

# HIGHER EDUCATION STUDENT ELECTIONS AND OTHER FIRST AMENDMENT STUDENT SPEECH ISSUES: WHAT *FLINT V. DENNISON* PORTENDS

DAVID ARONOFSKY\*

On June 1, 2007, in *Flint v. Dennison*,<sup>1</sup> the Ninth Circuit Court of Appeals rejected a *Buckley v. Valeo*<sup>2</sup>-based First Amendment challenge to public university student government election campaign spending limits. The court supported its decision on the following rationale:

Why, then, may a state university tell students how much they may spend to be elected to student office? Because, unlike the exercise of state-wide political self-determination at a national level at issue in *Buckley*, the student election at issue here occurred in a limited public forum, that is, a forum opened by the University to serve viewpoint neutral educational interests but closed to all save enrolled students who carried a minimum course load and maintained a minimum grade-point average. These educational interests outweigh the free speech interests

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\* General Counsel and Adjunct Faculty, Schools of Law and Education, University of Montana (UM); B.S., Education, J.D. (with honors), University of Texas at Austin; M.Ed., Counseling, Southern Methodist University; Ph.D., Florida State University. Mr. Aronofsky litigated the *Flint* case in the U.S. District Court of Montana and argued it in the Ninth Circuit, ably assisted by National Voting Rights Institute/Demos attorneys Brenda Wright and Lisa Danetz. Several University of Montana law students also assisted as interns at the UM Legal Counsel Office. The author especially acknowledges the invaluable contributions of 2007 UM Law School graduate Aaron Bouschor, who exhaustively researched student speech case law. He co-authored a presentation on this topic for the NACUA 2007 Annual Conference and helped prepare the *Flint* case oral argument by role-playing opposing counsel in a mock oral argument. The author also acknowledges the special help of 2007 UM Law School graduate Heather O’Laughlin, a former UM student government leader whose insight proved key at several points in the case. In 1974–75, the author had the pleasure of serving as the elected Student Body President at Florida State University while pursuing a Ph.D. in Higher Education. The views expressed herein are solely his personal ones and should not be attributed to The University of Montana.

1. 488 F.3d 816 (9th Cir. 2007), *aff’g*, 361 F. Supp. 2d 1215 (D. Mont. 2005), *cert. denied*, 128 S. Ct. 882 (2008).

2. 424 U.S. 1 (1976) (per curiam) (holding that campaign spending limits in elections for public office violate First Amendment speech rights).

of the students who campaigned within that limited public forum.<sup>3</sup>

The implications of *Flint* go well beyond student election speech issues. The decision raises an important question as to the extent to which public colleges and universities can apply limitations on other forms of student speech. National syndicated political columnist George Will has excoriated The University of Montana's campaign spending limits as part and parcel of "the grossly anti-constitutional premises of McCain-Feingold [federal campaign finance reform laws] seep[ing] through society, poisoning the practices of democracy at all levels."<sup>4</sup> The editors of a newspaper published in Missoula, Montana urged repeal of these spending limits because they are anathema to First Amendment political speech principles.<sup>5</sup> Professor Volokh has characterized these calls for repeal as legally misplaced, arguing that public education student projects have always differed from government political speech and thus enjoy far less First Amendment protection.<sup>6</sup> The Supreme Court denied certiorari,<sup>7</sup> which may have temporarily quieted the legal controversy, but probably not the political controversy.

This article has two primary purposes. The first is to describe *Flint* in the student election context, which, itself, offers useful insight into how campuses may (and may not) restrict student-government speech without violating the First Amendment. The second is to assess how the limited public forum analysis in *Flint* might reasonably apply to other forms of public campus student organization and individual student speech. Part I describes forum analysis principles generally applied by courts in First Amendment cases alleging government restrictions on protected speech. Part II provides the history of *Flint* from its beginning on May 5, 2004, when the lawsuit was filed in the Missoula Division of the U.S. District Court for the District of Montana. Part III discusses other relevant public higher education student election cases. Part IV reviews other student-initiated public higher education First Amendment litigation to examine the *Flint* decision's possible effects on the legal rules and reasoning in these cases. Part V offers some conclusions which are necessarily tentative, because the *Flint* case was decided relatively recently.

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3. *Flint*, 488 F.3d at 820.

4. George F. Will, *The \$114.69 Speech Police*, WASH. POST, Oct. 25, 2007, at A25.

5. Editorial, *Repeal Spending Limits for ASUM Campaigns*, MISSOULIAN, Nov. 5, 2007, available at <http://www.missoulian.com/articles/2007/11/05/opinion/opinion2.txt>.

6. Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1193352920.shtml> (Oct. 25, 2007, 18:55 EST).

7. 128 S. Ct. 882 (2008).

## I. FORUM ANALYSIS PRINCIPLES

To understand *Flint*, it is first necessary to review the basic principles of forum analysis as they have been applied to cases involving government restrictions on speech communicated on government premises, including higher education settings. A legal commentator has explained forum analysis as being a process whereby “courts identify the location, either literal or figurative, where the speech will be expressed; the subject of the message; and the source, timing, and effect of any restrictions.”<sup>8</sup> Forum analysis has played a prominent role in First Amendment jurisprudence since at least 1897, when the Supreme Court held that a government may generally control speech activities on its own property.<sup>9</sup> In the late 1930s, however, the Court began to recognize constitutional limits to the exercise of such control when it held that citizens retain some speech rights in public settings.<sup>10</sup> Since then, the Court has adopted and applied rules describing certain forum categories and types, in general and in public college and university settings.

A forum will always be either public or non-public. Within the public forum category, there are several forum types, each of which brings its own set of legal rules and precedents. For example, a traditional public forum is a place where tradition generally permits “assembly, communicating thoughts, and debating public questions,”<sup>11</sup> with few restrictions except those pertaining to volume and time of access. Traditional public fora tend to be limited in number, scope, and location, and courts are usually reluctant to conclude that a forum is of this type, preferring, instead, other forum types that are more conducive to at least some form of speech regulation.

In contrast to the traditional public forum, a designated public forum is a more limited area, such as an auditorium, where the government purposely permits expression by various classes of speakers and generally does not require individuals within each such speaker class to obtain permission to speak.<sup>12</sup> Courts recognize two types of designated public forum: a non-limited designated or open public forum, which allows all forms of expression and imposes no limit on who can speak,<sup>13</sup> and a limited designated or limited public forum, which restricts

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8. Derek P. Langhauser, *Free and Regulated Speech on Campus: Using Forum Analysis for Assessing Facility Use, Speech Zones, and Related Expressive Activity*, 31 J.C. & U.L. 481, 485 (2005).

9. *Id.* at 495 (discussing *Davis v. Mass.*, 167 U.S. 43 (1897)).

10. *Id.* (discussing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939)).

11. *Id.* at 497 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983); *Planned Parenthood Ass’n v. Chicago Transit Auth.*, 767 F.2d 1225, 1231 (7th Cir. 1985)).

12. *Id.* at 497–98 (citing *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998)).

13. *Id.* at 498 (citing *Gregoire v. Centennial Sch. Dist.*, 907 F.2d 1366 (3d Cir. 1990); *Rutgers 1000 Alumni Club v. Rutgers*, 803 A.2d 679, 688–89 (N.J. Super. Ct. App. Div. 2002)).

forum access based on designated group status or membership.<sup>14</sup> As to limited public fora, public college or university students or employees may, for instance, be entitled to such access, while commercial vendors or persons unrelated to the campus are not. Designated public fora are not limited to physical sites or locations; they may also include speech-based programs such as a student election, a campus newspaper, or a student government funding activity.

Courts treat government property lacking traditional or designated public forum status as a non-public forum, where public speech can generally be regulated or even prohibited altogether, such as in work areas or classrooms in an educational setting.<sup>15</sup>

Most higher education forum analysis cases, including *Flint*, appear to apply limited public forum principles which permit regulation of speech on bases other than viewpoint and, in some instances, content. One commentator appears to treat as synonymous the legal effects of speech regulation on the basis of viewpoint and regulation based on content.<sup>16</sup> Although the Supreme Court has deemed viewpoint discrimination as being “but a subset or particular instance of the more general phenomenon of content discrimination,” the Court has also acknowledged that the line between the two “is not a precise one.”<sup>17</sup> The Court has also imposed viewpoint neutrality requirements on speech regulation in a limited public forum, while upholding the validity of content regulation consistent with the reason for the forum’s creation.<sup>18</sup> For example, a public college or university may choose to limit student speech as a legitimate content restriction, but it may not limit student speech on the basis of particular student viewpoints.

Professor Beschle perhaps best captures the current state of forum analysis law in this regard when he suggests that if a limited or designated public forum regulates speech content based on the content’s relevance to the forum, and its regulation remains viewpoint neutral, the forum does not have to be content neutral.<sup>19</sup> In a non-public forum, reasonable restrictions on speech are usually upheld.<sup>20</sup> Most of the higher education cases discussed in Parts III and IV below turn on the presence or absence of content or viewpoint neutrality, or both. In *Flint*, however, this was essentially a non-issue because the student election spending limits were found both neutral and evenly applied.<sup>21</sup>

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14. *Id.* (citing *Gregoire*, 907 F.2d 1366).

15. *Id.* (citing *Ark. Educ. Television Comm’n*, 523 U.S. at 678; *Perry Educ. Ass’n*, 460 U.S. at 46).

16. *Id.* at 501. This same commentator nonetheless recognizes that there is a “subtle distinction” between content and viewpoint. *Id.* at 494.

17. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995).

18. *Perry Educ. Ass’n*, 460 U.S. at 46.

19. Donald L. Beschle, *Seventh Circuit Review: The First Amendment in the Seventh Circuit: 2002*, 36 J. MARSHALL L. REV. 807, 811–13, 823 (2003); see also Leslie Gelow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 MCGEORGE L. REV. 595, 596 (2003) (recognizing that the test for distinguishing content from viewpoint “remains murky”).

20. Langhauser, *supra* note 8, at 503.

21. See *Flint v. Dennison*, 488 F.3d 816, 834–35 (9th Cir. 2007).

II. THE LEGAL HISTORY OF *FLINT V. DENNISON*

On May 5, 2004, Aaron Flint filed a lawsuit against George Dennison, in his capacity as the President of The University of Montana, as well as certain students in their capacity as officials of the Associated Students of The University of Montana (ASUM) who were involved in the decision not to seat Flint because of his ASUM Senate election spending violation.<sup>22</sup> Flint claimed that the campaign spending limit, as applied, violated his rights under the First and Fourteenth Amendment, and he brought his claim under 42 U.S.C. § 1983.<sup>23</sup>

Aaron Flint ran for and won the 2003–04 academic year ASUM student body presidency.<sup>24</sup> He and his vice-presidential running mate spent a combined \$300 on the election, in violation of ASUM election rules or bylaws limiting ASUM election expenditures to \$100.<sup>25</sup> They also failed to fully disclose all their election expenditures, in violation of ASUM election requirements.<sup>26</sup> As a result of these violations, Flint and his running mate were censured by the ASUM Senate, but they were allowed to keep their ASUM positions.<sup>27</sup> The following year, Flint ran for and won an ASUM Senate seat and, again, he exceeded ASUM's \$100 senate election spending limit by spending \$214.69.<sup>28</sup> Upon filing his campaign spending report with ASUM disclosing the excessive spending, the ASUM Senate, upon ASUM Elections Chair recommendation, denied Flint his senate seat.<sup>29</sup> Flint then filed his lawsuit challenging this decision.<sup>30</sup>

The *Flint* litigation had three phases: the initial district court injunctive relief efforts, the district court summary judgment proceeding, and the Ninth Circuit appeal.

