THE VOTE IS IN: STUDENT OFFICER CAMPAIGNS DESERVE FIRST AMENDMENT PROTECTIONS

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INTRODUCTION

No one seriously doubts that college students on public campuses have free speech rights, but just what differentiates college students from their non-academic peers has not been so widely discussed. So while speech codes and activity fees have been the focus of numerous court cases and legal scholarship,[1] the fundamental basis of a college student's free speech rights is not as clearly defined. Likewise, campaign finance has been greatly scrutinized for its effect on First Amendment concerns. It is surprising, then, to discover that judicial and academic attention has been sparse at the juncture where these two topics intersect—student election codes.

Yet, campaigning by students for campus offices is neither a recent addition to university life nor an area of uncontroversial activity. Over the past several decades, many higher education institutions have enacted rules that regulate major (and minor) aspects of the how, when, and where students may run for election to student offices. The free speech implications of these provisions are no less troubling because they occur on a public college campus rather than in non-academic settings.

This note will examine three specific areas in order to show the compelling need for protection of students' free speech rights in college elections: (1) the two reported cases to deal specifically with expenditure limits in student elections (with opposite outcomes); (2) the extent to which public universities can act to limit free speech rights to promote their educational mission; and (3) what the Supreme Court has said about campaign finance laws with regard to public elections outside of the college and university setting. A discussion of these topics will reveal, after a sorting out of all the intricate complexities of the law, a reasonable rationale for

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1. *See, e.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); UWM Post, Inc., v. Bd. of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163 (E.D. Wis. 1991); Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1 (2004).

strong protection of student election speech.

I. COLLEGE AND UNIVERSITY ELECTIONS

The starting point for any analysis of student elections held at the college and university level is *Alabama Student Party v. Student Government Ass'n*,[2] which was decided by the Eleventh Circuit, the highest federal court to consider the subject. Although the facts of the case did not involve a campaign-expenditure limit, which will become the focus of this note later on, the conclusions of the court's majority—regarding the juxtaposition of judicial deference to university regulations (adopted in order to carry out the institution's educational mission) with the important constitutional rights a student possesses to engage in free speech—has become a standard beginning point for decisions by other courts confronted with similar cases and therefore serves as the springboard into the topic.

In *Alabama Student*, the court was confronted with a student challenge to rules adopted by the Student Government Association ("SGA") at the University of Alabama ("UA") that: (1) restricted the distribution of campaign literature to three days prior to the election and permitted dissemination only to on-campus residence halls or other buildings outside of campus; (2) prohibited distribution of campaign literature on the day of the student election; and (3) limited debates and open forums among candidates to the week of the election.[3] Students who belonged to a campus political party brought suit against the SGA to enjoin the enforcement of the election restrictions on the ground that such regulations violated their free speech rights under the Constitution.[4] The federal district court held that while the university had in fact restricted speech based upon its content, the election bylaws were nonetheless constitutional.[5] On appeal, the Eleventh Circuit determined that SGA was a state actor whose purpose was to support the educational mission of the university.[6] The court agreed with UA's contention that the regulation should be evaluated under a reasonableness standard, but distinguished the campaign challenge from other cases in which reasonableness was used (e.g. student groups seeking access or funding similar to treatment other groups received).[7] The issue was framed as:

> the level of control a university may exert over the school-related activities of its students. The question is whether it is unconstitutional for a university, which need not have a student government association at all, to regulate the manner in which the Association runs its elections. That question is a different one than posed by election restrictions in a non-academic setting.[8]

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2. 867 F.2d 1344 (11th Cir. 1989).
3. *Id.* at 1345.
4. *Id.*
5. *Id.* at 1349 (Tjoflat, J., dissenting).
6. *Id.* at 1347.
7. *Id.* at 1345. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981); Healy v. James, 408 U.S. 169 (1972).
8. *Alabama Student*, 867 F.2d at 1345–46.

While academic qualifications and regulations for *public* office would not withstand constitutional examination, the court noted that the educational setting poses several justifications for excluding academic institutions from traditional scrutiny. First, the purpose for which institutions of higher education are organized demands special treatment compared to non-academic settings.[9] Students do not attend college in order to achieve the objective of getting elected to campus government; rather, the goal is taking classes at a "university, whose primary purpose is education, not electioneering. Constitutional protections must be analyzed with due regard to that education[al] purpose . . . ."[10] A second justification that the court spoke of relates to the reason speech control was being sought. At the level of K-12 education, the Supreme Court has recognized the "right of educators to control school-related speech . . . 'so long as their actions are reasonably related to legitimate pedagogical concerns.'"[11] For example, to require a school official to publish sensitive or indecent stories in a school newspaper, or to prevent punishment against students who use lewd or vulgar language in school assemblies, would undercut a school's attempts at achieving an educational experience.[12] In contrast, the "standards governing burdens on the speech of adults to an audience of adults may differ from the standards governing speech of students in [K-12] public schools."[13] The court interpreted the First Amendment to allow reasonable regulation, in certain restricted circumstances, of speech-connected activities in conjunction with school-related pursuits.[14] Because, the court said, the SGA was created to serve as a "learning laboratory" for students interested in public service and practical democracy (similar to the purposes of student newspapers or yearbooks for journalistic experience), the campaigns for student office were not an open public forum but rather "[constituted] a forum reserved for its intended purpose, a supervised learning experience."[15] The Supreme Court's decision in *Hazelwood v. Kuhlmeier*[16] recognized that two distinct categories of speech existed at a K-12 public school: speech that a school must tolerate, and speech that a school must affirmatively promote.[17] The majority's opinion in *Hazelwood* held that a school need not tolerate student speech that is inconsistent with its basic educational mission.[18] Campaigns for public office outside of the academic setting, the *Alabama Student* court said, serve no primary purpose beyond that for which they were instituted—viz., the election of government officials—and this is why the courts apply full protection of the First Amendment to such activities.[19] But where students are involved, the court

9. *Id.* at 1346.

10. *Id.*

11. *Id.* (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).

12. Such speech would "undermine the school's basic educational mission." Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

13. 867 F.2d at 1346.

14. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

15. *Id.* at 1347.

16. 484 U.S. 260 (1988).

17. *Id.* at 270–71.

18. *Id.*

19. *Alabama Student*, 867 F.2d at 1346.

said, reasonable restrictions with regard to speech must be tolerated, at least when the speech is only a secondary component of a voluntarily-established learning program.[20]

The *Alabama Student* majority concluded its opinion by reiterating the great deference federal courts should give to regulations by university officials.[21] Historically, courts have been reluctant to interfere with the operation of state and local educational institutions due to the belief that "autonomous decisionmaking by the academy" fosters academic freedom.[22] In cases raising First Amendment challenges, "these principles translate into a degree of deference to school officials who seek to reasonably regulate speech and campus activities in furtherance of the school's educational mission."[23]

The dissent challenged the majority's position by first stating that forum analysis was appropriate in this case, and should be used to determine the applicable standard.[24] Further, the dissent concluded that the university had not sufficiently established an educational interest in regulating student elections, and then, assuming arguendo that the interest had been advanced, continued by construing the campaign regulations as overbroad anyway.[25] The regulation of campaign materials by the SGA, the dissent said, "restrict[s] speech based on its content, as opposed to the time, place and manner of speech."[26] The SGA rules apply to all printed political advertising and forums for student elections both on and off campus, and thus are content-based speech discrimination, the dissent argued.[27] For that reason, the dissent contended that the proper constitutional standard to be applied is not reasonableness (applicable to such nonpublic fora as school administrative buildings), but rather a compelling state interest required when speech occurs in a traditional public forum (e.g. student union, sidewalks, streets, etc.).[28] The dissent found that the university had failed to state a sufficient educational interest in allowing the SGA to prohibit distribution and placement of campaign literature within a specific time period and proscribed area.[29] As a result, the dissent regarded the challenged campaign regulations as unconstitutional.[30]

In considering the extent to which the majority decision in *Alabama Student* affects the analytical framework of student election expenditure limits, it is important to identify what the court's rationale really is. The SGA's regulation of the campus campaigning process involved "time, place, and manner" restrictions—

20. *Id.* at 1347.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 1349–50 (Tjoflat, J., dissenting).
25. *Id.* at 1348.
26. *Id.* at 1349.
27. *Id.* at 1352.
28. *Id.*
29. The dissent pointedly noted that contrary to the factual record adopted by the majority, testimony by the university's administrative officials indicated that the university "does not even approve of the challenged [SGA election] regulations." *Id.* at 1350.
30. *Id.* at 1354.

prescribing when and where debates took place and how literature was distributed—that still allowed the student candidate to engage in political expression. This differs substantially from other cases in which the student was prevented from engaging in free speech on his own behalf by a rule that prevented candidates from any communication that cost more than the proscribed threshold.[31] The Eleventh Circuit sanctioned the former speech restrictions because the university, in allowing student elections to take place, was engaged in creating a "supervised learning experiment;" the regulations allowed the university to funnel the speech activities into a timeframe that was conducive to its academic mission while minimizing disruptive effects on campus.[32] Because these measures constituted reasonable constraints that allowed the school to allocate its resources in the best fashion, the limiting effects on free speech could be tolerated under the Constitution. The court did not at any time discuss how its deferential approach in the case to "time, place, and manner" restrictions might apply to expenditure caps, leaving the issue clothed in the uncertainty that we find today.

