AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

**Felkner v. Rhode Island College, 203 A. 3d 433** (RI 2019)

*In 2004, William Felkner began studies as a graduate student at Rhode Island College, a state university, in the school of social work. When he learned that the school would be showing the Michael Moore documentary,* Fahrenheit 9/11*, as a component of the foundational course “Policy and Organizing I.” Felkner objected to his instructor and asked that the class also see the conservative counterpoint film,* FahrenHYPE 9/11*. His professor informed him that the school was dedicated to social justice and “anyone who consistently holds antithetical views to those that are espoused by the profession might ask themselves whether social work is the profession for them” and another instructor informed Felkner that the school was “not committed to balanced presentations” and that “Republican ideology” was antithetical to the profession’s values. For a different class assignment, students were instructed to write an advocacy paper for one of a preset list of policies and then lobby the state legislature on behalf of that policy. Felkner asked to write a paper opposing one of the policies on the list, but was told that the university “is a perspective school and we teach that perspective.” Felkner ignored that instruction and received a failing grade on his paper. His grade appeal was denied by university administrators, but he was not made to lobby the legislature. Felkner had similar difficulties in later classes with other instructors, including whether he would be allowed to satisfy his field work credit by working in the Republican governor’s office on welfare reform. Felkner was subsequently disciplined for recording conversations with his instructors and of his classes and publicizing those conversations on his website without the consent of the other participants. Felkner was granted some extensions on deadlines but eventually failed to continue to follow through on those procedures and the college regarded him as having left the program without a degree.*

*While still a student in 2007, Felkner filed suit in state court contending that his First Amendment rights were being violated by the compelled political speech requirements of the social work program. He sought both monetary damages and injunctive relief. After several years of discovery, a trial judge granted a motion for summary judgment in favor of the school. On appeal, the state supreme court vacated that judgment and remanded the case for a jury trial, holding that Felkner had made a credible showing that his rights had been violated. One dissenting justice thought that Fenkel had no legitimate First Amendment claims, but the other four thought that although university professors were entitled to discretion about how they conducted their classes they were obliged to adhere to professional norms and not use an academic program as a pretext to advance a political agenda.*

CHIEF JUSTICE SUTTELL.

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The freedom of speech and expression is perhaps our most cherished right as residents of the United States. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette* (1943). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal." *Turner Broadcasting System, Inc. v. Federal Communications Commission* (1994). Moreover, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide `what not to say.” *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995). . . .

Nor can it be gainsaid that freedom of speech and expression is alive and well in our public educational institutions. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The classroom is peculiarly the marketplace of ideas." *Tinker v. Des Moines Independent School District* (1969). Rights guaranteed by the First Amendment, however, are not unlimited in the context of academia. *Hazelwood School District v. Kuhlmeier* (1988).

In the case under review, both parties seemingly acknowledge that the *Hazelwood* case is instructive. *Hazelwood* stands for the proposition that "educators 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."

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. . . . [E]ducational institutions are granted wide latitude to establish their curricula and "further [their] legitimate curricular objectives." So, too, must teachers be given "broad discretion to give grades" and "in limiting speech when they are engaged in administering the curriculum." Moreover, "[s]o long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere." *Settle v. Dickson County School Board* (6th Cir. 1995). . . . Courts "should show great respect for the faculty's professional judgment. Plainly, they may not override it 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." *Regents of University of Michigan v. Ewing* (1985).

In light of these principles, we are of the opinion that Felkner's freedom of speech claims deserve to go to a jury. The record in this case is voluminous and replete with disputed facts. Resolving all such facts in the light most favorable to Felkner, the issue is whether he has made tenable claims that defendants have violated his constitutional rights to free speech and expression. We believe that he has. Felkner describes himself as a "conservative libertarian" and was no doubt a challenging student with a political agenda as robust as the agenda he ascribes to defendants. Given the broad discretion afforded to educational institutions, he may have a difficult road ahead of him. Nevertheless, he has raised genuine issues of material fact concerning whether the actions of defendants are "reasonably related to legitimate pedagogical concerns" or merely a pretext for punishing him for his conservative views. "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." *Axson-Flynn v. Johnson* (10th Cir. 2004). The fact that a student may be required to debate a topic from a perspective that is contrary to his or her own views may well be reasonably related to legitimate pedagogical concerns. That relationship is far more tenuous, however, when the student is told that he or she must then lobby for that position in a public forum or that his or her viewpoint is not welcome in the classroom because it is contrary to the majority viewpoint of the students and faculty.