## A. The District Court Injunctive Relief Litigation

Flint initially filed a motion for a temporary restraining order to set aside the ASUM Senate refusal to let him take his senate seat.<sup>31</sup> The district court immediately denied Flint's motion.<sup>32</sup> Subsequently, Flint filed a motion for a preliminary injunction, which the district court denied on August 20, 2004.<sup>33</sup> In denying the preliminary injunction, U.S. District Court Judge Donald Molloy chose not to apply *Welker v. Cicerone*,<sup>34</sup> a case decided under somewhat similar

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22. *Id.* at 821–22.

23. *Id.*; see also *Flint v. Dennison*, 361 F. Supp. 2d 1215, 1216–17 (D. Mont. 2005).

24. *Flint*, 488 F.3d at 822.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Flint v. Dennison*, 336 F. Supp. 2d 1065, 1070 (D. Mont. 2004).

34. 174 F. Supp. 2d 1055 (C.D. Cal. 2001).

circumstances, to set aside student election spending limits.<sup>35</sup> Judge Molloy, instead, followed *Alabama Student Party v. Student Government Association of the University of Alabama*,<sup>36</sup> an earlier case which upheld, against First Amendment attack, student election non-spending rules restricting campaign activities on the basis of date and campus location.<sup>37</sup> Judge Malloy assessed the ASUM campaign spending limits against the reasonableness standard, and concluded that Flint's probability of succeeding on the merits of his claim was low.<sup>38</sup> He also found ASUM's campaign spending limits to be "a reasonable attempt to maintain equal access to the pedagogical benefits of ASUM participation throughout the student body."<sup>39</sup> Judge Molloy also found that in balancing the hardships that would be faced by Flint in denying the preliminary injunction against the hardships to ASUM in granting it, "the balance of hardships favors . . . ASUM," because otherwise ASUM's "ability to enforce its election regulations is undermined."<sup>40</sup> Judge Molloy criticized Flint's decision to challenge ASUM spending limits so long after he first became aware of (and was censured for violating) them when he was elected ASUM President, well before he violated the limits a second time in his senate campaign.<sup>41</sup>

#### B. The Summary Judgment Litigation

Defendants filed various Rule 12(b)(6) dismissal motions, which Judge Molloy converted to a motion for summary judgment dismissal on October 8, 2004.<sup>42</sup> Following extensive briefing and oral argument in connection with the summary judgment motion, Judge Molloy granted summary judgment to the defendants on March 28, 2005.<sup>43</sup> Citing *Widmar v. Vincent*,<sup>44</sup> a case that recognized a public institution's "right to exclude even First Amendment activities that violate reasonable campus rules,"<sup>45</sup> the court applied a deferential standard of reasonableness to its analysis of the ASUM spending limits rules.<sup>46</sup> Rejecting the application of *Welker*, in favor of *Alabama Student Party*, Judge Malloy reasoned

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35. *Flint*, 336 F. Supp. 2d at 1068–69 (discussing *Welker v. Cicerone*, 174 F. Supp. 2d 1055 (C.D. Cal. 2001)).

36. 867 F.2d 1344 (11th Cir. 1989).

37. *Flint*, 336 F. Supp. 2d at 1068–69.

38. *Id.* at 1070.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Flint v. Dennison*, 361 F. Supp. 2d 1215, 1216 (D. Mont. 2005).

43. *Id.* at 1222.

44. 454 U.S. 263 (1981).

45. *Id.* at 277. Interestingly, *Widmar* upheld a First Amendment challenge by a student religious group seeking the right to meet and worship on a public university campus. Although the Court recognized a university's right to impose "reasonable campus rules" restricting on-campus speech, the Court nonetheless found the campus ban on religious group meetings a First Amendment violation as discriminatory against religious speech. *Id.* at 277 (Stevens, J., concurring).

46. *Flint*, 361 F. Supp. 2d at 1218.

that “a state university may, in the interest of preserving the quality and availability of educational opportunities for its students, place reasonable restrictions on free speech that would be impermissible outside the academic environment.”<sup>47</sup> He found student government participation well within The University of Montana mission for its role in “instructing students on many aspects of the governmental process.”<sup>48</sup>

Notably, Judge Molloy relied on a sworn declaration by ASUM Faculty Advisor Hayden Ausland, in which he described ASUM’s long history of providing its students leadership experience and how ASUM has learned to deal with complex decisions involving student governance.<sup>49</sup> Judge Molloy also gave weight to the sworn declaration of ASUM President Gale Price, who cited her own participation in student government “as strengthening her decision-making skills, teaching her how to work for the good of the University closely aside people with whom she often disagrees, and providing her with leadership experience.”<sup>50</sup> Further, Judge Molloy fully embraced the University’s position that the ASUM provides an important learning opportunity, as part of the University’s mission and that the ASUM was created to further the education of students serving in the ASUM.<sup>51</sup> Concluding his opinion, he wrote:

Rendering student government an educational opportunity for only those students who can afford to run . . . is contrary to a university’s educational mission. . . . [I]f we reach the stage where participation in student government is perceived as only given to those interests with large money contributions, the fundamental predicate of student governance breaks down. When the cynicism of wealth invades the academy, students learn not the lessons of orderly governance but instead are imbued with the anti-egalitarian notion that wealth is power.”<sup>52</sup>

Granting summary judgment, Judge Molloy found ASUM campaign spending limits “reasonable in light of ASUM’s educational purpose” and, therefore, not in violation of Flint’s First Amendment rights.<sup>53</sup>

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47. *Id.* at 1219.

48. *Id.* at 1220.

49. *Id.*

50. *Id.*

51. *Id.* at 1220–21.

52. *Id.* at 1221.

53. *Id.* at 1222.

### C. The Ninth Circuit Appeal

Flint appealed the summary judgment dismissal of his case to the Ninth Circuit.<sup>54</sup> The court considered whether Flint's claims were moot because he had already graduated from The University of Montana in 2004.<sup>55</sup> Although generally a student who graduates no longer has a live case or controversy required for federal court jurisdiction,<sup>56</sup> the Ninth Circuit rejected the mootness argument upon deciding that the ASUM's findings of election rules violations and its subsequent refusal to let Flint take his senate seat constituted a "disciplinary" record in his student file.<sup>57</sup> Noting that Flint's prayers for relief included expungement of these adverse decisions from his student file, the court reasoned that because it had the power to order the expungement, the case was "live" for purposes of retaining jurisdiction over the appeal.<sup>58</sup>

The University chose not to question the ASUM decision to keep Flint from his senate seat, because this, in turn, would have been contrary to the University's recognition of the educational importance of ASUM participation and decision-making. The ASUM actions stand as public record, and the question whether they constitute "disciplinary" records, from a student records standpoint, was left unanswered because the Ninth Circuit ultimately decided *Flint* on the merits.

The Ninth Circuit also rejected the University's Eleventh Amendment immunity defense when it ruled that Flint's case involved a prospective injunctive relief claim for record expungement, subject to the *Ex Parte Young* doctrine,<sup>59</sup> which creates a narrow exception to the Eleventh Amendment bar against federal court suits against states and arms of states.<sup>60</sup> As the court noted, even though state institutions cannot generally be sued in federal court because of this Eleventh Amendment ban, claims for prospective injunctive relief against state university officials may be brought in federal courts.<sup>61</sup>

The court began its analysis by rejecting a primary argument made by both Flint

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54. *Flint v. Dennison*, 488 F.3d 816, 823 (9th Cir. 2007).

55. *Id.*

56. *Id.* at 824.

57. *Id.*

58. *Id.*

59. *See generally* *Ex Parte Young*, 209 U.S. 123 (1908).

60. *Flint*, 488 F.3d at 825 (internal citations omitted). The court did not address the University's argument that the individually named defendants, all of whom were students except for University of Montana President George Dennison, were not state actors and thus should have all claims against them dismissed, based on federal decisions in other circuits refusing to find that students were state actors for § 1983 cases. *See* *Mentavlos v. Anderson*, 249 F.3d 301 (4th Cir. 2001) (refusing to treat students as state actors for § 1983 purposes); *Leeds v. Meltz*, 85 F.3d 51 (2d Cir. 1996) (refusing to treat students as state actors for § 1983 purposes); *see also* *Husain v. Springer*, 494 F.3d 108 (2d Cir. 2007) (refusing to find that public college or university student senators are state actors for § 1983 purposes). Normally, § 1983 claims against non-state actors must be dismissed as a matter of law. *Husain*, 494 F.3d at 134. The Ninth Circuit Panel chose, instead, to decide the case on its merits.

61. *Flint*, 488 F.3d at 825.



and the University, namely that forum analysis should not be used to decide the case.<sup>62</sup> Flint's position was that *Buckley* forecloses forum analysis, because all election spending limits, including those applicable to public campus student government elections, violate the First Amendment.<sup>63</sup> Meanwhile, the University cited *Widmar* as a precedential basis for not using forum analysis in educational speech cases.<sup>64</sup> The court refused to accept Flint's argument that political speech principles apply to student elections, and, instead, treated student election speech at public institutions as educational in nature.<sup>65</sup> Likewise, the court refused to accept the University's and Judge Molloy's position that reasonable educational decisions require strong deference.<sup>66</sup> Instead, the court cited both *Rosenberger v. Visitors of University of Virginia*<sup>67</sup> and *Board of Regents of University of Wisconsin System v. Southworth*,<sup>68</sup> as examples of Supreme Court cases pertaining to public higher education speech cases utilizing forum analysis.<sup>69</sup> The Ninth Circuit determined that "the constitutionality of the campaign expenditure limitation" at issue in *Flint* "depends on the nature of the forum [in which it was imposed, and on] whether the limitation on speech is a legitimate exercise of government power in preserving the character of the forum."<sup>70</sup>

Having concluded that forum analysis was required in student election speech cases, the court applied forum analysis to determine whether the otherwise constitutionally protected student election speech at The University of Montana could be lawfully restricted by the ASUM spending limits.<sup>71</sup> After reviewing public, non-public, designated and limited public forum legal principles,<sup>72</sup> the court found ASUM elections to constitute a limited public forum, *i.e.*, a forum open to certain groups and topics.<sup>73</sup> "[B]ecause Flint challenges the limitations on speech within the confines of the ASUM election, whether the speech is delivered on campus or off, the relevant forum is the ASUM election itself, with its accompanying rules and regulations."<sup>74</sup> The court also determined that this particular forum, as well as ASUM generally, should be attributable to the University, for purposes of assessing the validity of challenged speech.<sup>75</sup>

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62. *Id.* at 826.

63. *Id.* at 826–27.

64. *Id.*

65. *Id.* at 827–28.

66. *Id.* at 828.

67. 515 U.S. 819 (1995).

68. 529 U.S. 217 (2000).

69. *Flint*, 488 F.3d at 828–29.

70. *Id.* at 829; *see also id.* at 829 n.9 (finding student government election speech not to be school-sponsored, but instead an activity communicated in a forum opened by the University for election speech purposes).

71. *Id.* at 830.

72. *Id.* For an excellent description of forum analysis in a higher education setting, see Langhauser, *supra* note 8.

73. *Flint*, 488 F.3d at 830–31.

74. *Id.* at 831.

75. *Id.* at 831 n.10.