II. RECENT CASES

To date, only two court opinions have specifically determined an individual's free speech rights with regard to campaign expenditure limits in campaigns for collegiate student government. Both cases made it to a federal district court only on the issue of whether a preliminary injunction would be granted to enjoin the campus election restrictions applicable in each situation. Coincidentally, both claims occurred within the Ninth Circuit but resulted in different outcomes; this split has yet to be resolved by the appellate circuit court.

A. *Welker v. Cicerone*

The first suit to reach federal district court, *Welker v. Cicerone*,[33] was instituted against the student elections commission at the University of California at Irvine ("UCI") by David Welker, who, at the time in question, was a senior at UCI.[34] In his suit, he sought a preliminary injunction against the commission that would restore him to his position on the student council and expunge his election disqualification from the record.[35] The Associated Students of the University of California, Irvine ("ASUCI") is the student organization comprised of all students attending UCI who have paid the established ASUCI fee.[36] The ASUCI governing

31. *See* Flint v. Dennison, 336 F. Supp. 2d 1065 (D. Mont. 2004); Welker v. Cicerone, 174 F. Supp. 2d 1055 (C.D. Cal. 2001).

32. *Alabama Student*, 867 F.2d at 1347.

33. *Welker*, 174 F. Supp. 2d 1055.

34. *Id.* at 1060.

35. *Id.* at 1062.

36. The Preamble to the ASUCI Constitution sets forth the organization's purpose and goals:

> [T]o provide a forum for the expression of the student views and interests, encourage and maintain the freedom to pursue knowledge, encourage student academic rights and responsibilities, represent and articulate our rights to a voice in campus governance, to enhance the quality of student life, and foster recognition of the rights of students in

body consists of several branches, including a legislative council, executive cabinet, and judicial board;[37] any ASUCI student who maintains a minimum grade point average of 2.0 is eligible to run for elected office.[38] The ASUCI Elections Code ("Elections Code"), adopted by the ASUCI Legislative Council pursuant to the ASUCI Constitution, provided: "No candidate for ASUCI Legislative Council may spend more than one hundred dollars ($100) on his/her campaign."[39] The ASUCI Elections Commission consisted of six students, and it investigated all alleged violations of the election code by a student candidate.[40] If the election commission found a violation to have occurred, immediate disqualification of the candidate for the office to which the candidate was elected was to occur.[41] Appeals could be made to the judicial board, which had the authority to make a final, non-appealable ruling.[42]

Welker ran for a seat on the ASUCI Legislative Council as a senior in the spring 2001 election.[43] During the course of the campaign, Welker spent $233.40 on election posters, and was duly elected to a seat on the legislative council.[44] The elections commission, however, disqualified him from serving in his council seat after it was informed of his violation of the campaign expenditure limit.[45] Welker appealed the decision to the judicial board, which upheld the disqualification.[46] As a result, the seat to which Welker had been elected was filled by another student, and Welker went to federal court seeking a preliminary injunction because, he alleged, ASUCI had violated his First Amendment rights by its spending cap.[47]

The federal district court engaged in a review of the necessary elements Welker had to show in order for the court to issue a preliminary injunction.[48] "To obtain a preliminary injunction, a party must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in [the movant's] favor."[49] First, the district court found that there was at least a fair

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this university community . . . .

ASSOCIATED STUDENTS, UNIV. OF CAL. AT IRVING CONSTITUTION, *available at* http://www.asuci.uci.edu/documents/constitution.pdf (last visited Apr. 18, 2005).

37. ASUCI Legislative Council and Executive Cabinet members are each elected to one-year terms; students appointed by the executive cabinet to the judicial board serve two-year terms. *Welker*, 174 F. Supp. 2d at 1059.

38. *Id.*

39. *Id*. (quoting former Article XVII, § E, of the Election Code).

40. *Id*. at 1059–60.

41. *Id.* at 1060.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. The court also resolved issues of mootness (Welker's continued disqualification from the council seat served as harm to uphold standing) and sovereign immunity ("Eleventh Amendment provides no shield for state officials acting in their official capacities when plaintiffs request prospective injunctive relief"). *Id.* at 1062.

49. *Id.* (citing Diamontiney v. Borg, 918 F.2d 793, 795 (9th Cir. 1990)).

chance of success on the merits of the suit.[50] Welker argued that a forum-based analysis should be adopted in scrutinizing the constitutionality of the expenditure limit in the university's election code, and further maintained both that UCI was a limited public forum and that the expenditure limit was a content-based regulation not narrowly drawn to effectuate a compelling state interest.[51] Welker relied exclusively on the dissent in *Alabama Student*, which is discussed in Part I of this note. The *Alabama Student* dissent had "opined that a forum-based analysis is proper when reviewing a challenge to the constitutionality of a university election code."[52]

The *Welker* court refused to adopt "the view of [the] lone [*Alabama Student*] dissent [in] applying it to the facts of [the] case."[53] But the court was disinclined to embrace the reasonableness standard of scrutiny that the university claimed should apply.[54] The *Welker* court distinguished the case at bar from *Alabama Student* by noting that the expenditure limit at issue was substantially different from the regulation concerning physical activities on campus that had characterized the regulations at issue in *Alabama Student*.[55] Rather, as the court saw it, the election provision challenged by Welker implicated "the quantity and diversity of speech" instead of affecting how UCI distributed its scarce resources.[56]

The district court relied upon *Buckley v. Valeo*,[57] the "seminal 'campaign finance' case," for its constitutional standard.[58] Because *Buckley* made it clear that the freedom of speech found in the First Amendment encompasses political campaign spending, the *Welker* court held that UCI must demonstrate that its election code was adopted pursuant to a compelling interest and was narrowly tailored to achieve that interest.[59] Although *Buckley* involved the regulation of federal campaigns, it had been extended to state elections by the time *Welker* was decided,[60] and the *Welker* court saw no reason not to apply it to elections at a public university.[61]

The district court next dealt with the four compelling interests posited by UCI in maintaining the expenditure limits, finding all of them to fail the narrow tailoring threshold. First, the university argued that the provisions promoted equal participation by all students, regardless of socio-economic backgrounds, so that all individuals would have a chance to influence the election outcome.[62] The *Welker* court was unconvinced, stating that it was problematic for the government to

50. *Id.* at 1063–67.
51. *Id.* at 1063.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. 424 U.S. 1 (1976) (per curiam).
58. *Welker*, 174 F. Supp. 2d. at 1064.
59. *Id.*
60. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386 (2000); Suster v. Marshall, 149 F.3d 523, 528 n.3 (6th Cir. 1998).
61. *Welker*, 174 F. Supp. 2d at 1064–65.
62. *Id.* at 1065.

"'restrict the speech of some elements of our society in order to enhance the relative voice of others.'"[63] A second compelling interest put forth by UCI was encouraging academic pursuits.[64] As with the first interest, however, the court found the argument lacking; because the university already required student candidates running for legislative council to maintain a minimum grade point average for eligibility, the regulation was not narrowly tailored to meet the interest.[65] Third, UCI argued that the expenditure limit decreased the influence of private corporate sponsors upon candidates.[66] But the court identified alternate avenues outside of monetary disbursements that could cause a candidate to become beholden to a corporation (e.g. donation of campaign materials, food, office space, etc.); therefore, the court said, the "$100 expenditure restriction will not stem the potential of undue corporate influence over candidates."[67] The last interest claimed by the university was an increase in candidates' creativity.[68] UCI argued that by limiting how much a candidate could spend during the course of the campaign, the university was encouraging students to become more inventive and original.[69] The court saw no direct correlation between spending caps and creativity, noting that the opposite was more likely to be true (i.e. creativity increases as the money that a candidate has to spend on various channels of communication increases).[70] Because the university failed to meet its burden under strict scrutiny by establishing that its election regulation rose to the level of a compelling interest and did not achieve its stated objectives through narrowly tailored means, the court concluded that Welker suffered a loss of First Amendment freedoms at the hands of the university and granted his request for an injunction ordering his reinstatement to the legislative council.[71]

B. *Flint v. Dennison*

The second case involving judicial scrutiny of an expenditure restriction in a campus election for student office is *Flint v. Dennison*.[72] As in *Welker*, the student plaintiff, Aaron Flint, challenged campaign finance regulations adopted by a student government association, and sought a preliminary injunction against the University of Montana ("UM") and the Associated Students of the University of Montana ("ASUM").[73] During the 2003 elections, plaintiff ran for President of

63. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 49 (1976)).
64. *Id.* at 1065–66.
65. *Id.* at 1066.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 1066–67.
72. 336 F. Supp. 2d 1065 (D. Mont. 2004).
73. *See* ASUM, *ASUM Bylaws*, Art. V, § 2, *available at* http://www2.umt.edu/asum/government/bylaws.htm (last updated Apr. 6, 2005) [hereinafter ASUM Bylaws] ("Campaign expenditures, including donations, by each candidate or write-in candidate shall be limited to . . . . $100, with or without a primary election").

