AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Axson-Flynn v. Johnson, 356 F.3d 1277** (10th Cir., 2004)

*In 1998, Christina Axson-Flynn, a Mormon, applied to the University of Utah’s Actor Training Program (ATP). As part of the application, she auditioned before several ATP instructors, during which she was asked if there was anything that she would be uncomfortable doing as an actress and she identified several things she would not do on stage. She was admitted to the program and was soon asked to perform a monologue that included language she had indicated that she would not use during her audition. She used substitute language in the performance and received an A. Later she was asked to perform in a play and the instructor threatened to fail her if she refused to follow the script as written. When she continued to refuse, the instructor relented. In her end-of-semester review, she was told that she should either adjust her standards or leave the program, and the ATP coordinator Xan Johnson backed that view. A few weeks later, she voluntarily withdrew from the program and the university. She then entered the Utah Valley State College acting program which would tolerate her restrictions.*

*A year later, she filed suit in federal district court against the various instructors and administrators of the program arguing that they had violated her First Amendment rights of free speech and free exercise of religion by compelling her to engage in speech that violated her religious commitments. The district court found no constitutional violations and dismissed the suit. She appealed to the circuit court, which reversed the trial court’s decision and sent it back for a more fact-based inquiry of whether the acting instructors were singling Axson-Flynn out for harsher treatment in a context in which a properly administered college curriculum and set of classroom exercises would not pose a constitutional difficulty.*

JUDGE EBEL.

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The Supreme Court has long held that the government may not compel the speech of private actors. Moreover, it is apodictic that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." At the same time, however, the Court has emphasized that "the First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." *Hazelwood School District v. Kulmeier* (1988).

. . . . Nothing in the record leads us to conclude that under that standard, the ATP's classroom could reasonably be considered a traditional public forum. Neither could the classroom be considered a designated public forum, as there is no indication in the record that "school authorities have `by policy or by practice' opened [the classroom] `for indiscriminate use by the general public,' or by some segment of the public, such as student organizations. We thus find that the ATP's classroom constitutes a nonpublic forum, meaning that school officials could regulate the speech that takes place there "in any reasonable manner."

We next turn to the type of speech at issue in this case. There are three main types of speech that occur within a school setting. First is student speech that "happens to occur on the school premises," such as the black armbands worn by the students in *Tinker v. Des Moines Independent Community School District* (1969)*.* . . .

The second type of speech in the school setting is "government speech, such as the principal speaking at a school assembly." . . .

The third type of speech is "school-sponsored speech," which is "speech that a school `affirmatively . . . promotes,' as opposed to speech that it `tolerates.'" "`Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school' constitute school-sponsored speech, over which the school may exercise editorial control, `so long as [its] actions are reasonably related to legitimate pedagogical concerns.'" We conclude that Axson-Flynn's speech in this case constitutes "school-sponsored speech" and is thus governed by *Hazelwood.*

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Here, there is no doubt that the school sponsored the use of plays with the offending language in them as part of its instructional technique. The particular plays containing such language were specifically chosen by the school and incorporated as part of the school's official curriculum. Furthermore, if a school newspaper and a project to paint and post glazed and fired tiles in a school hallway can be considered school-sponsored speech, then surely student speech that takes place inside the classroom, as part of a class assignment, can also be considered school-sponsored speech. . . .

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[T]he Eleventh Circuit applied *Hazelwood* in the context of university curricular speech in *Bishop v. Aronov* (11th Cir.1991). There, the court held that the university's restriction of a professor's in-class curricular speech was reasonably related to legitimate pedagogical goals. The court explained, "As a place of schooling with a teaching mission, we consider the University's authority to reasonably control the content of its curriculum, particularly that content imparted during class time."

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. . . . Few activities bear a school's "imprimatur" and "involve pedagogical interests," more significantly than speech that occurs within a classroom setting as part of a school's curriculum. Accordingly, we hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum. Although we are applying *Hazelwood* to a university context, we are not unmindful of the differences in maturity between university and high school students. Age, maturity, and sophistication level of the students will be factored in determining whether the restriction is "reasonably related to legitimate pedagogical concerns." . . .

Axson-Flynn argues that forcing her, as part of an acting-class exercise, to say words she finds offensive constitutes compelled speech in violation of the First Amendment. "In order to compel the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is `regulatory, proscriptive, or compulsory in nature.'" . . .

. . . . we will uphold the ATP's decision to restrict (or compel) that speech as long as the ATP's decision was "`reasonably related to legitimate pedagogical concerns.'" We give "substantial deference" to "educators' stated pedagogical concerns."

That schools must be empowered at times to restrict the speech of their students for pedagogical purposes is not a controversial proposition. By no means is such power limited to the very basic level of a teacher's ability to penalize a student for disruptive classroom behavior. . . . By the same token, schools also routinely require students to express a viewpoint that is not their own in order to teach the students to think critically. . . .