Once the court found ASUM elections to be a limited public forum, it analyzed the constitutionality of the election spending limits by first finding the limits viewpoint-neutral, a finding essential to any later decision that the speech limits in question are, themselves, valid.<sup>76</sup> The evidentiary record in *Flint* demonstrated equal application of ASUM election rules to all candidates “regardless of their views.”<sup>77</sup> Although Flint contended that ASUM spending limits discriminate on the basis of his viewpoint because he, as a candidate, had fewer speech rights than student noncandidates and groups, as well as outsiders, the court rejected these contentions when it found that the spending limits were based on speaker status, not viewpoint.<sup>78</sup> The court then found the spending limits reasonable, because they were directly tied to the purpose for which the forum was created, namely student participation in ASUM as an important educational activity.<sup>79</sup> The court cited the ASUM Faculty Advisor Declaration, as had Judge Malloy, in making this determination:

ASUM exists for essentially educational purposes. . . . The election of student representatives to ASUM leadership positions is designed to help further the educational purpose of ASUM. The evidence before us clearly shows that the University views the spending limitation as vital to maintain the character of ASUM and its election process as an educational tool, rather than an ordinary political exercise. . . . The primary intent of the spending limits is to prevent student government’s being diverted by interests other than ones educational. It is thus obvious that the purpose of imposing the spending limit on student candidates is to serve pedagogical interests in educating student leaders at the University.<sup>80</sup>

The court referenced the “art of persuasion, public speaking, and answering questions face-to-face with one’s potential constituents” and student campaigners “wearing out their shoe-leather rather than wearing out a parent’s—or an activist organization’s—pocketbook” as examples of pedagogical benefits that result from the ASUM spending limits.<sup>81</sup> The court concluded its opinion by noting:

Even if not the best or most effective means of providing the student

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76. *Id.* at 833; *see also* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (“Discrimination against speech because of its message is presumed to be unconstitutional.”).

77. *Flint*, 488 F.3d at 833; *see also id.* at 834.

The \$100 limit does not apply solely to vegetarians, pacifists and Marxists, but not to meat-eaters, bellicists and fascists. Neither does the limit apply to candidates who might wish to abolish student government or at least intercollegiate athletics, but not to servile apple-polishers of the status quo or “jocks.” Thus the campaign expenditure limitation does not constitute viewpoint discrimination.

*Id.*

78. *Id.* at 834.

79. *Id.* at 834–35.

80. *Id.* at 835 (internal citations omitted).

81. *Id.*

candidates the educational experience that the University seeks to provide through the ASUM elections, we are confident the spending limits reasonably serve the purpose of the forum. . . . In a limited public forum, the First Amendment requires nothing more.<sup>82</sup>

### III. OTHER PERTINENT HIGHER EDUCATION STUDENT ELECTION CASES

College and university student election cases involving spending limits or other legal issues have not flooded the courts. Generally, there have not been many college and university student government cases, although *Rosenberger* and *Southworth* rank among the most significant higher education cases in U.S. legal history. A brief recap of key student election cases warrants reference here, to assess their relationship to *Flint*, and vice versa.

The best starting point for understanding student election First Amendment case law in public higher education is *Alabama Student Party v. Student Government Association of the University of Alabama*.<sup>83</sup> In that case, University of Alabama students challenged student government regulations that limited when and where student campaign literature could be distributed (including a ban on such distribution on student election days).<sup>84</sup> They also challenged rules that limited candidate fora and debates to the weeks of election as being First Amendment speech violations.<sup>85</sup> In affirming summary judgment dismissal of the lawsuit, the Eleventh Circuit applied a First Amendment review standard based on the two closely intertwined legal principles of giving broad judicial deference to college and university decisions pertaining to education and the reasonableness of challenged speech restrictions.<sup>86</sup> In other words, once the court found student elections to be educational, rather than political, activity, plaintiffs had to overcome the broad deference courts afford higher education institutional policy decisions and show that the election rules are inherently unreasonable. The plaintiffs could not do so.<sup>87</sup> Notably, Judge Molloy adopted this analytical approach in *Flint*,<sup>88</sup> whereas the Ninth Circuit rejected it in favor of forum analysis.<sup>89</sup>

In *Welker*, University of California at Irvine (UCI) student plaintiffs launched what appears to be the first, and to date only, successful student election spending

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82. *Id.* at 836 (internal citation omitted).

83. 867 F.2d 1344 (11th Cir. 1989).

84. *Id.* at 1345.

85. *Id.*

86. *Id.* at 1347.

87. *Id.*

88. *Flint v. Dennison*, 361 F. Supp. 2d 1215, 1219–20 (D. Mont. 2005).

89. *Flint v. Dennison*, 488 F.3d 816, 827–28 (9th Cir. 2007). At least in the Ninth Circuit, the *Alabama Student Party* deference-reasonableness standard is inapplicable to public college or university student election speech restrictions. That stated, however, the Ninth Circuit would ostensibly reach the same result as the Eleventh Circuit when it dismissed the *Alabama Student Party* lawsuit on the ground that the election restrictions were permissible under the *Flint* appellate opinion forum analysis.

limits challenge.<sup>90</sup> In *Welker*, Judge Timlin adopted *Buckley*'s essential holding that election spending limits of any kind violated the First Amendment,<sup>91</sup> applied this holding to the UCI student election spending rules,<sup>92</sup> and preliminarily enjoined their enforcement by the UCI student legislative body that sought to deny a legislative seat to a candidate who had breached the limits and went on to win the election.<sup>93</sup> Judge Timlin determined that the plaintiffs would likely prevail on the merits under *Buckley*, and found the other preliminary injunction elements satisfied.<sup>94</sup> Judge Timlin rejected the *Alabama Student Party* court's reasoning, which considered student elections to be educational activities, choosing instead to view student elections more as traditional non-educational political campaign speech.<sup>95</sup> The lawsuit settled soon afterwards, and no further litigation ensued in the case. Both Judge Molloy and the Ninth Circuit rejected *Welker* altogether in *Flint*, effectively overruling *Welker*'s applicability to student election cases with comparable facts in the Ninth Circuit.<sup>96</sup>

About a year after *Welker* was decided against UCI, a group of students at the University of California at Santa Cruz (UCSC) initiated a similar First Amendment challenge to their school's student election spending limit and candidate selection rules in *Students for a Conservative America v. Greenwood*.<sup>97</sup> Unlike in *Welker*, however, the *Greenwood* district judge dismissed the lawsuit on Eleventh Amendment and mootness grounds, finding that federal courts lack power to require new elections—the remedy sought by plaintiffs—and that the UCSC student government had mooted the case when it eliminated the challenged election rules.<sup>98</sup> The Ninth Circuit affirmed the lower court dismissal on both grounds and, in an amended opinion, later mooted the case on the ground that the student plaintiffs had been seated in the UCSC legislative body after the challenged rules were changed.<sup>99</sup>

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90. *Welker v. Cicerone*, 174 F. Supp. 2d 1055 (C.D. Cal. 2001).

91. *Id.* at 1065.

92. *Id.*

93. *Id.* at 1067. *Welker* and *Flint* have at least one remarkably similar fact. The *Welker* plaintiff spent \$233.40 at a campus with a \$100 spending limit at the time. *Welker*, 174 F. Supp. 2d at 1066. *Flint* spent \$214.69 in violation of the \$100 limit imposed by ASUM. *Flint*, 361 F. Supp. 2d at 1217.

94. *Welker*, 174 F. Supp. 2d at 1065–67.

95. *Id.* at 1063.

96. *Flint*, 361 F. Supp. 2d at 1219–20; *Flint v. Dennison*, 488 F.3d 816, 828 n.7 (9th Cir. 2007) (“[Unlike Judge Timlin in *Welker*] [w]e see the several differences . . . between ASUM’s elections and state and national political elections and therefore have no trouble making such a distinction.”).

97. 378 F.3d 1129 (9th Cir. 2004).

98. *Id.* at 1130–31. The Ninth Circuit agreed with the lower court that a demand for a new election is an injunctive relief not subject to the *Ex parte Young* exception to Eleventh Amendment immunity, because it seeks retroactive, rather than prospective, relief.

99. *Students for a Conservative America v. Greenwood*, 391 F.3d 978 (9th Cir. 2004). The Ninth Circuit *Flint* panel refused to apply *Greenwood* mootness principles because The University of Montana did not change ASUM election rules. Moreover, The University of Montana chose not to contest the nature of the ASUM Senate censure of *Flint* in a student record

Three other student government election cases deserve passing reference here, even though they do not involve issues litigated in *Flint*, *Greenwood*, and *Welker*. Recently, in *Husain v. Springer*,<sup>100</sup> the Second Circuit refused to dismiss a First Amendment challenge of the CUNY Staten Island President's decision to nullify the results of a student election after the student newspaper had endorsed candidates, in violation of campus rules requiring neutrality of student-funded organizations.<sup>101</sup> The *Husain* court concluded that because the newspaper had never been subject to censorship, and student government rules did not preclude student publication endorsements, there was no sound educational policy to justify infringement upon the paper's or candidates' First Amendment rights on what the court found was a viewpoint basis.<sup>102</sup> Like the Ninth Circuit in *Flint*, the Second Circuit applied forum analysis and found the newspaper and elections to constitute a limited public forum, but unlike *Flint*, the censorship was deemed viewpoint non-neutral.<sup>103</sup>

In *Ellingsworth v. University of Kentucky Office of Student Affairs*,<sup>104</sup> a state trial court enjoined public campus administrators from overturning student election results after finding the administrators' attempted actions to be arbitrary and capricious. It is not altogether clear that any First Amendment issue was present in the case, although the decision, nonetheless, suggests that student election decisions have sufficient educational value to merit judicial deference when administrators attempt to overturn these decisions without reasonable cause. Finally, in *Papineau v. Associated Students of Western Washington University*,<sup>105</sup> state trial and intermediate appellate courts rejected a student's challenge to his disqualification from holding student office for his failure to file a timely election spending disclosure, as required by student election rules, and for campaigning via email spam, also in violation of student election rules.<sup>106</sup> The *Papineau* courts found no First Amendment speech infringement in the disclosure requirement and mooted the spam claim after the plaintiff's violation of the disclosure requirement was proven.<sup>107</sup>

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expungement context. *Flint*, 488 F.3d at 824 n.3.

100. 494 F.3d 108 (2d Cir. 2007).

101. *Id.* at 125–26.

102. *Id.* at 127.

103. *Id.* at 122–28.

104. 2005-CA-001868 (Ky. Ct. App. Oct. 11, 2005) (affirming trial court injunction barring campus administrators from overturning student government election results).

105. No. 44237-6-I, 2000 WL 784252 (Wash. Ct. App. June 19, 2000).

106. *Id.* at \*1.

107. *Id.* at \*3–4.

#### IV. OTHER STUDENT FIRST AMENDMENT SPEECH CASES

This Part reviews other categories of public higher education student First Amendment speech litigation, including student government cases not involving elections, student religious speech cases, offensive and inappropriate student speech cases, student retaliatory speech and related conduct cases, other kinds of student forum analysis cases, and student publications cases. The objective of this Part is to determine the extent to which the *Flint* legal rules and analysis might apply to each category of cases.

##### A. Student Government Non-Election Cases

In addition to higher education of student government election cases, there have been a number of significant student activity spending cases, including *Rosenberger*<sup>108</sup> and *Southworth*,<sup>109</sup> which have reached the Supreme Court.