ASUM and was elected by the student body.[74] Flint and his running mate spent roughly $300 in the course of that election, despite campaign rules that limited their expenditures to only $175 for president/vice-president teams.[75] As a result, Flint was censured for his violation of the election bylaws.[76] In 2004, Flint ran for office to the ASUM Senate, this time spending $214.69, more than double the $100 limit for senate races.[77] Upon disclosure of the campaign breach, the ASUM Senate voted to deny Flint his seat pursuant to its bylaws.[78] Flint sued to regain his seat on the ASUM Senate.

The federal district court began its analysis of whether to grant Flint's request for a preliminary injunction by stating that Flint had to "show (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips in its favor."[79] In considering the first potential step of Flint's likelihood of success on the merits and irreparable injury, the court reasoned that the outcome of such an inquiry would "[depend] primarily on the degree of scrutiny with which the Court assesses the constitutionality of ASUM's spending limits."[80] Flint urged the court to apply strict scrutiny to the spending caps using *Buckley* as its guide,[81] whereas UM argued that as an academic institution, a deferential standard of review was appropriate in examining its actions.[82] The court sided with UM and rooted its decision in the fact that the United States Supreme Court has "acknowledged the right of [educational institutions] to ensure the quality and availability of educational opportunities, even where the exercise of that right results in the exclusion of First Amendment activities."[83] Because the purpose of UM in instituting campus elections was to provide additional educational opportunities to its students, rather than to fulfill a democratic requirement that drives state and national political elections, the court distinguished *Buckley's* affirmation of political speech rights from a university's regulation of student government.[84] It

74. *Flint*, 336 F. Supp. 2d at 1067.

75. *Id.*

76. *Id.*

77. *Id.*

78. ASUM Bylaws, *supra* note 73, at Art. V, § 5, prescribes: "Any candidate who violates any of these rules may be barred from candidacy and/or denied from taking office, as recommended by the Elections Committee, and approved by a two-thirds (2/3) majority vote of the Senate. This rule is not suspendable."

79. *Flint*, 336 F. Supp. 2d at 1067 (citing Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir. 1998)).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1068. The district court relied upon *Widmar v. Vincent*, 454 U.S. 263 (1981), *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), as its basis to apply a deferential standard of review to UM's actions. *Widmar* and *Tinker*, however, both held that the students' free speech rights had been violated by the schools' actions; additionally, it should be noted that *Hazelwood* and *Tinker* are both K-12 cases, rather than college or university-based cases.

84. The court's adoption of a reasonableness standard was based on its interpretation of the Supreme Court's view that a court: "should honor the traditional 'reluctance to trench on the prerogatives of state and local educational institutions.'" *Id.* at 1069 (quoting Alabama Student

refused to apply *Welker* (which had found that a university's regulation of student campaign expenditures infringed upon the First Amendment) and instead chose to rely on the analysis in *Alabama Student* (which *Welker* had rejected).[85] The district court held that *Alabama Student's* precedential value was not about the allocation of scarce resources that *Welker* claimed it to be based upon, but rather stood for the "proposition 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 of the academic environment."[86] Using a reasonableness standard, the court concluded that Flint had a low probability of success on the merits.[87] Because ASUM was organized to promote educational purposes,[88] the expenditure limits in the ASUM bylaws struck the court as "a reasonable attempt to maintain equal access to pedagogical benefits of ASUM participation throughout the student body."[89]

The alternate way in which Flint could obtain a preliminary injunction was to demonstrate to the court that there was a "significant likelihood of irreparable injury or show that the balance of hardships tips sharply in his favor."[90] Here, the court found that any hardship claimed by Flint was considerably reduced by his delay in seeking an injunction.[91] Flint, the court said, could have challenged the regulations in 2003 after he was censured for violating the expenditure limit in his presidential race; rather, he took the chance of being disqualified or receiving other punishment from the ASUM Senate when he again knowingly broke the election rules in overspending for his 2004 senate campaign.[92] The court concluded that Flint's hardship in being denied his senate seat was of less importance when balanced against the hardship ASUM would suffer "in its ability to enforce its election regulations."[93] Therefore, Flint's motion for a preliminary injunction was denied.[94]

The district court later issued a second ruling in which it granted the university's motion for summary judgment.[95] The court elaborated on its previous

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Party v. Student Gov't Ass'n, 867 F.2d at 1344, 1347 (11th Cir. 1989)) (internal citation omitted). The *Flint* Court also relied on the fact that "[t]he basis for distinction between school elections and government elections . . . is one of purpose. '[T]his is a university, whose primary purpose is *education*, not electioneering.'" *Id.* at 1069 (quoting *Alabama Student*, 867 F.2d at 1346) (internal citation omitted).

85. *Id.* at 1068.

86. *Id.*

87. *Id.* at 1070.

88. The ASUM Constitution reads: "ASUM shall be the representative body of the members of the Association, organized exclusively for educational and non-profit purposes. The primary responsibility of the Association is to serve as an advocate for the general welfare of the students." ASUM, ASUM Constitution, Art. II, § 1, *available at* http://www2.umt.edu/asum/government/constitution.htm (last updated July 28, 2004)

89. *Flint*, 336 F. Supp. 2d at 1070.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. ___ F. Supp. 2d ___ (No. CV 04-85-M-DWM, 2005 WL 701049 (D. Mont., Mar. 28,

opinion by holding that the existence of UM's student government was strictly an educational opportunity.[96] Drawing upon *Alabama Student*, *Hazelwood*, *Bethel*, and *Tinker*, the court elucidated the following controlling principle: "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 of the academic environment."[97] Therefore, a reasonableness standard controlled the analysis, and the university could impose expenditure limits to maintain the learning function of student elections.[98]

III. DEFERENCE GRANTED TO EDUCATIONAL INSTITUTIONS

It is quite true that public colleges and universities have been granted considerable leeway by the courts in carrying out their educational missions. For example, the Supreme Court held in *Regents of the University of Michigan v. Ewing*[99] that a university's decision to dismiss a student from a program of study after the student failed an exam required to continue in the program was a reasonable exercise of professional academic judgment that did not substantially depart from accepted academic norms. The Court expressed great hesitation at interfering in areas that inherently encompass the essence of academic instruction.[100] At times, certain constitutional rights (such as students' free speech rights) may constitutionally be impinged by an educational institution's decision or practice, even where most other state actors must always abide by the constraints of the First Amendment.[101] The Supreme Court has guided the development of this "doctrine of deference" to some extent, but the exact limits of that deference are unclear and imprecise, leading to inconsistent outcomes and application among state courts and lower federal courts. *Tinker v. Des Moines Independent Community School District*[102] established that students do possess some First Amendment rights that cannot be abridged by school administrators absent strict scrutiny, even where judicial deference might seem applicable.[103] *Bethel School*

2005)).

96. *Id.* at *4.

97. *Id.*

98. Id. at *5. Additionally, the court approved of the university's argument that spending limits were necessary to ensure access to the educational benefits ASUM provided that "if 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." *Id.* at *6.

99. 474 U.S. 214 (1985).

100. *Id.* at 225 ("When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment"). *See also* Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003) (holding that the University of Michigan Law School's desire to achieve diverse student body was compelling interest grounded in academic freedom).

101. *See, e.g.*, Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 215 (2000); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

102. 393 U.S. 503 (1969).

103. *Id.* at 511 ("[Students] are possessed of fundamental rights which the State must respect . . . . In the absence of a specific showing of constitutionally valid reasons to regulate their

District No. 403 v. Fraser[104] permits public schools to censor and punish offensive student speech that causes disruption to the school's operations or is detrimental to the values it is inculcating.[105] But two important decisions by the Court within the past two decades have left the issues of academic deference and reasonableness in flux—*Hazelwood School District v. Kuhlmeier*[106] addressed the speech rights of elementary and secondary school students,[107] while *Board of Regents of the University of Wisconsin System v. Southworth*[108] dealt with the proper treatment of free speech on college campuses.[109]

A. *Tinker*

The Supreme Court constructed a roadblock to a total sweeping away of free speech rights for students in public school when it handed down its decision in *Tinker v. Des Moines Independent Community School District.*[110] At issue was the conduct of several students who were suspended for protesting the Vietnam War by wearing black armbands to school, after school officials had adopted a policy banning the wearing of armbands.[111] The Court had to grapple with the intersecting problem "where students in the exercise of First Amendment rights collide with the rules of the school authorities."[112] The *Tinker* Court held that the student's display was a passive expression of speech that did not cause any interference with the school's operation.[113] Because students are "persons" under the Constitution, a school must respect their rights to expression absent a permissible reason to regulate their speech.[114] Only if students' conduct in exercising their free speech rights cause a "material or substantial" disruption to a school's pedagogical attempts will the Constitution allow limits to be placed upon the students' expression.[115]

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speech, students are entitled to freedom of expression of their views.").

104. 478 U.S. 675 (1986).

105. *Id.* at 685 ("The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.").

106. 484 U.S. 260 (1988).

107. *Id.* at 262.

108. 529 U.S. 217 (2000).

109. *Id.* at 220–21.

110. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

111. *Id.* at 504.

112. *Id.* at 507.

113. *Id.* at 508.

114. The Court noted:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. . . . In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Id. at 511.