There is ample evidence in the record which, if found credible by a factfinder, suggests that the MSW program had a strong predisposition toward so-called "progressive" social values. Viewing, as we must, the evidence most generously to Felkner, we are of the opinion that, in light of his avowedly conservative bent, genuine issues of material fact exist as to whether defendants' justifications for their actions were truly pedagogical or whether they were pretextual. . . .

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To establish a First Amendment retaliation claim, a plaintiff must prove that (1) he "engaged in constitutionally protected conduct" and (2) "this conduct was a substantial or motivating factor for the adverse" action taken against him.

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It is well settled that citizens may record government officials in the exercise of their official duties. . . . [A]cknowledging that the right to record is an activity protected by the First Amendment, we proceed to examine the activity in the context of an educational institution.

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As the hearing justice noted in her decision in the present case, "several students expressed their discomfort with Felkner's publication and editorializing of class discussions and activities, which they had previously believed were held in confidence." Clearly, the privacy rights "of other students to be secure and to be let alone" were implicated by Felkner's recordings. . . .

Under the *Tinker* standard, it is apparent that Felkner's recordings "might reasonably have led school authorities to forecast substantial disruption" and "collid[e] with the rights of other students to be secure and to be let alone." Moreover, as the hearing justice noted, "Felkner was not disciplined for the actual act of recording; rather, he was prohibited from engaging in deceptive behavior by making surreptitious recordings of his colleagues." . . .

With respect to Felkner's other claims of retaliatory conduct, as discussed above, genuine issues of material fact exist as to whether Felkner's activities were protected by the First Amendment. If Felkner is able to clear that first hurdle, clearly factual issues abound with respect to whether his conduct was a "substantial or motivating factor for the adverse" actions allegedly taken against him by defendants. . . .

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*Vacate and remand*.

JUSTICE ROBINSON, dissenting in part.

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I have never for a moment faltered in my long-held reverence for the First Amendment, nor am I even remotely retreating from that reverence at this time. However, from the beginning, I have been unable to glimpse any genuine First Amendment issue in the facts of record in this case. It is my considered judgment that this case involves at bottom nothing more than some petty academic squabbles and certainly nothing of constitutional magnitude. I submit that the following words of Judge Calvert Magruder, written in a famous law review article (published before his appointment to the bench), are pertinent to the case at bar and to plaintiff's grievances in general: "Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be." . . .

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. . . . It is my considered and precedent-supported belief that, except in perhaps the most truly exceptional circumstances (which do not even remotely exist in the instant case), a court is not "suited to evaluate the substance of the multitude of academic decisions . . . —decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Regents of University of Michigan v. Ewing* (1985).

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. . . . It is certainly a legitimate pedagogical purpose for a professor to require a student to write a paper or participate in a debate from a viewpoint that may conflict with that student's personal views; learning to understand and cogently articulate a viewpoint that is not one's own is without question a legitimate pedagogical purpose. . . .

Taking into account the just-cited legal authorities, Mr. Felkner was justifiably given a failing grade. . . . In the just-described context, Mr. Felkner was not engaging in protected speech.

. . . . [G]rading is a function of the often somewhat subjective assessment criteria of a particular professor, and this Court is not in a position to second-guess such a decision. *Board of Curators of University of Missouri v. Horowitz* (1978); *Settle v. Dickson County School Board* (6th Cir. 1995).

. . . . I would echo the hearing justice's perceptive statement that Mr. Felkner "seems to consider free speech a one-way street." I believe that that assessment is also applicable to Mr. Felkner's complaint about various e-mail communications he had with RIC professors wherein they stressed the progressive nature of the School of Social Work. Mr. Felkner's free speech rights were not violated simply because professors at RIC disagreed with him politically and were vocal about their own views.

. . . . I can perceive nothing in this case on which to base a legal conclusion that defendants' actions were not reasonably related to any legitimate pedagogical purpose but rather were pretextual. Even if the master's in social work program did have, as the majority puts it, a "strong predisposition toward so-called `progressive' social values," expressing those values and allowing class discussion on those values rather than fostering a more conservative perspective certainly did not violate Mr. Felkner's constitutional rights. *Brown v. Li* (9th Cir. 2002). While Mr. Felkner was required to argue against his personal viewpoint in class, it is important to remember that he was ultimately not required to lobby for any viewpoint with which he did not agree. . . .

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JUSTICE INDEGLIA, dissenting in part.

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