*Rosenberger* presented the question of whether a public college or university may allow its student government to ban the use of student activity fees to pay for religious speech as a way of avoiding First Amendment Establishment Clause violations.<sup>110</sup> In a challenge by a Christian student seeking to use activity fees to fund the publication of a religious newsletter, a sharply divided Supreme Court decided that First Amendment religious freedom principles prohibited discrimination against religious communications at public colleges and universities and required the University of Virginia to fund the newsletter's publication.<sup>111</sup> The Court concluded that barring activity fee spending on religious communications constituted viewpoint discrimination, which overrides Establishment Clause concerns, because paying for such communications does not constitute public agency endorsement of the religious message itself.<sup>112</sup> The decision was perhaps predictable because in 1981 the Court, in *Widmar v. Vincent*,<sup>113</sup> had already ruled that public colleges and universities choosing to open their buildings to First Amendment-protected expressive activities and groups had to allow religious organizations and services on campus premises.<sup>114</sup> The *Rosenberger* majority cited *Widmar* to require equal treatment for religious and non-religious speech at public colleges and universities.<sup>115</sup> The four dissenting *Rosenberger* Justices paid relatively little heed to *Widmar* and, instead, provided a lengthy Establishment Clause analysis declaring the use of public funds for religious speech as contrary to U.S. constitutional principles and history.<sup>116</sup>

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

109. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

110. *Rosenberger*, 515 U.S. at 822–23.

111. *Id.* at 820–21.

112. *Id.* at 822–46; *Id.* at 846–52 (O'Connor, J., concurring).

113. 454 U.S. 263 (1981).

114. *Id.* at 277.

115. *Rosenberger*, 515 U.S. at 842–53.

116. *Id.* at 863–99 (Souter, J., dissenting).

The *Rosenberger* majority used forum analysis to find the student government funding process a “metaphysical” limited public forum which had been opened to pay for a wide variety of communicative speech protected by First Amendment viewpoint neutrality principles.<sup>117</sup> Once open, the forum could not subject proposed speech to viewpoint discrimination.<sup>118</sup>

Five years after *Rosenberger*, the Supreme Court again decided a public university student activity fee spending case in *Southworth*.<sup>119</sup> At issue was whether the University of Wisconsin at Madison (UW) student government may allocate mandatory student activity fees to groups that other students may find offensive for engaging in perhaps politically and ideologically objectionable expression.<sup>120</sup> In other words, the objecting students did not want their student fees supporting political groups and activities hostile to the objectors’ views. The Court concluded that as long as the student government allocated fees to student organizations on a viewpoint neutral basis, no First Amendment violation occurred merely because certain students objected to certain funded groups.<sup>121</sup> After distinguishing its prior cases that invalidated on First Amendment grounds mandatory union or professional dues used for political activities considered objectionable by certain dues-paying members,<sup>122</sup> the Court applied *Rosenberger* forum analysis and upheld the student government allocation process as viewpoint neutral except for the student referendum process.<sup>123</sup>

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117. *Id.* at 828–35 (majority opinion).

118. In *Flint*, the Ninth Circuit cited the *Rosenberger* forum analysis to assess whether ASUM’s spending limits were viewpoint neutral and reasonable. Finding viewpoint neutrality as required by *Rosenberger*, the *Flint* panel deemed the limits reasonable and permissible under the First Amendment. *Flint v. Dennison*, 488 F.3d 816, 831–35 (9th Cir. 2007). *Flint* also cites *Widmar* as a basis for requiring viewpoint neutrality, although the court makes clear that ASUM elections are not the expansive forum type found in *Widmar*, but instead are a limited purpose public forum subject to reasonable speech restrictions. *Id.* at 828–29, 832 n.11.

119. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

120. *Id.* at 221.

121. *Id.* at 219. The Court remanded the case to the lower courts to determine whether the UW referendum process allowing students to vote on certain groups’ funding protected viewpoint neutrality, because such neutrality requires protection of minority views from majority will. *Id.* This ignores the fact that a majority of student government legislators at public campuses will routinely vote to fund or not fund student groups over the objection of a legislative minority.

122. *Id.* at 230–32. The Court in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), prohibited union use of member dues for political activities not germane to union labor purposes and activities. *Id.* at 235–36. The Court in *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), applied similar germaneness reasoning to state bar member dues use by bar associations. *Id.* at 13–14.

123. *Southworth*, 529 U.S. at 233–34. The Ninth Circuit *Flint* opinion cites *Southworth* to require forum viewpoint neutrality, but otherwise does not use the case. *Flint*, 488 F.3d at 828–29. While acknowledging the UW student government funding criteria to be viewpoint neutral and carefully drawn, on remand, the Seventh Circuit and the district court concluded that criteria pertaining to student travel and durational existence of student organizations posed viewpoint neutrality problems. *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566 (7th Cir. 2002). More important, both courts found that because UW significantly changed its student government funding allocation criteria in response to the lawsuit, plaintiffs acquired prevailing party status entitling them to attorneys’ fees and costs totaling several hundred thousand dollars. *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 376 F.3d 757, 764 (7th Cir. 2004).

Two other pertinent student fee cases have emerged since *Southworth*. In a somewhat unusual party posture, University of California at Santa Barbara (UCSB) and the University of California at Berkeley (UCB) student governments recently sued the University of California Board of Regents in a First Amendment challenge to the Regents' ban on the use of student activity fees for state ballot measures.<sup>124</sup> The court found no First Amendment right at issue because the Regents are not required to use public funds to subsidize student political speech. In a more recent case, the Second Circuit applied *Southworth* to uphold a First Amendment challenge by two students and a student organization against the SUNY Albany student government use of advisory referenda to allocate funds to a public interest organization that plaintiffs found objectionable.<sup>125</sup> The court here found that the referenda use violated viewpoint neutrality that is required in the type of forum applicable to fee allocation cases.<sup>126</sup> These cases suggest that even though student fee allocations by student governments have important educational value, there are limits on how student governments may exercise fee allocation powers.

#### B. Student Religious Speech and Related Freedom of Association Cases

Since *Rosenberger*, some important student religious speech First Amendment cases have been or are being litigated. These cases fall primarily into two categories. The first involves a clash between the First Amendment right of student religious groups to discriminate on the basis of religious belief as to who can be organizational officers or members, and public college or university anti-discrimination policies that bar recognition and funding for student groups engaged in any form of religious discrimination. The second involves individual student religious viewpoint speech that clash with institutional academic policies.

The Christian Legal Society (CLS) actively litigates the rights of CLS law student chapters to restrict chapter officer status to persons who share CLS religious views. In *Christian Legal Society v. Walker*,<sup>127</sup> CLS obtained a preliminary injunction against Southern Illinois University (SIU) to prevent SIU from revoking its recognition of its CLS chapter in violation of SIU's anti-discrimination policy.<sup>128</sup> After expressing doubt that the CLS chapter had in fact

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These developments suggest that public colleges and universities that respond to First Amendment lawsuits challenging student government (or other student organization and activity) speech policies by changing the challenged policies may find themselves on the losing end of an attorney fee dispute. Although neither ASUM nor The University of Montana saw a need to change student election rules after Flint filed his lawsuit and thus avoided this dilemma, a public college or university might reasonably wonder whether changing policies in the wake of First Amendment challenges likely to fail on the merits is a good idea.

124. *Associated Students of Univ. of Cal. at Santa Barbara v. Regents of the Univ. of Cal.*, No. C05-04352, 2007 WL 196747 (N.D. Cal. Jan. 23, 2007).

125. *Amidon v. Student Ass'n of State Univ. of N.Y.*, 508 F.3d 94 (2d Cir. 2007), *aff'g* 399 F. Supp. 2d 136 (N.D.N.Y. 2005).

126. *Id.* at 95.

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

128. *Id.* at 867.



violated any actual SIU anti-discrimination policies, the court determined that CLS would likely prevail on the merits of its First Amendment challenge to the SIU policy under two separate theories.<sup>129</sup> The first involves First Amendment freedom of association rights for persons sharing a common religious belief not to be excluded or discriminated against by public agencies when trying to associate, subject to disruption exceptions inapplicable to the case.<sup>130</sup> The second involves the First Amendment right of CLS members not to be excluded on the basis of their religious views from a forum created to permit broad forms of speech.<sup>131</sup> The court applied *Rosenberger* forum analysis and determined, despite expressing uncertainty about what kind of forum actually existed in the SIU Law School, that CLS would likely prevail on a viewpoint discrimination claim because CLS had been singled out to lose student organization recognition status based on its religious views.<sup>132</sup> CLS had similar success challenging the Arizona State University (ASU) Law School anti-discrimination policy.<sup>133</sup> In addition, a University of Wisconsin at Madison (UWM) Catholic student group obtained a preliminary injunction against enforcement of the UWM student recognition policy by persuading the court that *Walker* permitted the group to limit membership to Catholic students, even though this restriction violated the policy.<sup>134</sup>

In contrast to *Walker* and the ASU cases, CLS did not fare well in a similar challenge to the University of California Hastings Law School's anti-discrimination policy. The case, *Christian Legal Society of University of California v. Kane*,<sup>135</sup> resulted in summary judgment dismissal of CLS's claims.<sup>136</sup> First, the *Kane* court found that the Hastings anti-discrimination and organizational recognition policies challenged CLS regulated conduct, rather than speech, and, as

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129. *Id.* at 860–61. The court saw little evidence that CLS had violated any federal or state anti-discrimination law, in response to the SIU requirement that all student groups comply with all applicable laws, or that CLS by its nature as a private student group could violate the SIU Affirmative Action/EEO policy requiring equal educational opportunities for all, without regard to sexual orientation or other classifications. *Id.*

130. *Id.* at 861–64.

131. *Id.* at 865–67.

132. *Id.*

133. *Christian Legal Soc'y Chapter at Ariz. State Univ. Coll. of Law v. Crow*, No. CV 04-2572, 2006 U.S. Dist. LEXIS 25579 (D. Ariz. Apr. 28, 2006). CLS obtained attorneys' fees as a prevailing party.

134. *Univ. of Wis.-Madison Roman Catholic Found., Inc. v. Walsh*, No. 06-C-649-S, 2007 U.S. Dist. LEXIS 17084 (W.D. Wis. Apr. 4, 2007); *see also* *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 1:04CV00765, 2006 U.S. Dist. LEXIS 28065 (M.D. N.C. May 4, 2006). The *Moeser* court initially granted a preliminary injunction against enforcement of a University of North Carolina at Chapel Hill anti-discrimination policy to a male Christian student group and then mooted the case, pursuant to a changed campus policy, when the group received recognition. *Id.* at \*12–13. The court denied attorneys' fees and costs to plaintiff by determining that even though the litigation changed the campus policy, the plaintiff obtained the recognition it sought and had no further legal case or controversy for prevailing party status purposes. *Id.* at \*45.

135. No. C 04-04484, 2006 WL 997217 (N.D. Cal. May 19, 2006).

136. *Id.* at \*1.

such, the policies did not violate any constitutional rights, because the policies equally applied to all Hastings student organizations as pre-conditions for recognition.<sup>137</sup> The court went on, however, to review the challenged policies as if they did trigger freedom of association and First Amendment religious speech considerations.<sup>138</sup> In its exhaustive analysis, the court applied *Rosenberger* and *Southworth* forum principles to find that Hastings had created a limited public forum requiring viewpoint neutrality.<sup>139</sup> The Hastings anti-discrimination policy was viewpoint neutral because it applied equally to all student organizations, and it was a reasonable educational policy designed to bar discriminatory practices on campus property.<sup>140</sup> The court then determined that the Hastings policy violated no First Amendment freedom of association rights because CLS members were free to meet and express their views, albeit not as a recognized student organization at Hastings.<sup>141</sup> Finally, the court rejected CLS free exercise and equal protection arguments.<sup>142</sup> The *Kane* decision is currently on appeal to the Ninth Circuit, and it would be premature to speculate how much, if any, of the lower court's opinion will stand. That said, the author's view is that there is no viable way to reconcile *Kane* with *Walker*.<sup>143</sup>

Although not a religious speech case per se, a recent Second Circuit decision, *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. CUNY*,<sup>144</sup> may reinforce public campus authority to impose anti-discrimination policies without violating constitutional rights. The case involves a predominantly Jewish, all male fraternity that had obtained a lower court preliminary injunction against enforcement of the CUNY-Staten Island campus anti-discrimination policy denying student organization recognition of student groups with membership restricted on the basis of gender.<sup>145</sup> In vacating the injunction, the Second Circuit determined that the campus interest in barring gender discrimination outweighed any First Amendment intimate associational rights, and it further determined that such associational rights did not warrant extensive constitutional protection.<sup>146</sup> Because speech was

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137. *Id.* at \*5–8.