115. The *Tinker* Court stated:

B. *Bethel*

The Supreme Court upheld a high school's decision to suspend a student for inappropriate remarks given at a student assembly in *Bethel School District No. 403 v. Fraser*.[116] During a speech nominating a fellow student for school elective office, Fraser used lewd and sexually graphic remarks to describe the candidate. [117] As a result, the school district suspended Fraser for three days and removed him from a list of possible speakers at the high school commencement ceremony.[118] The Court distinguished the case at hand from other cases involving offensive political speech, stating that "[i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school."[119] Because the speech was not essentially political and reached an audience of children, the school board possessed the right, according to the Court, to impose sanctions in order to uphold the fundamental values of the school's educational purpose.[120]

C. *Hazelwood*

The notion that courts should defer to public K-12 institutions when the latter are regulating speech in order to carry out their primary mission was firmly established in *Hazelwood School District v. Kuhlmeier*.[121] In that case, high school students who were enrolled in a journalism class at the school wrote and edited the school newspaper, which was published about every three weeks and

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> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. . . . The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom. If a regulation were adopted by school officials forbidding . . . expression by any student . . . anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.

Id. at 513.

116. 478 U.S. 675 (1986).

117. *Id.* at 677–78.

118. *Id.* at 678–79.

119. *Id.* at 682.

120. The Court noted:

> The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. . . . Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.

Id. at 685–86.

121. 484 U.S. 260 (1988).

distributed to about 4,500 students, school personnel, and community members.[122] Prior to publication, proofs of the articles and layout were submitted to the principal for approval.[123] At issue in the case was the principal's censorship of two student articles: one dealing with student pregnancy at the school, the other about the effect of divorce on students at the school.[124] As to the first story, the principal believed that even with the "'[the false names used] to keep the identity of [the female students] a secret,' the pregnant students still might be identifiable from the text . . . . [and] that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school."[125] Likewise, the principal feared that the second story's use of quotes from a student disparaging her divorcing dad was unfair since no opportunity for the father to respond was available.[126] For those reasons, the newspaper was sent to publication without these two articles appearing in print.[127] Several journalism students sued, claiming their First Amendment rights had been violated by the school omitting the written pieces from the paper.[128] The district court held that no constitutional violation had occurred;[129] the circuit court reversed that decision,[130] and certiorari was sought from the Supreme Court, which the Court granted.

In an opinion written by Justice White, and joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Scalia, the Supreme Court ruled that on occasion, school administrative officials need to have the flexibility to monitor the speech that occurs within their educational confines.[131] The majority was careful to emphasize that "students in the public schools do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate;'"[132] the Court said, however, that speech that substantially interferes with the goal of education or encroaches upon the right of other students relegates that expression to a realm of principal/teacher supervision.[133] School officials would now have the duty of determining what speech was inappropriate when it occurred under the auspices of a school setting; although that decision could be challenged under the First

122. *Id.* at 262–63.

123. *Id.* at 263.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 264.

128. *Id.*

129. *Id.* at 264–65 (holding that it was permissible for school officials to restrict student speech that is strongly related to an educational purpose).

130. *Id.* at 265–66 (holding that newspaper was a public forum and therefore censorship was inappropriate absent circumstances that met defined criteria for an exception).

131. *Id.* at 266.

132. *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

133. The Court found adequate support for its position in past cases: "We have nonetheless recognized that the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings.'" *Id.* (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)); "[Students' freedom of speech] must be 'applied in light of the special characteristics of the school environment.'" *Id.* (quoting *Tinker*, 393 U.S. at 506); and "A school need not tolerate student speech that is inconsistent with its "basic educational mission." *Id.* (citing *Bethel*, 478 U.S. at 685).

Amendment, federal courts would accord the school's judgment greater regard than had been previously recognized.[134]

The Court based its decision on the fact that the school newspaper at issue did not constitute a public forum. "School facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' . . . or by some segment of the public, such as student organizations."[135] As represented by the board rules and curriculum guide of the Hazelwood School District, school policy regarded the newspaper as part of its educational program and as a classroom activity by journalism students; thus, the Court found that there was no intent by the public school to treat the publication as a public forum.[136] Any student control over the newspaper's content was limited to developing leadership skills that the school hoped to foster.[137] Because school officials "'reserved the forum for its intended purpose,' as a supervised learning experience for journalism students . . . . [those officials] were entitled to regulate the contents of [the newspaper] in any reasonable manner."[138]

Using forum analysis, the majority moved on to consider whether the First Amendment required a school to promote certain student speech. School activities such as newspapers, theater productions, and the like, the Court said, are expressive activities that some parents, students, and community members might regard as conveying school approval of the content in question.[139] To combat this problem of perception:

> [e]ducators are entitled to exercise greater control over this [form] of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[140]

If the school is to be responsible for producing the speech as part of its goal of educating students, it is important that the institution have the ability to check speech that is detrimental or in opposition to its ultimate purpose.[141]

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134. *Id.* at 267 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board, rather than with the federal courts.") (internal citations omitted).

135. *Id.* (internal citations omitted).

136. *Id.* at 270.

137. *Id.*

138. *Id.* (internal citations omitted).

139. *Id.* at 271 ("School-sponsored publications, theatrical productions, and other express activities [are ones] that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.").

140. *Id.*

141. For example, the Court noted that "a school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the 'shared values of a civilized social order.'" *Id.* at 272 (internal citations omitted). Otherwise, a school would be expressing sentiments that posed diametrical suggestions to the educational goals it is working to inculcate within its students.

The Court acknowledged (under its traditional jurisprudence) that when there is no "valid educational purpose" behind the censoring of student expressive activity, the full force of the First Amendment applies to protect the students' constitutional rights, and courts may involve themselves in the vindication of those rights.[142] But when an activity has been adopted as a means to fulfill an educational goal, deference to a school administrator is appropriate. In this case, "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[143] The Court concluded that the principal in *Hazelwood* had acted reasonably in omitting the articles in question out of concerns of privacy and suitability; therefore, the Court said, there was no violation of any student's First Amendment rights.[144]

The dissent in *Hazelwood*, while recognizing the difficult role public educators occupy and the numerous challenges they face in carrying out their duties, balked at giving school administrators too much deference. When the competing interests of free speech and pedagogy collide, the dissent said, student expression must be accommodated even when incompatible with the message the school is attempting to inculcate.[145] How *Hazelwood* should apply to colleges and universities will be discussed in Part V.B.

D. *Southworth*

The Supreme Court tackled the issue of deference to college and university action when it considered the question of student activity fees in *Board of Regents of the University of Wisconsin System v. Southworth*.[146] In that case, several students challenged the university's mandatory nonrefundable activity fee used to support various campus services and extracurricular student activities, including organizations claiming to be engaging in political and ideological speech. The university's student government association disbursed the allocable portion of the collected fees to qualified student groups that registered under the applicable

142. *Id.* at 273 ("It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' as to require judicial intervention to protect students' constitutional rights.") (internal citations omitted).

143. *Id.*

144. Legal commentators have noted that it is unclear after *Hazelwood* whether its central holding will be extended to public universities. *See, e.g.*, Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case Against Extending* Hazelwood *to College Campuses*, 150 U. PA. L. REV. 1915, 1917 (2002) ("The Supreme Court, indeed, has not foreclosed the possibility of extending *Hazelwood* to colleges. In *Hazelwood*, the Court explicitly left open that possibility, stating 'We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.'" (internal citation omitted)).

145. The dissent opined that "public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 280 (1988) (Brennan, J., dissenting).

146. 529 U.S. 217 (2000).

guidelines.[147] The district and appellate court both found that the fee program constituted compelled speech and thus violated the First Amendment;[148] the students sought certiorari, which the Court granted.

The Court's majority opinion, written by Justice Kennedy, and joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Thomas, and Ginsburg, began its analysis by analogizing the claims of the students regarding the fee program to past cases involving members of unions and bar associations required to fund objectionable speech.[149] The Court quickly decided, however, that prior precedent in this area was neither "applicable nor workable in the context of extracurricular student speech at a university."[150] The reason the majority distinguished college students from members of professional and occupational organizations was due to the immense range of speech existing on college campuses.[151] While courts can attempt to define what type of speech was appropriate for a labor union or bar association to engage in without committing its members to supporting expression that conflicted with their personal beliefs, the public university setting posed an impossible arena in which to set a manageable standard.[152] It might seem then that a possible solution would be to allow students to indicate which organizations they wanted their fees to support; but doing so, the Court said, would undoubtedly create an administrative nightmare that would probably undo the university's goal of "stimulat[ing] the whole universe of speech and ideas" on campus.[153]

Higher educational institutions often seek to "facilitate a wide range of speech"[154] as part of the college experience, the Court said. In recognition of this lofty ideal to which colleges and universities aspire, the Court held that courts should ordinarily defer to the judgment of the university regarding mandatory student fees:

> The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.[155]

While the university is, of course, not free to abrogate the constitutional speech rights of students,[156] the Court stated that as long as the institution follows the principle of viewpoint-neutrality, reasonable action by administrative officials to

147. *Id*. at 225–26.

148. *Id.* at 221.

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

150. *Southworth*, 529 U.S. at 230.

151. *Id.* at 231.

152. *Id.*

153. *Id.* at 232.

154. *Id.* at 231.

155. *Id.* at 233.