In the instant case, Defendants justified their restriction on speech — the requirement that students, including Axson-Flynn, perform the acting exercises as written — as a methodology for preparing students for careers in professional acting. Defendants argue that requiring students to perform offensive scripts advances the school's pedagogical interest in teaching acting in at least three ways: (1) it teaches students how to step outside their own values and character by forcing them to assume a very foreign character and to recite offensive dialogue; (2) it teaches students to preserve the integrity of the author's work; and (3) it measures true acting skills to be able convincingly to portray an offensive part. Requiring an acting student, in the context of a classroom exercise, to speak the words of a script as written is no different than requiring that a law or history student argue a position with which he disagrees. Both types of restriction on student speech, if not pretextual, can meet the *Hazelwood* standard, which "does not require that the [restrictions] be the most reasonable or the only reasonable limitations, only that they be reasonable." The school's methodology may not be *necessary* to the achievement of its goals and it may not even be the most effective means of teaching, but it can still be "reasonably related" to pedagogical concerns. A more stringent standard would effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers to the whims of what a particular student does or does not feel like learning on a given day. This we decline to do.

Although we do not second-guess the *pedagogical* wisdom or efficacy of an educator's goal, we would be abdicating our judicial duty if we failed to investigate whether the educational goal or pedagogical concern was *pretextual.* In *Regents of the Univ. of Mich. v. Ewing* (1985), the Supreme Court directed courts not to override a faculty member's professional judgment "unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Thus, we may override an educator's judgment where the proffered goal or methodology was a sham pretext for an impermissible ulterior motive. . . .

. . . . Viewing the evidence in a light most favorable to Axson-Flynn, we find that there is a genuine issue of material fact as to whether Defendants' justification for the script adherence requirement was truly pedagogical or whether it was a pretext for religious discrimination. Therefore, summary judgment was improper.

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Neutral rules of general applicability ordinarily do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief. . . . By contrast, if a law that burdens a religious practice or belief is not neutral or generally applicable, it is subject to strict scrutiny, and "the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest."

We first address the threshold requirement of *Employment Division v. Smith* (1990) of determining whether the strict adherence to offensive script requirement was a "neutral rule of general applicability." A rule that is discriminatorily motivated and applied is not a neutral rule of general applicability. As discussed in the free speech section above, we find a genuine issue of fact in the record as to whether Defendants' requirement of script adherence was pretextual. Therefore, we remand for further proceedings on whether the script adherence requirement was discriminatorily applied to religious conduct (and thus was not generally applicable). . . .

If Defendants succeed on remand in showing their requirement was not pretextual but rather was a neutral and generally applicable requirement, Axson-Flynn argues that the two exceptions to the *Smith* rule apply, and if she were to be successful in establishing an exemption, Defendants' conduct would not be sheltered by the rational basis test of *Smith.* The first exception, following *Wisconsin v. Yoder* (1972), has come to be called the "hybrid rights" exception: when a free exercise claim is coupled with some other constitutional claim (such a free speech claim), heightened scrutiny may be appropriate. The second exception, following *Sherbert v. Verner* (1963), is the "individualized exemption" exception: where a state's facially neutral rule contains a system of individualized exemptions, a state "may not refuse to extend that system to cases of `religious hardship' without compelling reason." . . .

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[W]e have chosen the middle ground of requiring the hybrid-rights claimant to show that the companion constitutional claim is "colorable." We define this to mean that the plaintiff must show a fair probability or likelihood, but not a certitude, of success on the merits. This inquiry is very fact-driven and must be used to examine hybrid rights on a case-by-case basis.

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The syllabus for First-Year Acting (the ATP class that Axson-Flynn was taking in the fall of 1998) contained a curricular requirement to do improvisational work. However, a Jewish student named Jeremy Rische asked for and received permission to avoid doing an improvisational exercise on Yom Kippur without suffering adverse consequences. Defendant Barbara Smith, who taught First Year Acting, gave him this exemption despite the fact that, in Rische's words, "she said it would be an exercise that couldn't be made up, because it was one of the exercises by — an improv exercise that involved the whole class, and it would be almost impossible to make up." Rische was never penalized, his grades were never lowered, and he was never asked to make up the assignment in any way. Axson-Flynn argues that Defendants' willingness to grant an exemption to Rische demonstrates that the ATP had a system of individualized exemptions in place. That Defendants did not grant her an exemption, Axson-Flynn argues, constitutes "discriminat[ion] among members of different religious faiths" that violates the Free Exercise Clause.

When this evidence is coupled with the fact that Defendants sometimes granted Axson-Flynn herself an exemption from their script adherence requirement, we find that the record raises a material fact issue as to whether Defendants maintained a discretionary system of making individualized case-by-case determinations regarding who should receive exemptions from curricular requirements.

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 *Reversed.*