138. *Id.* at \*10.

139. *Id.*

140. *Id.* at \*10–20. This is essentially the analysis used by the Ninth Circuit in *Flint*.

141. *Id.* at \*20–24.

142. *Id.* at \*24–27.

143. On December 14, 2007, CLS filed suit in the U.S. District Court for the District of Montana, Missoula Division, against The University of Montana School of Law Dean and Student Bar Association Executive Board Members. Press Release, Alliance Defense Fund, University of Montana School of Law Continues Trend of Silencing Christian Groups at Public Universities (Dec. 14, 2007), available at <http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=4331>. The lawsuit challenges the Law School SBA decision not to fund CLS. *Id.*

144. 502 F.3d 136 (2d Cir. 2007).

145. 443 F. Supp. 2d 374 (E.D.N.Y. 2006). In granting the preliminary injunction, the court rejected the *Kane* analysis and refused to apply its ruling. *Id.* at 392.

146. 502 F.3d at 148–49 (noting that First Amendment associational expressive rights, like those seen in CLS and other religious organization cases, were not properly presented on appeal).

not at issue before the Second Circuit, the court did not perform forum analysis in this case. The court did stress, however, the fundamental importance of public campus anti-discrimination policies, and suggested that such policies could likely override competing First Amendment speech rights.<sup>147</sup>

Student plaintiffs have challenged public campus policies that are allegedly restrictive of or offensive to student religious beliefs and expression. In *Goehring v. Brophy*,<sup>148</sup> the court considered and rejected a University of California at Davis (UCD) student's religious freedom challenge to the use of mandatory student health fees for abortion services after it found a compelling state public health interest which outweighed the burden on the plaintiff's anti-abortion beliefs grounded in religion.<sup>149</sup> Federal and state courts rejected free exercise and other First Amendment claims by a San Jose State University student who, among other claims, challenged the California state teacher certification agency and accrediting body requirements that student teachers demonstrate multicultural sensitivities as a condition for being allowed to student teach.<sup>150</sup> Offering little explanation, the federal court dismissed the case for failure to state a claim under Federal Rule 12(b)(6).<sup>151</sup> The appellate court cited *Rosenberger* and *Southworth* in its detailed analysis and found that the challenged curricular requirements were well within the University's right to set its own curricular requirements without judicial interference.<sup>152</sup>

Student plaintiffs challenging campus curricular policies in *Axson-Flynn v. Johnson*,<sup>153</sup> a Tenth Circuit case, and *Watts v. Florida International University*,<sup>154</sup> a case in the Eleventh Circuit, have had more success sustaining First Amendment religious free exercise claims, at least against early dismissal. *Axson-Flynn* involved a Mormon student's challenge to the University of Utah drama program's refusal to accommodate her religious objections to certain acting roles which required her to use foul language.<sup>155</sup> The Tenth Circuit conducted a forum analysis and found the drama program to be a non-public forum, and it further found that

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147. *Id.* at 149 n.2.

148. 94 F.3d 1294 (9th Cir. 1996), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-2000cc-5 (2000), *as recognized in* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007).

149. The case initially included a number of challenges to the mandatory student fees, but the only one remaining on appeal after the others were dismissed by the lower court was the religious freedom claim. *Id.* at 1297.

150. *Head v. Bd. of Trs. of the Cal. State Univ.*, No. C 05-05328, 2006 U.S. Dist. LEXIS 60857 (N.D. Cal. Aug. 14, 2006); *Head v. Bd. of Trs. of the Cal. State Univ.*, No. H029129, 2007 Cal. App. LEXIS 393 (Cal. Ct. App. Jan. 18, 2007).

151. *Head*, 2006 U.S. Dist. LEXIS 60857, at \*9-29.

152. *Head*, 2007 Cal. App. LEXIS 393, at \*28-47 (applying the principle recognized in *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 242-43 (2000), and *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 834 (1995), to the right of public colleges and universities to determine the content of their own institutional speech to the teacher education requirements at issue).

153. 356 F.3d 1277 (10th Cir. 2004).

154. 495 F.3d 1289 (11th Cir. 2007).

155. *Axson-Flynn*, 356 F.3d at 1280.

the curricular requirements constituted school-sponsored speech that is entitled to broad latitude.<sup>156</sup> Such latitude is not unlimited, however, in that certain allegations raised a material factual dispute as to whether the Utah program requirements, as applied to plaintiff, were pretextual and intentionally hostile to her religion.<sup>157</sup> The Court reversed dismissal of plaintiff's claims to allow discovery about whether such hostility existed, and, if so, whether they violated her free exercise rights.<sup>158</sup> In *Watts*, the Eleventh Circuit reversed the lower court's Rule 12(b)(6) dismissal of a social work graduate student's free exercise claim resulting from the student's ouster from a mandatory practicum because the student had informed a client about the availability of a religious program, in violation of the campus and practicum site's policy not to discuss religion with clients.<sup>159</sup> Foregoing forum analysis, the *Watts* court allowed the plaintiff to proceed with his claim that he was illegally discriminated against because of his religious beliefs, while precluding the lower court or campus from assessing the sincerity of the claimed religious belief.<sup>160</sup> *Watts* does not address the issue of school-sponsored speech or the validity of the curricular requirement.

The extent to which forum analysis applies to religious free exercise claims is debatable. Certainly a public college or university must have the authority to set reasonable curricular requirements. Assuming that curricular delivery takes place in a non-public forum, plaintiffs making free exercise claims should have to meet a very high threshold of proving unreasonable burdens on their religious beliefs to bring such claims. As long as these requirements are uniformly applied and not intended to target students with only certain viewpoints for adverse academic treatment because of such viewpoints, free exercise claims arising from curricular disagreements appear unlikely to succeed.

### C. Offensive And Inappropriate Student Speech Cases

Most reported public higher education cases involving controversial and offensive—offensive to at least some institutional administrators—speech tend to involve faculty or other employees as plaintiffs, rather than students.<sup>161</sup> These employee cases have been decided somewhat inconsistently, with some resulting in invalidation of campus speech restrictions or their application on vagueness and overbreadth grounds, while others have seen little to no First Amendment protection at all.<sup>162</sup> A recent case, *Garcetti v. Ceballos*,<sup>163</sup> will likely have

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156. *Id.* at 1285.

157. *Id.* at 1286–89.

158. *Id.* at 1299.

159. *Watts*, 495 F.3d at 1277. The Eleventh Circuit affirmed dismissal of various other claims. *Id.* at 1301.

160. *Id.* at 1294–300.

161. See, e.g., *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001); *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) (en banc); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

162. Compare *Hardy*, 260 F.3d at 671 (concluding that instructor's use of racial slurs is

significant impact on public higher education First Amendment speech cases involving employees. In *Garcetti*, the Court rejected a First Amendment challenge by a Los Angeles prosecutor who was disciplined for publicly protesting case management decisions by his superiors, because the Court found that public employee workplace speech pertaining to workplace issues is generally unprotected.<sup>164</sup> The application of *Garcetti* to higher education institutions is only now beginning, and most speech cases involving employees are decided in favor of the institutions because the speech tends to be work-related rather than a matter of public concern, which would entitle citizens to speak publicly.<sup>165</sup> How *Garcetti* will apply to future higher education student speech cases, if at all, is uncertain, because it is an employment-specific decision. Meanwhile, the controversial student speech cases that have been decided to date offer at least some guidance as to how courts might decide similar cases in the future by applying forum analysis, as the *Flint* court had done.

One of the first contemporary student offensive speech First Amendment cases, *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*,<sup>166</sup> appears to still be valid precedent. George Mason University severely punished a fraternity for putting on, in the student union cafeteria, an “ugly women” skit which incorporated crude gender- and race-based humor, with one member painted in black face to emulate an African-American female in less than flattering light.<sup>167</sup> The Fourth Circuit affirmed a preliminary injunction barring application of the punishment based on First Amendment grounds, namely the protected nature of the speech as artistic parody containing viewpoint-specific content.<sup>168</sup> While the court did not conduct forum analysis to reach its result, a concurring opinion suggested that the campus probably could have banned the speech had it taken steps to do so

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protected speech that outweighs the institution’s interest in regulating it), and *Cohen*, 92 F.3d 968 (holding institution’s sexual harassment policy to be unconstitutionally vague), and *Dambrot*, 55 F.3d 1177 (concluding that the institution’s discriminatory harassment policy was unconstitutionally vague and overbroad), with *Bonnell*, 241 F.3d 800 (holding that the institution’s interest in protecting confidentiality outweighs the professor’s speech interest in circulating a list of sexual harassment complainants), and *Urofsky*, 216 F.3d at 401 (holding that a statute prohibiting state employees from accessing sexually explicit material on state owned computers did not violate First Amendment rights).

163. 126 S. Ct. 1951 (2006).

164. *Id.* at 1961–62.

165. See, e.g., *Bessent v. Dyersburg State Cmty. Coll.*, 224 F. App’x 476 (6th Cir. 2007); *Bradley v. James*, 479 F.3d 536 (8th Cir. 2007); *Battle v. Bd. of Regents for Ga.*, 468 F.3d 755 (11th Cir. 2006); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006); *Massey v. Johnson*, 457 F.3d 711 (7th Cir. 2006); *Bowers v. Rectors & Visitors of the Univ. of Va.*, 478 F. Supp. 2d 874 (W.D. Va. 2007); *Hood v. Tenn. Bd. Of Regents*, No. 3:04-0473, 2006 U.S. Dist. LEXIS 65881 (M.D. Tenn. Sept. 14, 2006); *Wells v. Bd. of Trs. of Cal. State. Univ.*, No. C 05-02073 CW, 2006 U.S. Dist. LEXIS 68260 (N.D. Cal. Sept. 7, 2006); *Allen v. Or. Health Scis. Univ.*, No. 06-CV-285, 2006 U.S. Dist. LEXIS 54885 (D. Or. Aug. 4, 2006); *Payne v. Univ. of Ark. Fort Smith*, No. 04-2189, 2006 U.S. Dist. LEXIS 52806 (W.D. Ark. July 26, 2006); *Hughes v. Timko*, No. 255229, 2007 Mich. App. LEXIS 530 (Mich. Ct. App. Aug. 2, 2007).

166. 993 F.2d 386 (4th Cir. 1993).

167. *Id.* at 387–88.