156. The *Southworth* majority stated: "The University must provide some protection to its students' First Amendment interests . . . . The proper measure . . . is the requirement of viewpoint neutrality in the allocation of funding support." *Id.*

control access to or quantity of expression on campus (e.g. compulsion through mandatory fees) is permissible when done in the name of education.[157] Thus, in this case, as long as viewpoint neutrality existed in the allocation process, students could be required to pay fees to the university without endangering their First Amendment rights—even if the funds eventually ended up going to organizations that disseminated speech to which some students objected.[158]

The three concurring members of the Court outlined an even broader position of deference that they would grant to public universities in this situation.[159] Drawing upon the "academic freedom" cases decided by the Supreme Court,[160] the concurrence noted that "autonomous decisionmaking by the academy itself" was an essential component of free-flowing speech in the marketplace.[161] While the concurring opinion refused to go so far as to recognize an immunity that attached to the judgment of school officials in discharging their educational mission, it considered deference an important analytical component in First Amendment claims of this type.[162]

IV. CAMPAIGN SPENDING

A. *Buckley*

The seminal Supreme Court decision dealing with campaign finance

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157. The majority maintained that if "the University reaches [the conclusion that a broad range of speech is necessary], it is entitled to impose a mandatory fee to sustain an open dialogue to these ends. The University must provide some protection to its students' First Amendment rights, however . . . . [by following the] viewpoint neutrality [principle]." *Id.* On the other hand, the Court provided a warning as to what rules it would apply to speech outside of the "educational mission" box:

> Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its faculty, are subject to First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different.

Id. at 234–35.

158. *Id.* at 233–34.

159. Justices Souter, Stevens, and Breyer joined in concurring with the majority's opinion. *Id.* at 1357.

160. *See, e.g.*, Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

161. *Southworth*, 529 U.S. at 237 (Souter, J., concurring). Justice Souter, who authored the concurring opinion, wrote: "Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach." *Id.*

162. The concurrence opined that "we have never held that universities lie entirely beyond the reach of students' First Amendment rights." *Id.* at 239. It continued, "[a]s to that freedom and university autonomy, then, it is enough to say that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees." *Id.* A similar sentiment seems to have played an important role in the outcome of the Court's recent decisions regarding affirmative action policies in higher education. *See* Grutter v. Bollinger, 539 U.S. 306, 324, 329 (2003).

regulations, and specifically expenditure caps, took place almost three decades ago in *Buckley v. Valeo*.[163] The challenge brought before the Court involved the constitutionality of several provisions in the Federal Election Campaign Act of 1971 ("FECA").[164] Of particular importance was the manner in which FECA treated contributions by individuals to political campaigns versus how the campaigns in turn spent their money. The legislation at issue placed restrictions on the amount individuals could contribute to candidates and political organizations (no more than $25,000 in a single year or more than $1,000 to any single candidate); limited independent expenditures by individuals or groups to $1,000 annually; required public disclosure and reporting of contributions and expenditures that rose above a certain threshold; and prescribed limits for campaign spending by candidates for federal office.[165] In a per curiam opinion, the Supreme Court set out the boundaries of constitutional protection afforded to various types of political contributions and expenditures.

The opinion started its analysis of the federal legislation by recognizing that political expression is an integral component of free speech.[166] The history and purpose of the First Amendment reflect a strong desire to "protect the free discussion of governmental affairs . . . . [and] the ability of the citizenry to make informed choices among candidates for office . . . ."[167] The problem the Court faced was to determine the correct legal standard that applied to communication that was a combination of both speech and conduct.[168] Part of the government's rationale for FECA was to "level the playing field" among candidates for federal office by instituting spending and contribution limits; the government argued that regulation was directed at the "conduct" of citizens giving money to candidates (contributions) and also of candidates spending their own money on their own campaigns (expenditures), rather than being directed at an attempt to get at the "speech" element of supporting particular political ideas expressed by candidates.[169] The Court, however, refused to accept this rationale as legitimate, stating:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating in today's mass

163. 424 U.S. 1 (1976).

164. Pub. L. No. 92-225, 86 Stat. 3 (1971).

165. *Buckley*, 424 U.S. at 7.

166. *Id.* at 14 ("The First Amendment affords the broadest protection to such political expression in order to 'assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (internal citations omitted).

167. *Id.* at 14–15.

168. Restrictions on expressive conduct were approved by the Court in *United States v. O'Brien*, 391 U.S. 367 (1968). In *Buckley*, the appellees argued that the Act regulated conduct and thus any effect on speech was incidental. The Court found the claim without merit and refused to apply *O'Brien*. *Buckley*, 424 U.S. at 16.

169. *Id.* at 25.

society requires the expenditure of money.[170]

The Court treated expenditures as if they were speech by the candidate and treated contributions as if they were speech by the donor. The Court upheld FECA's limit on the amount an individual may contribute to a specific candidate.[171] Although the contribution size may be curtailed by the government with respect to the amount of the donation, the speech still exists (regardless of the actual amount given). The Court thought that having the symbolic ability to give some money to a specific campaign was sufficient protection of a donor's right to free political expression and association,[172] but the Constitution's speech guarantee did not prevent Congress from limiting the total amount an individual could give.[173]

In contrast, when a candidate "speaks" through spending his own money, his statements are truncated if they are limited to a maximum expenditure amount.[174] Expenditures directly determine the quantity of political speech, and allowing the government to decide indirectly which speech is proper by capping how much can be spent is squarely opposite to the intentions of the First Amendment.[175] Ultimately, the Court believed that the distinction between regulation of campaign expenditures and contributions rested on the idea that "*expenditure* ceilings impose significantly more severe restrictions on protected freedoms of political expression and associations than do its limitations on financial *contributions*."[176]

The opinion in *Buckley* also reached the notion of combating the negative public perception resulting from the then-current financing of federal campaigns. The government claimed that its primary interest in the legislation was to prevent

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170. *Id.* at 19.

171. *Id.* at 29.

172. The Court distinguished its contribution rationale by stating:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount . . . [a person may contribute to a candidate] entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.

Id. at 21.

173. The Court stated that a spending limitation involved "little direct restraint on [a person's] political communication, for it permits the symbolic expression of support evidenced by a contribution . . . . the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.*

174. *Id.* at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."). *See also* Fed. Election Comm'n v. Beaumont, 539 U.S. 146, 161 (2003) (noting that "while contributions may result in political expression if spent by a candidate or an association . . . the transformation of contributions into political debate involves speech by someone other than the contributor") (quoting *Buckley*, 424 U.S. at 20–21).

175. *Buckley*, 424 U.S. at 57 ("The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise.").

176. 424 U.S. at 23 (emphasis added).

actual and apparent corruption of the political process.[177] On the expenditure side, the Court flatly denied that such an interest was achieved by the regulation laid out in FECA and instead held that it "heavily burden[ed] core First Amendment expression."[178] Allowing the government to dictate how much an individual can spend of his personal financial wealth to advance his own candidacy, the Court said, directly reduces his right to engage in political speech.[179] Instead of creating an unequal influence on the election, the Court held that "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures" that Congress was attempting to prevent.[180]

Since the time *Buckley* was handed down, the Supreme Court has reaffirmed the case's central holdings on numerous occasions. In *Federal Election Commission v. Beaumont*,[181] for example, the Court restated that "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression."[182] On the other hand, the Court has continued to recognize that "limits on political expenditures deserve closer scrutiny than restrictions on political contributions . . . . [as] [r]estraints on expenditures generally curb more expressive and associational activity than limits on contributions do."[183] The line drawn between permissible limits on contributions versus required strict scrutiny for expenditure restrictions continues to hold on in the Court's jurisprudence.

In its most recent exposition of campaign finance expenditures limits, *McConnell v. Federal Election Commission*,[184] the Court allowed the government to impose restrictions on the amounts that outside political groups (i.e. political action committees ("PACs")) can spend to influence the election of a certain candidate or issue through coordinated independent expenditures.[185] The *McConnell* majority (over a vigorous dissent) sanctioned the campaign expenditures impositions on the basis that the "soft money" the law was aimed at regulating was similar to the corruption rationale that *Buckley* upheld for contribution limits.[186] The majority, however, did not disturb *Buckley's* long-standing principle that spending by a candidate cannot be restricted under the First Amendment unless the law survives strict scrutiny.

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177. *See id.* at 25.

178. *Id.* at 48.

179. *Id.* at 52–53.

180. *Id.* at 53.

181. 539 U.S. 146 (2003).

182. *Id.* at 161.

183. 533 U.S. 431, 440 (2001) (internal citations omitted). *See* Nixon v. Shrink Mo Gov't PAC, 528 U.S. 377, 386–88 (2000); Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 610, 614–15 (1996); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259–60 (1986).

184. 540 U.S. 93 (2003).

185. *Id.* at 706.

