008 WL 4378466, at \*7–\*8.

169. *Id.* at \*8.

170. *Id.*

171. *Id.* at \*10.

172. *Id.* at \*11.

173. *Id.* at \*12.

law is more fully developed in this area, specific requests for student fees funding for religious student organizations will continue to generate controversy and questions about the meaning and applicability of the Establishment Clause in relation to forum analysis in a forum of fees.

## 2. Political Organizations

Religious student organizations, of course, are not the only groups whose requests for funding may raise difficult issues. Funding requests for the activities of student political organizations, too, hold the potential for disputes.

Like student religious organizations, student political groups were often excluded from access to fees funding before *Southworth I*. Since then, however, funding applications from these groups have generated concerns about the applicability of state election laws and related restrictions on the use of state resources, including facilities and funding, for campaign or election purposes.

For example, Wis. Stat. § 11.36(3) prohibits the entry of any person into a state building for the purpose of making a campaign “contribution.”<sup>174</sup> As defined in the statute, “contribution” includes not only financial donations and support, but also an act done for the purpose of influencing the election or nomination for election of a person to national office.<sup>175</sup> Such broad statutory language could be interpreted to prohibit the use of college or university funds, resources, or facilities by student political organizations active in national campaigns, raising questions about how to reconcile the state law with forum principles governing access to student fees funding for expressive activities. As in the case of purely religious activity, the college or university’s interest in avoiding violations of election laws might arguably be sufficient to justify some degree of discrimination against, or restrictions on, speech in the context of access to student fees. Similarly, it might be argued that certain political campaign activities can appropriately be excluded from the funding forum because they do not serve the forum’s primary purpose of stimulating the exchange of ideas, debate, or dialogue. While such issues have not yet been presented in litigation, specific fees funding requests from politically-affiliated groups for the support of specific campaigns could well trigger disputes about the impact of state election laws on access to the funding forum.<sup>176</sup>

A related problem involves the application of institutional policies to the

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174. WIS. STAT. ANN. § 11.36(3) (West 2004).

175. § 5.

176. For those public institutions that have also received tax exempt status under I.R.C. § 501(c)(3), the political activities of student organizations receiving institution funds may raise questions about the institution’s tax exempt status. See I.R.C. § 170 (West 2008).

funding of student political activity. In *Associated Students of the University of California at Santa Barbara v. Regents of the University of California*<sup>177</sup> the plaintiff student government associations filed suit when the University of California refused to disburse funds from student fee accounts to print flyers and educate voters about a state ballot initiative.<sup>178</sup> The university's policies prohibit use of student fees for ballot initiative advocacy.<sup>179</sup> The student groups sued, seeking a declaratory judgment that the institutional policies violated their speech rights under the U.S. Constitution.<sup>180</sup>

Finding that the student fees involved in the case were public money that belonged to the university, the court concluded that the students had no right to receive funds for the purpose of ballot initiative campaigning.<sup>181</sup> Relying on *Regan v. Taxation With Representation of Washington*,<sup>182</sup> the court characterized the fees funding as a subsidy for speech and held that the university's "decision to not fund the plaintiffs' ballot activity is simply a 'decision not to subsidize the exercise of a fundamental right [which] does not infringe the right.'"<sup>183</sup>

While the analysis in *Associated Students* neatly side-steps application of forum principles, the case leaves unanswered underlying questions about whether the university's policy is an appropriate restriction in the limited forum comprised of student fees. As this result suggests, there remains a significant potential for future disputes about the denial of funding for student political organizations.

#### D. Advisory Referenda and Fee Distribution

An additional aspect of forum analysis that has led to litigation involves the use of referenda as a student fees distribution mechanism.<sup>184</sup> Both *Southworth I* and *Southworth II* cast serious doubt on the validity of using a referendum as the means of distributing student fees for expressive activities. In *Southworth I*, the Supreme Court indicated that it was unlikely that a referendum system for the allocation of student fees could meet the requirement of viewpoint neutrality, since a referendum is

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177. No. C 05-04352, 2007 WL 196747 (N.D. Cal. Jan. 23, 2007) (*Associated Students*).

178. *Id.* at \*1.