168. *Id.* at 389–93.

with clear advance notice about what was banned.<sup>169</sup>

In *Gay Lesbian Bisexual Alliance v. Pryor*,<sup>170</sup> the Eleventh Circuit invalidated an Alabama statute barring public colleges and universities from directly or indirectly using public funds to encourage same-sex sodomy acts, which were subject to Alabama criminal punishment.<sup>171</sup> The Alabama statute also barred institutions from distributing public funds through student organizations for the same prohibited purpose.<sup>172</sup> The court conducted forum analysis and found that the campuses subject to the statute were limited public fora.<sup>173</sup> The court also found the statute to be viewpoint censorship, and thus enjoined its application.<sup>174</sup> The court cited and applied *Rosenberger* to support its conclusion that public campuses (and state legislative bodies) cannot create a limited public forum for student expression and then censor speech based on viewpoint.<sup>175</sup>

*United States v. Alkhabaz*, a Sixth Circuit case, involves gruesome email chat content written and communicated by a male student at the University of Michigan, which was purportedly fictional, about torture, rape and murder of a female whose name was identical to one of his female classmate's.<sup>176</sup> The male student was indicted for allegedly violating a federal statute,<sup>177</sup> which criminalizes interstate communications containing threats to kidnap and harm another person.<sup>178</sup> The Sixth Circuit affirmed dismissal of the indictments because the emails were mere communication of sexual fantasies between two men, and they contained no actual threats.<sup>179</sup> The majority declined to consider the First Amendment issues raised by both the accused student and the prosecution, even though the lower court had cited the First Amendment to dismiss the charges.<sup>180</sup> The dissenting judge argued that the majority should have considered and then rejected any First Amendment protection of the speech at issue because of its violent content that

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169. *Id.* at 394–95 (Murnaghan, C.J., concurring). The concurrence cites Justice Stevens' *Widmar* concurrence, suggesting that college and universities have the ability to regulate speech-related behaviors. *Widmar v. Vincent*, 454 U.S. 263, 278 (1981) (Stevens, J., concurring). This seems consistent with the Ninth Circuit *Flint* view authorizing public colleges and universities to restrict speech for educational purposes, although the viewpoint neutrality condition linked to the permissibility of such regulation would be problematic in cases like *Iota Xi*.

170. 110 F.3d 1543 (11th Cir. 1997).

171. ALA. CODE § 16-1-28 (2007). This statute is still on the books. Notably, the statute, then as it does now, includes the following provision: "This section shall not be construed to be a prior restraint of the First Amendment protected speech. It shall not apply to any organization or group whose activities are limited solely to the political advocacy of a change in the sodomy and sexual misconduct laws of this state." *Id.* § 16-1-28(c).

172. *Id.*

173. *Pryor*, 110 F.3d at 1548.

174. *Id.* at 1549–50.

175. *Id.* (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)). This is consistent with the Ninth Circuit's reasoning in *Flint*.

176. 104 F.3d 1492 (6th Cir. 1997).

177. *Alkhabaz*, 104 F.3d at 1493.

178. 18 U.S.C. § 875(c) (2008).

179. *Alkhabaz*, 104 F.3d at 1494–96.

180. *Id.* at 1493.

was arguably directed at the female classmate.<sup>181</sup> The case raises troubling constitutional concerns about the extent to which campuses can bar and punish even the most graphically violent speech when it is not directly communicated to an identifiable victim as a threat intended to intimidate. Ironically, a number of years before *Alkhabaz*, a Michigan federal district court invalidated the University of Michigan anti-harassment policy on vagueness and overbreadth grounds.<sup>182</sup>

*Bair v. Shippensburg University*,<sup>183</sup> a case decided in 2003, demonstrates the difficulties faced by public colleges and universities in trying to regulate offensive speech. Shippensburg's Student Conduct Code had a provision urging or requiring—depending on the plaintiff's or defendant's position—students not to engage in “acts of intolerance directed at others for ethnic, racial, gender, sexual orientation, physical, lifestyle, religious, age, and/or political characteristics.”<sup>184</sup> The Code also stated that “the expression of one's beliefs should be communicated in a manner that does not provoke, harass, intimidate, or harm another.”<sup>185</sup> The court enjoined enforcement of this language for being overly broad and unduly restrictive of protected speech in violation of the First Amendment.<sup>186</sup>

A much more recent *Bair*-like case occurred in *College Republicans at San Francisco State University v. Reed*.<sup>187</sup> The case arose after students were charged and investigated for disparaging Islam,<sup>188</sup> when the anti-terrorism rally sponsored by the plaintiff College Republicans at San Francisco State University resulted in the desecration of the Hezbollah and Hamas flags, which feature the word “Allah.”<sup>189</sup> The Standards for Student Conduct stated that students are (a) “expected . . . to be civil to one another and to others in the campus community, and to contribute positively to student and university life;” (b) required to refrain from “intimidation” or “harassment;” and (c) refrain from organizational behaviors

181. *Id.* at 1502–06 (Krupansky, J., dissenting).

182. *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989); *see also* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) (invalidating a high school anti-harassment policy on vagueness and overbreadth grounds); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968 (9th Cir. 1996); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995); *Booher v N. Ky. Bd. of Regents*, Nos. 98-6126/98-6194, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Dec. 21, 1998). Applying the *Flint* analysis would appear to make such speech restrictions problematic in a limited public forum because tough speech tends to be viewpoint-specific—e.g., “I want to kill this stupid university president” or “Our governing board is comprised of idiots who ought to be put out of their misery”—and therefore protected.

183. 280 F. Supp. 2d 357 (M.D. Pa. 2003).

184. *Id.* at 362–63.

185. *Id.* at 363.

186. *Id.* at 367–73. The court did not conduct forum analysis, but, instead, enjoined application of the Code on straightforward First Amendment censorship grounds. *See id.* Applying the *Flint* analysis, even if a limited forum were created and recognized as such, one would be hard-pressed to find viewpoint neutrality in much of the speech prohibited or otherwise restricted by the Code.

187. 523 F. Supp. 2d 1005 (N.D. Cal. 2007).

188. *Id.* at 1009–10.

189. *Id.* at 1007.

“inconsistent with SF State goals, principles, and policies.”<sup>190</sup> Although the investigations did not lead to sanctions, the court preliminarily enjoined application of the Code’s civility and organizational behaviors language because they were held as being contrary to First Amendment speech rights.<sup>191</sup> At the same time, the court upheld the validity of the intimidation and harassment language.<sup>192</sup> The court took especially serious issue with the civility requirement by noting:

The First Amendment difficulty with this kind of mandate should be obvious: the requirement “to be civil to one another” and the directive to eschew behaviors that are not consistent with “good citizenship” reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. Similarly, mandating civility could deprive speakers of the tools they most need to connect emotionally with their audience, to move their audience to share their passion.<sup>193</sup>

The court issued the injunction on vagueness and overbreadth grounds.<sup>194</sup>

*Brown v. Li*,<sup>195</sup> a Ninth Circuit case, is a somewhat complex First Amendment case because of its unique facts. Christopher Brown, a University of California at Santa Barbara (UCSB) graduate student who had received committee approval of his thesis subsequently added a “Disacknowledgements” section containing crude and obscene language critical of various UCSB faculty and staff.<sup>196</sup> When the student then tried to file the thesis with the library, the thesis committee learned of the addition and it refused to approve the thesis as changed.<sup>197</sup> The student received his degree but the thesis was kept from the library, resulting in a First Amendment challenge.<sup>198</sup> The Ninth Circuit split as to reasoning, and two judges held that no First Amendment violation had occurred because they found the thesis a curricular assignment subject to reasonable campus pedagogical requirements.<sup>199</sup> Judge Graber, writing for the court, determined that the thesis was not a public forum but instead a school-sponsored activity subject to regulation.<sup>200</sup> Reinforcing a public college or university’s right to control curricular content, Judge Graber also applied *Hazelwood School District v. Kuhlmeier*,<sup>201</sup> an earlier case in which the Supreme Court ruled that school officials may lawfully censor high school

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190. *Id.* at 1010–11.

191. *Id.* at 1017–18.

192. *Id.* at 1022.

193. *Id.* at 1019.

194. *Id.* at 1021.

195. 308 F.3d 939 (9th Cir. 2002).

196. *Id.* at 943.

197. *Id.* at 943–44.

198. *Id.* at 945.

199. *Id.* at 952 (plurality opinion); *id.* at 956 (Ferguson, J., concurring).

200. *Id.* at 950–55 (plurality opinion).

201. 484 U.S. 260 (1988).



newspapers on the ground that they constitute school-sponsored speech.<sup>202</sup> Judge Ferguson's concurrence did not endorse Judge Graber's analysis but, instead, treated the "Disacknowledgements" section as the equivalent of academic fraud with no First Amendment credence.<sup>203</sup> Judge Reinhardt's dissent, on the other hand, recognized a potentially significant First Amendment issue and suggested possible public or limited public forum treatment of the thesis, while rejecting altogether Judge Graber's *Hazelwood* analysis.<sup>204</sup>

The *Flint* court declined to apply *Brown* school-sponsored speech principles to ASUM election rules.<sup>205</sup> Applying *Flint* to *Brown* poses First Amendment problems because it would seem that if curricular speech were treated as a limited public forum, restrictions on much of that speech would not likely be viewpoint neutral. Therefore, restricting it, at least under traditional forum analysis, raises serious First Amendment difficulties. Perhaps the better course would be to treat curricular speech as a non-forum, much the way Judge Graber did in *Brown*,<sup>206</sup> so that it can be reasonably regulated by the academy.

#### D. Student First Amendment Retaliatory Speech and Related Conduct Cases

Some of the harder student speech First Amendment disputes to explain with any consistency are those in which the allegedly protected speech encompasses behavior subject to student disciplinary penalties. For example, in *Feldman v. Community College of Allegheny County*,<sup>207</sup> the administration had a student forcibly removed and arrested for violating the campus computer lab use policy, following a dispute between the student and the computer lab director lasting many months.<sup>208</sup> Among other claims, the student alleged that he was the subject of illegal retaliation in violation of the First Amendment, because of remarks he had made to the college's president about the dispute, which the student claimed resulted from racial and religious discrimination by the lab director (the student being a white Jewish male, the director an African-American female).<sup>209</sup> The court applied a three-part test comprised of whether (i) the student's statements were protected by the First Amendment; (ii) the statements were a "motivating factor" in his being denied computer lab use and later arrested; and (iii) the student would

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202. 308 F.3d at 947–53. The application of *Hazelwood* to higher education had been rare prior to this case with one exception in *Alabama Student Party v. Student Government Ass'n of the University of Alabama*, 867 F.2d 1344, 1346–47 (11th Cir. 1989). The Seventh Circuit has now done so in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), a public university newspaper case, and the Ninth Circuit did so in *Flint v. Dennison*, 488 F.3d 816, 829 n.9 (9th Cir. 2007), for the limited purpose of forum analysis application.

203. 308 F.3d at 955–56 (Ferguson, J., dissenting).

204. *Id.* at 956–64 (Reinhardt, J., dissenting).

205. *Flint*, 488 F.3d at 829 n.9.

206. *See supra* notes 145–47 and accompanying text.

207. 85 F. App'x 821 (3d Cir. 2004).

208. *Id.* at 824.

209. *Id.*

have been denied access and later arrested for reasons other than his statements.<sup>210</sup> The court found that the student could not meet the first part of the test because the remarks to the president were about a private dispute over lab use and access policies, and not a matter of public concern protected by the First Amendment.<sup>211</sup>

The Second Circuit applied a different First Amendment retaliatory speech test and analysis in *Garcia v. SUNY Health Sciences Center*.<sup>212</sup> There, a student who was academically dismissed from medical school and subsequently diagnosed with a learning disability sought readmission, which would have been granted but for the student's disagreement with the school over how much of the first year curriculum he had to retake.<sup>213</sup> Among other claims, the student filed a First Amendment retaliatory speech claim, alleging that he was retaliated against for a letter he had written more than a year before the readmission denial, complaining about certain course grading problems he and several other students with similar academic problems had experienced.<sup>214</sup> The court concluded that student speech of this nature was protected and found adverse action against the student.<sup>215</sup> The court, nonetheless, dismissed the First Amendment claim because there was no causal connection between the protected speech and the adverse action.<sup>216</sup> The court did not perform forum analysis, despite its finding that the speech was broadly protected.