186. *Id.*

V. DISCUSSION

A. Political Speech

Campaigning for an elective office in our nation traditionally involves rhetoric by a candidate telling the electorate why the candidate believes he or she is worthy of office; this elemental practice should be governed by uniform standards. Despite the deference that courts owe academic decisions, just because a student decides to run for student government and is elected on a university campus by his peers does not mean that he should be treated differently by the law, especially when it comes to such fundamental liberty interests as free speech. *Buckley* made it clear that on the federal level, any restriction on candidates' ability to spend funds (either their own or those collected subject to contribution limits) in an effort to get elected abridged their First Amendment right to engage in unhindered political expression.[187] This broad construction of an individual's right to free speech has been expanded to cover state political elections. Although the issue in *Nixon v. Shrink Missouri Government PAC*[188] was the constitutionality of state campaign finance laws that limited contributions to state candidates, the U.S. Supreme Court held that the *Buckley* rationale must be applied at the state level as well as the federal level.[189] Based upon this natural extension of First Amendment protection present in *Nixon*, *Welker* applied *Buckley's* strict scrutiny standard to the student elections held at UCI.[190] I will argue that the *Welker* court's approach to resolving conflicts between academic deference and students' First Amendment rights is the correct approach.

Student elections are an exercise in limited self-government and hence involve concerns similar to those at the federal or state level. Professor Kevin Saunders has noted that "[p]olitical speech is at the core [of democracy and self-expression] and deserves the strongest of protection."[191] Just as expenditure limits at the state and federal levels adversely impact a candidate's right to political expression, students too are hindered by their inability to expend their own resources beyond a certain threshold in attracting voters.[192] Student candidates with low name-

187. Buckley v. Valeo, 424 U.S. 1, 58–59 (1979).

188. 528 U.S. 377 (2000). *See also* Suster v. Marshall, 149 F.3d 523, 528 n.3 (6th Cir. 1998) (rejecting defendant's argument that the *Buckley* standard should not apply to expenditure limit in state election).

189. Justice Souter, writing for the majority in *Nixon*, stated: "We hold *Buckley* to be authority for comparable state regulation . . . ." *Nixon*, 528 U.S. at 382. He continued, "[t]here is no reason in logic or evidence to doubt the sufficiency of *Buckley* to govern this case in support of the Missouri statute." *Id.* at 397–98.

190. Welker v. Cicerone, 174 F. Supp. 2d 1055, 1064–65 (C.D. Cal. 2001). Judge Timlin held: "The court sees no reason to distinguish between applying *Buckley* to state political elections and political elections at state universities. Thus, *Buckley's* strict scrutiny is the proper standard to apply to the expenditure restriction at bar." *Id.* at 1065.

191. KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 21 (2003).

192. Campaign finance scholar Bradley A. Smith (now an FEC commissioner) has written: "[S]peech costs money. If the government can regulate or limit expenditures to fund speech, it can effectively regulate or limit the corresponding speech." Bradley A. Smith, UNFREE SPEECH:

recognition or facing popular incumbents are at a disadvantage if they are limited in the amount of money they can spend to achieve a level of presence at which they can compete for office.[193] Professor Bradley Smith has written that "voters' understanding of issues increases with the quantity of campaign information received . . . [but] spending less on campaigns will result in less public awareness and understanding . . . ."[194] It is vitally important that student candidates have the ability to communicate their message to the campus body in order to compete for votes.[195] The speech rights at issue in student elections are not so different from those of a state or federal candidate in campaigning for public office as to justify a wholly different constitutional norm for them. Students elected to campus office make substantive decisions that have a genuine consequence for certain aspects of student life, and the money spent in their effort to get elected has a real effect on the number of students who vote for them. If the First Amendment dictates strict scrutiny of expenditure limits in regular elections, there is no good reason why these students do not deserve the same speech protection. Although *Southworth*, in principle, allows universities to require students to pay fees to support campus activities with which the students may not agree, collection of fees is fundamentally different from spending money in a campaign. Paying a fee to a college in order to fund a school newspaper is not a voluntary act by the student compelled to pay the fee, whereas the student seeking campus office spend his or her own money voluntarily, and the students who contribute to his or her campaign do that voluntarily as well.

In *Buckley*, the Court accepted as a compelling governmental interest—which justified limits on contributions to candidates—the prevention of both actual corruption and the appearance of corruption.[196] With regard to the expenditure limits, however, a majority of the justices concluded that the government's attempt at avoiding corruption was not narrowly tailored.[197] The corruption rationale that was given some approval in *Buckley* and other more recent campaign finance regulation cases[198] is a weak ground for schools to base spending caps on student candidates. Because the Constitution forbids the state from placing monetary

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THE FOLLY OF CAMPAIGN FINANCE REFORM 4 (2003).

193. Professor Smith argues that "the positive effect of added spending is significantly greater for challengers than for incumbents" as overall spending caps hurt a challenger's ability to offset the advantages of incumbency. BRADLEY A. SMITH, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1074 (1996).

194. *Id.* at 1060.

195. The essential point is to be able to get your message out to others, even though it may not ultimately win the day. *See* Michael Malbin, *Most GOP Winners Spent Enough Money to Reach Voters*, POL. FIN. & LOBBY REP., Jan. 11, 1995, at 9 ("[H]aving money means having the ability to be heard; it does not mean the voters will like what they hear").

196. Buckley v. Valeo, 424 U.S. 1, 29 (1976) (stating that "the weighty interests served by [the law] . . . are sufficient to justify the limited effect upon First Amendment freedoms . . . .").

197. *Id.* at 55 (reiterating the belief that "no governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by [the] campaign expenditure limitations").

198. *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).

constraints on a candidate's ability to spread his or her political message, it should also bar public universities from adopting the same regulations for students. A student candidate could easily get around the expenditure prohibition by having supporters provide non-monetary backing;[199] moreover, if the money is coming from a candidate's own pocket, the corruption argument falls on it face.[200] Thus, even if the university could legitimately argue that it was attempting to prevent donors from influencing a candidate, a spending limit is not narrowly tailored to achieve the institution's interest in preventing any "indebtedness" a student has to particular groups or individuals.

Likewise, the *Buckley* Court held that the state's interest in equalizing the financial resources of candidates so as to impose a "level-playing field" upon which to compete for votes was not compelling, but was rather an illegitimate pursuit by the government.[201] In the realm of campus elections, barring all candidates from spending more than $100 on their election efforts would hardly "equalize" students in communicating their political message and attracting voters. Students can receive endorsements or non-monetary support that potentially could have a far greater effect on the election outcome than what is attributable to financial expenditures alone. As the Court has reaffirmed, "political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."[202]

Professor Charles Fried has distinguished "time, place, and manner" regulations from speech-silencing on the ground that the former is a content-neutral attempt to give speakers the right to express a message while also protecting individuals who prefer not to listen from the message being communicated; the autonomy of each individual is preserved.[203] Campaign expenditure restrictions limit a student's

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199. For example, the *Welker* court noted that "private sponsors could . . . [donate] campaign materials, food, utility services, telephone services, office space, etc., to candidates" that would create the same problem of undue influence. Welker v. Cicerone, 174 F. Supp. 2d 1055, 1066 (C.D. Cal. 2001).

200. Indeed, *Buckley* specifically held that the "use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks" present in campaigning. *Buckley*, 424 U.S. at 53.

201. *Id.* at 54 ("[T]he First Amendment simply cannot tolerate . . . restriction upon the freedom of a candidate to speak without legislative limit [even based upon equality concerns] on behalf of his own candidacy").

202. Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986).

203. Professor Fried asserts that "time, place, and manner regulations, which are content-neutral, are not an illiberal assertion of authority, but rather a good faith attempt by the liberal state to adjust zones of privacy without regard to what will be pursued within those zones." Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 237 (Geoffrey Stone, et al. eds.) (1992). Fried describes the role of the First Amendment as:

> The Constitution protects speech primarily against state *silencing* of private speech because silencing is distinctive. Silencing invokes the power of the state against both speaker and audience. It stops both mouth and ears. It prevents a transaction between citizens. Classic free speech law privileges speech transactions between citizens as none of the state's business . . . . [B]y silencing, the state is asking us to acquiesce in sovereignty over our minds, our rational capacities.

Id. at 236 (emphasis original).

ability to reach fellow students who might wish to hear the message being conveyed. A historical approach to the First Amendment informs us that the Framers' worry over state suppression of political speech was the central motivating factor in adopting this component of the Bill of Rights.[204] If this concern remains true today, it is anomalous for courts to single out college students as unworthy recipients of First Amendment protection when they are engaged in political speech of their own in a campus election.

While the Supreme Court has countenanced further campaign finance reforms that have eroded some of the protections afforded political spending since *Buckley* was decided,[205] its adherence to a standard of strict scrutiny for candidate expenditure limits has not wavered.[206] Even in the area of political contributions, where the Court has employed a watered down standard of review to uphold congressional action that imposes limits on an individual's free speech rights, the Court has nonetheless specifically recognized the First Amendment rights of minors to engage in speech by making political donations.[207] If even children have a constitutional right to participate in the political system by donating to candidates and national parties on the contribution side, the justification for finding expenditure caps a violation of an *adult* college student's free speech rights becomes all the more compelling.

B. Educational Prerogative

Although the *Hazelwood* Court specifically refrained from deciding whether the judicial deference courts gave to high school principals would extend to university officials,[208] there are several reasons that counsel against expansion.[209] In a variety of situations, the federal courts have recognized that college and university students possess the same panoply of rights as adults.[210] And this is as it should

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204. *See* Cass Sunstein, *Free Speech Now*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 305 (Geoffrey Stone et al. eds.) (1992).

205. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003).

206. *See* Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 533 U.S 431 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S 377 (2000); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S 238 (1986).