179. *Id.*

180. *Id.*

181. *Id.* at \*7-8.

182. 461 U.S. 540 (1983).

183. *Associated Students*, 2007 WL 196747, at \*8 (quoting *Regan*, 461 U.S. at 549).

184. See *Southworth I*, 529 U.S. 217, 230 (2000); *Southworth II*, 307 F.3d 566, 570 (7th Cir. 2002).

inherently a reflection of majoritarian views.<sup>185</sup> In *Southworth II*, the Seventh Circuit held that considering the popularity of particular viewpoints is an impermissible factor for guiding discretion in the distribution of fees.<sup>186</sup> Neither case, however, directly presented the question whether an advisory referendum might be used in connection with a fee distribution scheme.

This issue was recently litigated in a case involving the State University of New York at Albany, *Amidon v. Student Association of State University of New York*.<sup>187</sup> The trial court there concluded that an advisory referendum failed to satisfy the viewpoint neutrality standard as articulated in *Southworth I* and *Southworth II*, holding that the “student referendum is a content-based criterion that cannot be saved by its advisory nature or the fact that it is only used to set the amount of funding as opposed to the question of funding or defunding altogether.”<sup>188</sup> The appeals court agreed, and noted that, although “content-based regulations are not necessarily prohibited by the First Amendment . . . they are subject to a strict scrutiny analysis.”<sup>189</sup> Because the university had not demonstrated any compelling state interest in using referenda the strict scrutiny standard could not be met.<sup>190</sup>

### III. CONCLUSION

The ongoing controversies over student fee programs are a natural outgrowth of the holding in *Southworth I*, with its expansive application of forum principles in the context of compelled financial support for expressive activities and concomitantly strict adherence to viewpoint neutrality requirements in the allocation of fees funds. The attractiveness of mandatory fees as a source of organization support has paved the way for the aggressive efforts of religious, political, and potentially other student groups to seek recognition or to claim a share of fees funding. With increasing numbers of funding requests have come disputes involving difficult legal issues, competing constitutional interests, and conflicts between and among other state and federal laws. These struggles over student fees have greatly increased the complexities of administering a mandatory student fees program. The associated legal problems require not only clarification and guidance from the courts, but some re-evaluation of the extent to which strict adherence to forum principles provides an adequate framework for analysis for the issues that can arise in a forum of money.

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185. *Southworth I*, 529 U.S. at 235.

186. *Southworth II*, 307 F.3d at 594–95.

187. 399 F. Supp. 2d 136 (N.D.N.Y. 2005), *aff'd*, 508 F.3d 94 (2d Cir. 2007).

188. *Id.* at 150.

189. *Id.*

190. *Id.* at 151.

While the analogy of a money forum to a physical forum seems reasonable on its face, a forum of state funds presents unique problems. This sort of “metaphysical” forum is plainly distinguishable from spatial forums, thus calling into question whether it is appropriate to require rigid adherence to or expansion of traditional forum analysis principles in this context. The adoption of strict spatial forum principles for use in defining unbridled discretion in the allocation of student fees in *Southworth II*, for example, appears unnecessarily restrictive and deprives student governments of the opportunity to exercise virtually any discretion in funding decisions. Moreover, the application of principles based on rules for access to traditional, spatial forums fails to take into account that funding is a limited, non-traditional, public forum in which some reasonable restrictions on access are appropriate and necessary. Re-examination and clarification of these issues would alleviate some of the existing pressures on the administration of fees funds.

Also of critical importance is the ongoing need for clarification of the impact of the Establishment Clause in the administration of a student fees forum comprised of state funds. Access to a financial forum is different from access to rooms and other physical settings made available for the purposes of expressing ideas, and these differences need to be acknowledged and reconciled with Establishment Clause requirements.

Further, as the post-*Southworth I* cases suggest, guidance as to the appropriate analytical approach to problems with student organization recognition would be beneficial. Adherence to viewpoint neutral institutional policies appears to be an appropriate condition for receiving state funding, but how to accommodate other competing constitutional interests remains problematic.

Further consideration and refinement of the analytical framework for these issues could provide greater certainty in the administration of fees programs. If past is prologue, however, the answers from the current set of lawsuits will likely engender new and different controversies.