Student critics of public college and university administrators are not without First Amendment rights to be free from retaliatory strikes against them. In *Brown v. Western Connecticut State University*,<sup>217</sup> a student expelled for allegedly changing his grades survived early dismissal of his First Amendment retaliatory speech claim by pleading that various defendant university administrators had, in effect, fabricated the charges to get rid of the student and stop his incessant criticisms of their performance.<sup>218</sup> In *Qvyjt v. Lin*,<sup>219</sup> a federal district court reached a similar result, in allowing a Northern Illinois University graduate student to proceed with a First Amendment retaliatory speech claim because the student was barred from using campus lab facilities following his complaint about faculty

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210. *Id.*

211. *Id.* at 824–25. This analysis is similar to that later used in *Garcetti* in that the court looked to the nature of the student speech at issue within the context of the student's campus relationships. See *supra* notes 121–22 and accompanying text. No forum analysis was used. A *Flint* analysis might not have the same result if student complaints about campus policies were subjected to a limited public forum analysis because speech in these cases would almost always have viewpoint bias rather than neutrality.

212. 280 F.3d 98 (2d Cir. 2001).

213. *Id.* at 104–05.

214. *Id.* at 105.

215. *Id.* at 106–07.

216. *Id.* *Flint* probably would not apply to this kind of situation because viewpoint neutrality issues are seldom present in these kinds of cases.

217. 204 F. Supp. 2d 355 (D. Conn. 2002).

218. *Id.* at 363–65.

219. 953 F. Supp. 244 (N.D. Ill. 1997).

research misconduct.<sup>220</sup> The court rejected the employee speech-public concern mode of analysis and, instead, the court treated the content of his speech as fully protected, and, under the circumstances, therefore free from punishment.<sup>221</sup> No forum analyses were conducted in these cases.

Student critics may enjoy First Amendment freedom from retaliatory punishment by campus employees unhappy with the criticisms, but these freedoms have obvious limits. In *Moore v. Black*,<sup>222</sup> the court rejected a First Amendment claim by a student banned from the SUNY Buffalo campus for threatening to beat one administrator with a baseball bat and hit another in the face.<sup>223</sup> A federal district court, in *Willett v. CUNY*,<sup>224</sup> likewise, dismissed a First Amendment challenge by a law student claiming his criticism of classmates' children was the basis for his removal, when in fact the student had committed several major disciplinary infractions that were more than sufficient to support his ouster, even assuming his speech was protected.<sup>225</sup> And although it is not a retaliatory speech case, in *Pi Lambda Phi Fraternity v. University of Pittsburgh*,<sup>226</sup> the Third Circuit rejected a First Amendment freedom of association claim by a fraternity that was severely punished after several members were arrested for illegal drug possession in the chapter house.<sup>227</sup> The court concluded that the justification for disciplinary punishment outweighed any First Amendment rights the group might have.<sup>228</sup>

These retaliatory speech and conduct cases do not employ forum analysis, and, thus, *Flint* would seem inapplicable. That stated, however, the line between regulating student speech in a forum context and punishing students for engaging in speech-like activity on a public college or university campus seems at times a bit blurred. For example, students at a public college or university ostensibly have some speech rights to criticize administrators and faculty, perhaps even loudly and rudely, unless—as seems unlikely—*Garcetti* has eliminated student criticism rights. Assuming students have such rights, administrators would seemingly need to use care before punishing students for expressing viewpoints contrary to what the administrators wish to see and hear.

#### E. Other Student Speech Cases Involving Forum Analysis

Most higher education forum analysis cases not mentioned above do not involve students, but they do directly affect how courts decide all campus forum cases.<sup>229</sup>

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220. *Id.* at 247.

221. *Id.* at 247–48 (citing *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973), wherein the Court had determined graduate students cannot be punished for the content of their speech).

222. No. 03-CV-033A, 2004 U.S. Dist. LEXIS 18023 (W.D.N.Y. Sept. 2, 2004).

223. *Id.*

224. No. 94 CV 3873, 1998 WL 355321 (E.D.N.Y. May 5, 1998).

225. *Id.* at \*2.

226. 229 F.3d 435 (3d Cir. 2000).

227. *Id.* at 442.

228. *Id.* at 441.

229. *See, e.g.*, *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Gilles v.*

Public colleges and universities can generally restrict speech in a nonpublic forum and even restrict speech in a limited public forum on a viewpoint neutral basis. Once the campus has created a public forum, however, speech restrictions on any basis other than time, place, and manner normally fail to pass First Amendment muster. In addition, even when colleges and universities create a public forum for unfettered free speech, they may not unduly restrict speech in other parts of campus. Two Texas cases illustrate these points.

In *Pro-Life Cougars v. University of Houston*,<sup>230</sup> an anti-abortion student group and individual group members prevailed on a First Amendment challenge to the University of Houston's refusal to permit them to demonstrate in a part of the campus set aside for all types of speech, because the administration considered plaintiffs' speech "potentially disruptive."<sup>231</sup> The court invalidated application of campus policy in this case, because it offered no guidance to prospective speakers or administrators on how to define "potentially disruptive" speech, in a way that would permit its restriction or prohibition within constitutional bounds.<sup>232</sup>

In *Roberts v. Haragan*,<sup>233</sup> the court imposed what may be the broadest definition of public forum on a public college or university of any case to date. The court in that case essentially found all open areas of the Texas Tech campus a designated public forum which could not be restricted as to speech content or delivery.<sup>234</sup> The court found in favor of a Texas Tech law student who had filed a First Amendment challenge to the campus policy requiring students to obtain permission to speak and hand out literature outside the free speech zone, on the ground that it burdened free expression.<sup>235</sup> Even though the campus had changed its policy to eliminate the discretionary grant or denial of permission, the court found that requiring anyone to seek permission to speak in a designated public forum violated First Amendment rights as an unnecessary, and thus not narrowly tailored, restriction.<sup>236</sup> The court also invalidated application of the campus speech code, which restricts offensive speech such as threats, insults, or sexually harassing communication, even in designated free speech zones because the code suppressed much more than unprotected speech.<sup>237</sup> In addition, the court invalidated certain restrictions on the distribution of printed materials by finding these restrictions inconsistent with designated public forum principles.<sup>238</sup>

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Blanchard, 477 F.3d 466 (7th Cir. 2007); Bowman v. White, 444 F.3d 967 (8th Cir. 2006); ACLU v. Mote, 423 F.3d 438 (4th Cir. 2005); Justice for All v. Faulkner, 410 F.3d 760 (5th Cir. 2005); Giebel v. Sylvester, 244 F.3d 1182 (9th Cir. 2001); Brister v. Faulkner, 214 F.3d 675 (5th Cir. 2000); KKK v. Curators of Univ. of Mo., 203 F.3d 1085 (8th Cir. 2000); Jones v. Mont. Univ. Sys., 155 P.3d 1247 (Mont. 2007).

230. 259 F. Supp. 2d 575 (S.D. Tex. 2003).

231. *Id.*

232. *Id.* at 582–84.

233. 346 F. Supp. 2d 853 (N.D. Tex. 2004).

234. *Id.* at 858–63.

235. *Id.* at 869–70.

236. *Id.* at 868–70.

237. *Id.* at 870–73.

238. *Id.* at 873. This particular court would not likely adopt the *Flint* view that most campus

If *Pro-Life Cougars* and *Roberts* represent the broadest form of public forum application, the Tenth Circuit, in *Pryor v. Coats*,<sup>239</sup> approaches the issue more narrowly. The court defined bulletin boards in public college and university buildings as being limited public fora that are subject to administrative restrictions on who gets to post communications on these boards, based on reasonable organizational criteria.<sup>240</sup> At issue in the case was the school's requirement limiting bulletin board use to registered student groups which, in turn, required at least ten student members.<sup>241</sup> The court upheld the validity of this restriction as viewpoint neutral.<sup>242</sup> The Ninth Circuit subsequently followed suit in determining that a public campus may remove fliers posted on nonpublic forum bulletin boards as long as it is clear that the ban is viewpoint neutral and the bulletin boards are not opened for broad forms of expression.<sup>243</sup> In *Wilson v. Johnson*,<sup>244</sup> the Sixth Circuit recently reached the same result when it concluded that campus buildings are not designated public fora entitling students to communicate political messages wherever they wished, but that, instead, they are nonpublic fora in which schools could ban political messages altogether.<sup>245</sup>

Finally, in *Hickok v. Orange County Community College*,<sup>246</sup> a federal district court in New York addressed the issue of whether a public college or university may have and enforce a policy requiring lectures to be apolitical and non-partisan in nature.<sup>247</sup> The court in *Hickok* held that the campus lecture series was a limited public forum created solely to permit non-partisan, apolitical speech, and it upheld the validity of the policy.<sup>248</sup>

#### F. Student Publication Cases

Student publication cases present perhaps the most interesting and pertinent First Amendment forum cases. During the past few years, the laws applicable to public higher education student publications have become reasonably well-established. Generally, the cases fall into three First Amendment categories. The

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expressive activities take place in a limited public forum that is more susceptible to viewpoint neutral regulation on a reasonable basis. This court rejected the Texas Tech argument that most of its campus was a limited public forum. *Id.* at 861–63. For an interesting discussion of how this case was litigated by a prominent conservative advocacy organization, see Clay Calvert & Robert D. Richards, *Interview and Commentary: Lighting a Fire on College Campuses: An Inside Perspective on Free Speech, Public Policy and Higher Education*, 3 *GEO. J. L. & PUB. POL'Y* 205 (2005).

239. No. 99-6271, 2000 U.S. App. LEXIS 1805 (10th Cir. Feb. 9, 2000).

240. *Id.* at \*18–19.

241. *Id.* at \*3.

242. *Id.* at \*18–19.

243. *Desyllas v. Bernstine*, 351 F.3d 934, 944 (9th Cir. 2003).

244. No. 05-6733, 2007 WL 1991057 (6th Cir. July 5, 2007).

245. *Id.* at \*4.

246. 472 F. Supp. 2d 469 (S.D.N.Y. 2006).

247. *Id.* at 473.

248. The court dismissed the First Amendment case for plaintiff's failure to show how the campus had caused him legal injury. *Id.* at 476.

first involves student publication First Amendment rights to be free from censorship. The second involves the issue of whether publications enjoy autonomy from administrative control. If they do, there can be no First Amendment claim, because there is no state action. The third is comprised of cases that raise novel constitutional issues regarding publication rights and status.

The newest legal trend in this area appears to be application of K-12 education *Hazelwood* principles to public higher education publications. In *Hosty v. Carter*,<sup>249</sup> the Seventh Circuit found that public colleges and universities create designated public fora.<sup>250</sup> When the college or university allows student publications to exist as extra-curricular activities under the supervision of student publication boards, the publications cannot be subjected to viewpoint or content censorship by the administration.<sup>251</sup> This case involved an administrator's refusal to pay the campus newspaper printing bills unless the administrator had first reviewed and cleared the newspaper content.<sup>252</sup> Under these circumstances, the court had little difficulty treating the student publication as a designated public forum, while simultaneously recognizing that the law in this area was unsettled enough to grant the Governors State University administrator qualified immunity from suit.<sup>253</sup> The *Flint* court considered *Hazelwood's* application to the ASUM election rules but concluded that *Hazelwood* should only be used for forum analysis, rather than for general use in higher education.<sup>254</sup> Unlike the Seventh Circuit in *Hosty*, however, the Ninth Circuit found that the ASUM elections were a limited public forum which could be regulated by the campus on a viewpoint neutral basis.<sup>255</sup> This is probably appropriate, given the difference between student government elections, which are less susceptible to First Amendment speech protection, and newspapers, which traditionally enjoy more First Amendment rights.