207. The Court in *McConnell* held that the portion of the Bipartisan Campaign Reform Act ("BCRA"), which forbid individuals under the age of seventeen from making political contributions, was a "violat[ion of] the First Amendment rights of minors." *McConnell*, 540 U.S. at 109.

208. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level").

209. *See* Derek P. Langhauser, *Drawing the Line Between Free and Regulated Speech on Public College Campuses: Key Steps and the Forum Analysis*, 181 EDUC. LAW. REP. 339, 344 (2003) (stating that political speech, defined as "expressions that advance 'an idea transcending personal interest or opinion, and which impacts our social and/or political lives,'" is a category of speech generally protected by the First Amendment).

210. *See* Hosty v. Carter, 325 F.3d 945, 949 (7th Cir. 2003), *vacated and reh'g en banc granted*, No. 01-4155, 2003 U.S. App. LEXIS 13195 (7th Cir. June 25, 2003) (stating "the judicial deference the Supreme Court found necessary in the high school setting . . . is inappropriate for a university setting"); Goss v. Lopez, 419 U.S. 565, 591 (1975); Bystrom

be, for most students attending institutions of higher education are adults under the law: they can vote, drive, marry, enter into contracts, and serve in the armed forces.[211] In addition, with the advent of many non-traditional students enrolling on college campuses, it is silly to reduce the scope of rights that they have enjoyed for many years just because the individual is now a college or university student. Given the repeated pleas by college officials for judicial deference, it is rather telling that the U.S. Supreme Court has consistently held that courts must "subject[t] restrictions on campaign expenditures to clos[e] scrutiny"[212] rather than defer to legislative attempts to restrict campaign spending by enacting expenditure limits. If Congress, usually given wide latitude in acting "rationally" on the public's behalf, is prevented from proceeding in such a manner, it surely is irrational to give such forbidden power to a public university.

On the other hand, high school students typically do not receive such an extensive range of rights under our laws.[213] Moreover, the reason the Supreme Court has granted a deference exception to public schools with respect to student speech rights is based on a recognition that elementary and secondary students are at a vulnerable emotional stage in their maturity.[214] At this level, courts are concerned that students might get the impression that school-sponsored speech bears the imprimatur of the principal and teachers.[215] In other contexts, such as

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Through & By Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14, 822 F.2d 747, 750 (8th Cir. 1987); Kincaid v. Gibson, 191 F.3d 719, 730 n.1 (6th Cir. 1999) (Cole, J., concurring in part and dissenting in part), *vacated and reh'g en banc granted*, 236 F.3d 342 (6th Cir. 2001). *See also* Fiore, *supra* note 144, at 1930 ("[F]ederal courts . . . generally have recognized broader First Amendment rights at the college level, both before and after *Hazelwood*"); J. Marc Abrams & S. Mark Goodman, *End of an Era? The Decline of Student Press Rights in the Wake of* Hazelwood School District v. Kuhlmeier, 1988 DUKE L.J. 706, 728 (arguing that "[college] students are, in fact, young adults with full legal rights in our system (save in most states, the right to drink)").

211. The Seventh Circuit, in a case directly focused on *Hazelwood's* applicability to higher education, found that:

> [O]nly 1 percent of [students] enrolled in American colleges or universities are under the age of 18, and 55 percent are 22 years of age or older. Treating these students like 15-year-old high school students and restricting their First Amendment rights by an unwise extension of *Hazelwood* would be an extreme step for us to take absent more direction from the Supreme Court.

Hosty, 325 F.3d at 948–49.

212. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 134 (2003). *See also id.* at 311 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("[T]he constitutionality of [the expenditure limits] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression") (internal citations omitted).

213. *See* Veronia Sch. Dist. v. Acton, 515 U.S. 646, 656 (1995) (stating that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public [elementary and secondary] schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children").

214. For example, the *Hazelwood* Court noted, "[A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting." Hazelwood Sch. Dist v. Kuhlmeier, 484 U.S. 260, 272 (1988).

215. *Id.* at 271 ("Educators are entitled to exercise greater control over this . . . form of student expression to assure that . . . the views of the individual speaker are not erroneously

government funding of religious schools and state-sponsored prayer at public school graduations, the Court has traditionally been concerned about the impressionability of school-age children.[216] As schools are "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment,"[217] public school officials deserve greater latitude than what is typically allowed to ensure that our children receive instruction in an environment that is most conducive to an upbringing of which society approves.[218] Additionally, Professor Saunders argues that the full application of First Amendment rights to children is not as compelling because they are typically not decisionmakers.[219] Insofar as we value speech for its ability to impact self-government, then it is not as important that children receive all the same information as adults.

These emotional and maturity concerns are less-justifiable when considered at the postsecondary level.[220] As the Supreme Court has noted, "[t]here is substance to the contention that college students are less impressionable and less susceptible" than elementary students in presuming the government is endorsing school-sponsored speech.[221] By the time students enter college, their core moral and personal beliefs have often been established through years of parental and educational instruction. Part of the goal, and indeed, allure, of college life is

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attributed to the school.").

216. *See*, *e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) (noting the "impressionable age of the pupils, in primary schools particularly"); Lee v. Weisman, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools . . . . [for] adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention").

217. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

218. One commentator has noted:

> [F]ederal courts view the role of free expression on college campuses in stark contrast to its role in primary and secondary schools. Whereas colleges historically have taken it upon themselves to cultivate creativity, experimentation, and a "marketplace of ideas," such free expression rights are less recognized in primary and secondary schools. Indeed, as the Court now firmly recognizes, those schools are primarily responsible not for encouraging exposure to a vast array of viewpoints, but rather for instilling in students particular values and principles that will prepare them for future endeavors.

Fiore, *supra* note 144, at 1954–55.

219. SAUNDERS, *supra* note 191, at 21–22 (stating that "children are not among those who make the decisions, so it as at least questionable how strongly the First Amendment, at least on this justification, applies to children").

220. *See* Karyl Roberts Martin, Note, *Demoted To High School: Are College Students' Free Speech Rights The Same As Those Of High School Students?*, 45 B.C. L. REV. 173, 194 (2003). ("[C]ollege students are both more mature than high school students and less likely to be influenced on controversial topics.").

221. Tilton v. Richardson, 403 U.S. 672, 686 (1971). *See also* Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (observing that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion."); Goss v. Lopez, 419 U.S. 565, 591 (1975) (stating that the "rights of children and teenagers in the elementary and secondary schools have not been analogized to the rights of adults or to those accorded college students").

exposure to a wide set of values and philosophies different from our own.[222] The years an individual spends at a postsecondary institution should be characterized by exploration and engagement in the "marketplace of ideas;" therefore, free speech should especially bloom in full form at the academy without unnecessary restriction.[223] Additionally, by the time they enter college, students are of an age at which they are ready to begin participation in self-government. "Straw votes and mock political campaigns, as well as campaigns for school government, serve to prepare [students] for participation in self-government."[224]

Proponents of judicial deference at the university level might point to the Supreme Court's recent affirmative action decisions as evidence of judicial acceptance of their position. Indeed, in *Grutter v. Bollinger*,[225] the Court reiterated that "academic freedom [has long] 'been viewed as a special concern of the First Amendment,'"[226] and an argument can be made for a link between institutional academic freedom and judicial deference to academic policy decisions. Yet the *Grutter* decision did not involve student speech; the University of Michigan was engaged in carrying out its academic mission by determining the composition of its student body. After *Grutter*, it would be unwise to conclude that a court should defer to university regulation of student elections solely because the postsecondary institution is supposedly fulfilling its academic mission, when the effect is to burden students' free speech.[227]

Certainly, when the government is acting as an educator, it has much more leeway to control how it goes about its teaching role than when it is not in the process of education. That is why it is permissible for a public university to impose certain "time, place, and manner" restrictions on student campaigns. If schools are trying to "teach" by allowing students to participate in campus elections, they must ensure that their educational goal is not frustrated by

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222. *See* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 231–33 (2000) ("Students enroll in public universities to seek fulfillment of their personal aspirations and of their own potential . . . . [The educational] mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects . . ."). *See also* Fiore, *supra* note 144, at 1949–50 ("[I]ntellectual curiosity of students remains today a central determination of a university's success . . . restriction of that curiosity 'risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses'") (internal citations omitted).

223. *See* Kincaid v. Gibson, 236 F.3d 342, 352 (6th Cir. 2001) (en banc) ("The university environment is the quintessential 'marketplace of ideas,' which merits full, or indeed heightened, First Amendment protection."); Hosty v. Carter, 325 F.3d 945, 948 (7th Cir. 2003) ("The differences between a college and a high school are far greater than the obvious differences in curriculum and extracurricular activities. The missions of each are distinct reflecting the unique needs of students of differing ages and maturity levels."), *vacated and reh'g en banc granted*, No. 01-4155, 2003 U.S. App. LEXIS 13195 (7th Cir. June 25, 2003).

224. SAUNDERS, *supra* note 191, at 23.

225. 539 U.S. 306 (2003).

226. *Id.* at 324 (citing Justice Powell's decision in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

227. Justice Scalia in *Grutter* criticized the majority for their acquiescence to the deference principle, writing: "The Court bases its unprecedented deference to the Law School—*a deference antithetical to strict scrutiny*—on an idea of 'educational autonomy' grounded in the First Amendment." *Id.* at 362 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

substantial disruption in the process.[228] Schools, however, cannot go so far as to regulate the type or volume of speech allowed in a student election. It is one thing to restrict the placement of partisan placards or the timing of debates, but quite another to require a student to turn off his message by placing a spending cap on his election campaign. When the area of speech being proscribed—by draconian funding limits—is the fundamental message being communicated, public universities are no longer engaged in "education" but rather have turned into censors. Campus officer elections can be broken into two distinct parts: an extracurricular activity where the goal is to teach students about the nature and process of representative government; and a free speech component in which an individual candidate is expressing his or her own views in a political message to potential student voters. The former component can be reasonably regulated by the state as no important rights a student possesses are implicated; the latter, on the other hand, involve a fundamental liberty interest in freedom of expression and participation in the "marketplace of ideas."

A last argument for why the educational deference principle should not extend to expenditure limits in public university elections flows from a means/end analysis. The *Tinker* Court sanctioned the ability of a school to take action that caused a diminution in students' constitutional speech rights only where the action in question was intended to prevent a material and substantial disruption of the work and discipline of the school.[229] Even assuming that a university enacted election spending caps in the belief that unlimited spending by student candidates would cause "material and substantial disruption" to the institution's attempts to educate, such regulation is not narrowly tailored to achieve those objectives. There is no direct correlation between monetary expenditures and academic disturbances. Rather, the speech restrictions are both over- and under-inclusive in that they prevent a certain group of people (i.e. candidates) from exercising speech rights that might not cause disruption while allowing non-candidates to exercise speech rights that might adversely impact teaching at the university. Moreover, the type of speech in the election context is one of personal expression akin to "pure speech,"[230] rather than an institutionally-sponsored activity such as a newspaper or yearbook. The former is speech that an institution should tolerate because the speech in question can only be viewed as the candidate's own opinion, while the latter may be subject to some level of regulation as it is more likely to be perceived as bearing the institution's imprimatur.[231] Thus, the justification for judicial

228. *See, e.g.*, Alabama Student Party v. Student Gov't Ass'n, 867 F.2d 1344 (11th Cir. 1989).

229. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

230. *Id.* at 508.

231. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988). The Court held:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities

deference is misplaced under the test provided in *Hazelwood*, even on the assumption that *Hazelwood* is applicable in the post-secondary setting.

C. Student Expenditure Limits

Once it becomes clear that the significant aspects of primary and secondary education that induce courts to grant school officials substantial deference with respect to limitations on student speech are not applicable at the university level, it is easy to see why campus speech restrictions on student election expenditures run afoul of the First Amendment. The rationale for K-12 public school deference is based on the need to maintain the smooth operation of the "educational mission" by giving school officials the ability to avoid learning interruptions or distractions in furtherance of that goal.[232] As adults, college students no longer need such a rigid structure to guide them upon the path to knowledge, hence placing burdens on their ability to engage in protected political self-expression is impermissible.

Whereas "time, place, and manner" speech restrictions may be constitutionally-permissible in some circumstances,[233] prohibitions on the amount of money that can be spent, on the other hand, directly affects the quantity of speech.[234] If a student is allowed to "purchase" only $100 of speech in a campaign, once that limit is reached, he is precluded from reaching any more potential voters. The following hypothetical is instructive: Bobby and Sam are running for student body president; each can spend $100 on his campaign. Both want to increase their name recognition and inform students of their platforms by distributing flyers to each dorm room. Bobby can make copies of his flyer at ten cents each; therefore, he can purchase a total of 1,000 copies. But the campus has 3,000 dorm rooms, so Bobby can only reach one-third of potential student voters. Sam's father is in the printing business and can make a flyer at the cost of one cent per copy. Thus, Sam

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> may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Id.

232. *See Alabama Student*, 867 F.2d at 1345 ("This deference to the educational mission of institutes of higher learning has resulted in the recognition of a 'university's right to exclude even First Amendment activities that violate reasonable campus rules or *substantially interfere with the opportunity of other students to obtain an education*'") (internal citations omitted) (emphasis added).

233. Even when "time, place, and manner" restrictions are permitted, the government is limited to adopting regulations that are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Roberts v. Haragan, 346 F. Supp. 2d 853, 859 (N.D. Tex. 2004) (internal citations omitted).

234. Professor Smith writes:

> Gifts of money and the expenditure of money are forms of speech. Across the board regulation of monetary gifts and spending are not content neutral . . . . [c]ampaign finance regulations attempt to limit speech precisely for its communicative value, and do so in ways that are not content neutral . . . they significantly interrupt the flow of information by silencing certain voices and limiting the total amount of communication between candidates and the public.

Bradley A. Smith, *Money Talks: Speech, Corruption, Equality and Campaign Finance*, 86 GEO. L.J. 45, 55 (1997).

can hand out a flyer to each dorm room and still have $90 left over. It can easily be seen that the expenditure cap placed on Bobby limits whom he can reach. A simple "time, place, and manner" restriction, such as limiting flyers to public bulletin boards around campus, would have given Bobby and Sam a more equal chance of reaching all the students on campus.[235]

An expenditure limit on student spending does not further the goal of giving school administrators a means to control their scarce resources. Rather, as the *Welker* court found, it is a direct limit on the "quantity and diversity of speech."[236] For that reason, a court should apply a strict scrutiny standard to the challenged restriction: if the public university can assert a compelling interest that is narrowly tailored to achieve its ends, then the speech restriction should be tolerated; if not, the restriction should be struck down. Like the defendants in *Welker*, officials often claim their regulation is supported by a goal of equal access to student government. *Buckley* flatly denies the legitimacy of such a claim, stating:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[237]

Moreover, proponents of spending caps argue that creativity is enhanced: thereby, students must find unique ways to spread their message without money. The opposite is closer to the truth—spending opens up new "channels of communication."[238] Without having to worry about exceeding a university's expenditure cap, students can engage in numerous avenues of cutting-edge or untraditional campaigning; for example, with money, candidates can set up websites or "blogs" on the internet or design campaign t-shirts and other apparel for supporters to wear.

The Court in *Southworth* upheld mandatory student fees against claims of compelled speech because the purpose and effect of the fee system was to promote a broader and diverse range of speech on campus. Likewise, if the primary goal of campus elections is to provide the student body with a forum for political expression and an opportunity to engage in democratic practice, colleges and universities should promote actions that foster enhanced opportunities for speech

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235. Although, again, the university would need to make sure that its regulations were content-neutral and narrowly tailored to serve its compelling interest. *See Roberts*, 346 F. Supp. 2d at 869–70.

236. Welker v. Cicerone, 174 F. Supp. 2d 1055, 1064 (C.D. Cal. 2001). *See also* Healy v. James, 408 U.S. 169, 180 (1972) (stating that "the precedent of this Court leaves no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large").

237. Buckley v. Valeo, 424 U.S. 1, 48–49 (1976).

238. Welker, 174 F. Supp. 2d at 1066 (stating that "the potential to spend more than $100 on a campaign likely opens up new channels of communication that might not otherwise be available to candidates who are limited to spending $100. Thus, the expenditure restriction has the *potential to stifle, not foster*, candidates' creativity." (emphasis added)).

to occur. Spending restrictions are antithetical to this objective, as "[the] regulation and bureaucracy required to limit campaign spending contributions and spending limits [tend] to intimidate and silence voices."[239]

CONCLUSION

Expenditure limits on student campaigns at public universities run afoul of the First Amendment's free speech guarantee; a student's rights to free speech should not be diminished merely because he or she is pursuing further education at a postsecondary institution. Whereas K-12 students have less than a full bundle of First Amendment rights due to their impressionability and the special role schools play in their development, college students, as adults, occupy a substantially different position under the law. When analyzed on the spectrum of the protection afforded speech rights, college students are much more akin to adults (indeed, if they are not already fully recognized as such under most laws) than to elementary school students. Thus, there is good reason to argue that the First Amendment should be wholly applicable to individuals running for office in a public university election, especially with regard to expenditures of money for campaign purposes.

The early attempts by courts to define the extent to which public colleges and universities can limit the First Amendment rights of students running for campus government offices have produced little definitive guidance for either administrators or students. The district court's decision in *Flint* presumed *Hazelwood's* reasonable deference standard was applicable to universities and upheld a student expenditure restriction. In contrast, the *Welker* court identified no discernable distinction between an election at the federal or state level and one taking place on a public university campus, and thus reinstated a student to his student government position after he was removed for violating an election spending cap. *Buckley*, which outlawed spending caps in federal elections as a violation of the First Amendment, has been extended to state elections, and should apply to student campaigns as well. For free speech to remain a valued liberty interest under our Constitution, any incursion to limit its applicability must be called into question. While both *Welker* and *Flint* deal with the issue only superficially on procedural grounds, educators should be aware of the delicate and uncertain ground they tread upon in regulating spending in student elections. The best course of action is to focus university regulations on content-neutral "time, place, and manner" restrictions, for which there is a stronger legal basis, instead of suppressing the quantity of student political speech that occurs when campaign expenditure limits are adopted.

239. Smith, *supra* note 234, at 75.