A somewhat similar censorship issue arose in *Kincaid v. Gibson*,<sup>256</sup> when a Kentucky State University (KSU) administrator confiscated and held the student-published yearbook because of purported technical deficiencies in content.<sup>257</sup> The court reviewed the campus student publications policy and found the yearbook a limited public forum which may be censored only in a viewpoint-neutral manner, based on reasonable rules.<sup>258</sup> The court then concluded that the censorship at issue was neither viewpoint neutral nor reasonable because the confiscation occurred when the administrator objected to the content that students wanted to publish.<sup>259</sup>

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249. 412 F.3d 731 (7th Cir. 2005) (en banc).

250. *Id.* at 737.

251. *Id.* at 737-38.

252. *Id.* at 733.

253. *Id.* at 735-38.

254. *Flint v. Dennison*, 488 F.3d 816, 829 (9th Cir. 2007).

255. *Id.* at 820.

256. 236 F.3d 342 (6th Cir. 2001) (en banc).

257. *Id.* at 345.

258. *Id.* at 347-51.

259. *Id.* at 356.

Furthermore, the confiscation was apparently unprecedented on the campus.<sup>260</sup> The court specifically noted in dictum that not even a non-public forum of this nature could be censored because of speaker viewpoint.<sup>261</sup>

In *Pitt News v. Pappert*,<sup>262</sup> the Third Circuit addressed a different kind of censorship, in the form of a Pennsylvania statute which banned advertisers from paying for the dissemination of alcoholic beverage advertising by media affiliated with colleges, universities, and other educational institutions.<sup>263</sup> The University of Pittsburgh student newspaper, which suffered financially from the ban, successfully sued the state to enjoin the statute's enforcement.<sup>264</sup> The court found the statute unconstitutional as applied because it impermissibly restricted commercial speech by not directly advancing reduction of underage drinking and for not being narrowly tailored to achieve this stated statutory objective.<sup>265</sup> Further, the court found that the statute presumptively violated the First Amendment because it targeted a narrow segment of the media, namely educational institution media, rather than media generally.<sup>266</sup> The court conducted no forum analysis but instead treated the First Amendment issue solely on the basis of commercial speech.<sup>267</sup>

Two cases have directly addressed the issue of when public college or university student newspapers lack public agency status for First Amendment analysis purposes. In *Leeds v. Meltz*,<sup>268</sup> a CUNY Law School student newspaper refused to publish an advertisement that the paper staff considered potentially defamatory, and the would-be advertiser filed a First Amendment challenge, claiming government censorship.<sup>269</sup> The court concluded that because neither the Law School nor campus administration could control editorial content or decisions, there was no state action or state actors, and so there was no First Amendment

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260. *Id.*

261. *See supra* note 182 and accompanying text.

262. 379 F.3d 96 (3d Cir. 2004).

263. 47 PA. CONS. STAT. ANN. § 4-498 (West 2003).

264. 379 F.3d at 103.

265. *Id.* at 107-09.

266. *Id.* at 109-13.

267. At least one federal appellate court has determined that commercial speech cases should not be subject to forum analysis in a public higher education setting. *Fox v. Bd. of Trs.*, 841 F.2d 1202 (2d Cir. 1988). The precedential value of this ruling is questionable, because the U.S. Supreme Court reversed the Second Circuit in *Board of Trustees v. Fox*, 492 U.S. 469 (1989), when it found error in the lower court commercial speech analysis requiring the least restrictive means test to determine First Amendment permissibility. The Supreme Court, instead, determined the test was whether the speech was protected at all, and if so, as commercial speech the test would be whether the ban was reasonably related to its purpose, namely a ban on product-selling in public campus dormitories, without being invalid on overbreadth grounds. The case was ultimately mooted on other grounds. *See Fox v. Bd. of Trs.*, 42 F.3d 135 (2d Cir. 1994). Under a *Flint* analysis, it is unclear whether this particular ban is viewpoint neutral. But, based on the Third Circuit analysis, the ban would likely fail on reasonableness grounds, even if it is viewpoint neutral because it was unlikely to achieve its stated purpose.

268. 85 F.3d 51 (2d Cir. 1996).

269. *Id.* at 53-54.

violation in the case.<sup>270</sup> In *Lewis v. St. Cloud State University*,<sup>271</sup> a Minnesota state appellate court reached a similar result that the lack of administrative editorial control over the student paper eliminated any state action by the paper, and thus precluded defamation liability against the university for any alleged defamation by the paper.<sup>272</sup> Neither decision contains mention of forum analysis.

Under a *Flint* analysis, one would be hard-pressed to argue that student newspaper activities at public colleges and universities do not have educational significance. Although the Court in *Hazelwood* determined that high school papers are not a public forum because of direct school sponsorship and curricular characteristics,<sup>273</sup> the Seventh Circuit in *Hosty* concluded that the campus paper was a designated public forum not susceptible to censorship because of full student editorial control.<sup>274</sup> And the Second Circuit in *Husain* found the student paper a limited public forum.<sup>275</sup> The Sixth Circuit likewise found the student yearbook in *Kincaid* a limited public forum.<sup>276</sup> The challenging question in these limited public forum decisions is whether, and if so, how, censorship of college or university publication content could ever be viewpoint neutral or reasonable, and thus legally permissible. In *Coppola v. Larson*,<sup>277</sup> a First Amendment challenge by former editors of the Ocean City (New Jersey) Community College student-run paper to the removal of the paper's advisor in alleged retaliation for paper content hostile to the campus, the court suggested the answer is likely no: "Once a limited public forum, like the *Viking News*, has been created, students must be able to express their views free of editorial control and censorship from the school's administration."<sup>278</sup>

## V. SOME TENTATIVE QUESTIONS

As noted at the outset of this article, *Flint* is too new for anyone to know whether it will be followed, either in the Ninth Circuit or elsewhere, with regard to student election speech. It is sufficiently different from *Alabama Student Party*, in terms of legal analysis, for *Flint* to be *sui generis* as to any kind of student government election case. *Flint* stands for the legal proposition that student extracurricular activity of significant educational value and a First Amendment speech component may constitute a limited public forum. Student governments will, in turn, be treated as important educational activity, rather than as political organizations with a broad grant of free speech rights, such that their speech can be subject to viewpoint neutral and objectively reasonable restrictions.

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270. *Id.* at 55–56.

271. 693 N.W.2d 466 (Minn. Ct. App. 2005).

272. *Id.* at 472–73.

273. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 269–70 (1988).

274. *Hosty v. Carter*, 412 F.3d 731, 737–38 (7th Cir. 2005) (en banc).

275. *Husain v. Springer*, 494 F.3d 108, 124–25 (2d Cir. 2007).

276. *Kincaid v. Gibson*, 236 F.3d 342, 347–51 (6th Cir. 2001) (en banc).

277. No. Civ. 06-2138, 2006 WL 2129471 (D.N.J. July 26, 2006).

278. *Id.* at \*7.



The inability of public colleges and universities to regulate student organizational and individual speech deemed educationally valuable on the basis of speaker viewpoint nonetheless has significant educational ramifications. For example, what if student extracurricular organizational speakers urge that students of a certain gender, race, ethnicity, or religion be excluded altogether from the campus as “undesirable elements”? Under *Flint*, such speech would be protected from campus regulation.<sup>279</sup> Of course, the student religious organization speech cases litigated by the Christian Legal Society and Roman Catholic Foundation are, in essence, about the right of exclusion. Certain student religious organizations seek to exclude openly gay students involved in same sex relationships from holding office or being members, or in a non-sexual orientation context, they seek to limit their participants to persons of the same religious beliefs. Conversely, students opposed to these student religious groups seek to exclude them from having full-fledged rights and status equivalent to what other student organizations enjoy. As seen in *Walker* and *Kane*, when two courts effectively cancel each other out on the same factual and legal questions, the issue of exclusion advocacy in a limited public forum is such that reasonable judicial minds can reach opposite conclusions. A legal scholar recently wrote, “The legal conflict between the homosexual movement and those who oppose it on religious grounds is intense and likely to grow; neither side is about to obliterate the other. This conflict cannot be resolved by a single legislative or judicial act; it will play out in innumerable skirmishes.”<sup>280</sup> Limited public forum analysis of the sort applied in *Flint* appears to tilt the scale against application of campus anti-discrimination policies to the extent such policies, as written or applied, result in viewpoint-based censorship.

Offensive non-religious speech by student organizations and individuals raises equally difficult First Amendment challenges if such speech is presented in a limited public forum. The school-sponsored curricular principle seen in *Brown v. Li*,<sup>281</sup> a Ninth Circuit case, seldom applies to student extracurricular activities. If contemporary courts choose to follow the approach used in *Roberts v. Haragan*,<sup>282</sup> treating most of a public campus outside the instructional classroom or laboratory as a designated public forum with even more rights than are seen in a limited public forum, the notion of “anything goes” speech by students will flourish. To this author, very little offensive speech does not express a viewpoint (albeit at times quite inarticulately), and so it cannot be censored. Again, speech code cases like *Bair* and *Roberts* appear to reinforce this point. *Flint* thus adds to the weight of legal authority ruling that when a limited public forum is present, offensive speech cannot be viewpoint regulated. This assumes, of course, that objectively bad behavior not constituting speech can still be regulated and punished.<sup>283</sup>

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279. The speech code cases such as *Bair* and *Roberts* also suggest they will be protected from regulation.

280. George W. Dent, *Civil Rights for Whom?: Gay Rights versus Religious Freedom*, 95 KY. L.J. 553, 647 (2006-2007).

281. 308 F.3d 939 (9th Cir. 2002).

282. 346 F. Supp. 2d 853 (N.D. Tex. 2004).

283. *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding criminal punishment for draft

Student publication cases appear to offer the closest parallel to student government in terms of educational value. Courts to date have not hesitated to find these publications a limited public forum shielded from campus viewpoint regulation and, based on *Kincaid*, any other sort of restriction at all. This author predicts that *Flint* will be applied in future student publication cases whenever valuable educational experience arguments tied to these publications are raised.

Finally, *Flint* appears to eliminate future application of educational deference standards to student speech communicated in a limited public forum. It may seem incongruous that valuable student educational activity cannot be restricted on the basis of offensive viewpoint if it is extracurricular in nature and occurs in a limited public forum. On the other hand, as the Supreme Court noted many years ago in one of the nation's earliest public campus student speech cases:

We note . . . that the wide latitude accorded by the Constitution to the freedoms of expression and association is not without its costs in terms of the risk to the maintenance of civility and an ordered society. Indeed, this latitude often has resulted, on the campus and elsewhere, in the infringement of the rights of others. Though we deplore the tendency of some to abuse the very constitutional privileges they invoke, and although the infringement of rights of others certainly should not be tolerated, we reaffirm this Court's dedication to the principles of the Bill of Rights upon which our vigorous and free society is founded.<sup>284</sup>

*Flint v. Dennison* paves new ground by subjecting important student extracurricular activity containing speech to limited public forum status. Although the case itself involved no viewpoint issue, in adopting the limited public forum approach to decide it, the Ninth Circuit has undoubtedly created a new panoply of student expressive rights at public higher education institutions.

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card burning as illegal behavior rather than lawful First Amendment-protected speech). The case remains valid precedent.

284. *Healey v. James*, 408 U.S. 169, 194 (1972).