

IDHE REPORT

The Case for Academic Freedom: Students, Opinions, Faculty Standards

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BY NANCY THOMAS

The Institute for Democracy & Higher Education is dedicated to shifting institutional priorities, practices, and culture to increase student political learning, equity, and engagement in democracy. The Institute's signature initiative, the National Study of Learning, Voting, and Engagement (NSLVE) is both a service to colleges and universities—providing more than 900 colleges and universities nationwide with tailored reports containing their students' voter registration and voting rates—and a database of 8.5 million student records, which is used for research on college student political learning and engagement. The Institute also conducts other research, including studies of institutions with high (and low) levels of student political engagement. These reports stem from that research to bridge theory and practice.

IDHE is a part of Tufts University's Jonathan M. Tisch College of Civic Life, a national leader in civic education whose model and research are setting the standard for higher education's role in civic engagement.

ON MARCH 28, THE U.S. Court of Appeals for the Tenth Circuit decided [Pompeo v. Board of Regents of the University of New Mexico](#), ruling in favor of a university that had been accused of discriminating against a student because of her political views. The court's decision affirmed faculty academic freedom and offered guidance to professors navigating challenging waters of controversial political issue discussions and course content at public institutions. It is also relevant to private institutions, where academic freedom is usually a normative value and contractual right. While the case may yet be appealed, the opinion seems intentionally written to withstand judicial review. I believe this will be a widely cited and respected ruling.

THE COURT'S RULING ALSO ALIGNS with our research at Tisch College's Institute for Democracy and Higher Education, which for the past two years has been examining campus climates for political learning and engagement in democracy. We've visited public and private colleges and universities across the country and analyzed data from focus groups and interviews involving more than 500 professors, students, and administrators. Our case studies highlight the importance of balancing student expressive freedom and faculty academic freedom. We found promising examples of professors who artfully manage classroom discussions on politically charged topics in the manner supported and affirmed by the circuit court's decision: through careful preparation, well-communicated expectations and standards, and principled facilitation and conflict management. These lessons for educators, always valuable, are especially vital in these politically polarized times.

THE FACTS

IN 2012, POMPEO ENROLLED IN an upper-level course at the University of New Mexico called “Images of (Wo)men: From Icons to Iconoclasts.” The stated pedagogical goals for the course included teaching students to think critically, write analytic papers, and, according to the syllabus, “discern critical argument from opinions and polemics.” In the syllabus, the professor warned that students would view sexually explicit material and should expect “perhaps even incendiary classroom discussions.” The syllabus also stated that students would be expected to act “with respect and care for everybody’s marvelously complex subjectivities.” Students were advised that they may be required to rewrite papers that did not satisfy these requirements.

The professor assigned the 1985 film *Desert Hearts*, about a lesbian romance, and required students to write an analytic paper about the film. The plaintiff’s paper included disparaging statements such as referring to lesbians as “barren” and describing the film as “perverse in its desire and attempt to reverse the natural roles of man and woman” while offering little critical assessment of the film. The professor discussed the paper with the student and explained that “inflammatory” or “polemical” statements must be “backed up with critical, authoritative citations and sources.” In subsequent classroom discussions, the professor found the student to be domineering, speaking out of turn and interrupting others. Both the professor and Pompeo took the matter up the academic ladder. A decision was made that Pompeo would finish the class as an independent study with the department chair, but she never resubmitted the paper and eventually withdrew from both the class and the university.

Pompeo sued the university, the professor, and the department chair, alleging violations of her First Amendment rights. Pompeo claimed that both the reactions to the paper and the suggestion that she had been disruptive and disrespectful in class were based on Pompeo’s viewpoint rather than on a legitimate educational concern. In other words, Pompeo claimed that the professor and the department chair were personally offended by the student’s *political* viewpoint — her anti-gay perspective — and used pedagogical purposes as a pretext, negatively affecting Pompeo’s grade and future in the class. A lower court ruled on summary judgment (a decision based on the briefs, with limited testimony) in favor of the university and the faculty members, and Pompeo appealed.

IN THIS CHAPTER, WE REVIEW additional findings from our nine-campus qualitative study of institutional climates – specifically our analysis of the norms, behaviors, attitudes, and structures – for political learning and engagement in democracy. We weave into the review of these findings evidence of the essential role faculty members, particularly political science professors, have as an integral part of fostering a robust climate for political learning. We conclude by making the case that colleges and universities should be viewed as a collection of mini-publics in which people with diverse social identities, ideologies, perspectives, and interests associate, coalesce, discuss problems, and share authority in decision-making.

THE LAW

THE U.S. CIRCUIT COURT OF Appeals affirmed the lower court’s ruling and, in a 28-page decision, carefully walked through the debate over First Amendment rights at public universities. On one hand, students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate” (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)). Faculty members should establish trusting relationships with students and encourage students to inquire freely (*Sweezy v. New Hampshire*, 354 U.S. 234 (1957)). (*Sweezy* is usually cited for its articulation of the four essential freedoms in higher education: the right to determine who may teach, what may be taught, how it shall be taught, and who may be admitted to study.) Here the Court warned that academics should avoid casting “a pall of orthodoxy” over the classroom, (*Keyishian v. Board of Regents*, 385 U.S. 589 (1967)). In other words, faculty members should not indoctrinate students.

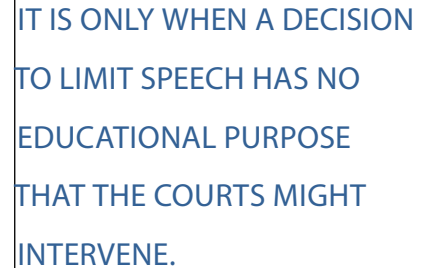
ON THE OTHER HAND, COURTS “do not and cannot intervene in the resolution of conflicts which arise in the daily operations” of schools, unless the decision infringes on an individual’s Constitutional rights (*Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Here, the court went to great lengths to clarify the right of teachers to restrict speech for pedagogical purposes and to assure that students learn “whatever lessons the activity is designed to teach.” Educators may limit speech that is “poorly written, inadequately researched, biased or prejudiced.” It is only when a decision to limit speech has no educational purpose that the courts might intervene.

Two parts of the ruling answer some long-standing questions about viewpoint discrimination that might provoke heightened judicial scrutiny and cause a court to overrule the judgment of a teacher or professor; specifically, when a matter involves viewpoint discrimination about “race, gender, economic class, religion or political persuasion” (“the Settle factors,” quoting *Settle v. Dickson County School Board*, 53 F. 3d 152 (6th Cir. 1995)). Interestingly, Pompeo did not argue that the professors were motivated by these impermissible factors.

Nonetheless, the court observed that while Pompeo’s allegations concerned “a politically charged topic,” to warrant stricter scrutiny the faculty bias or prejudice would need to concern *partisan affiliation* — political parties and candidates — not merely views that “cross some threshold of political salience.” Simply stated, a student’s or professor’s attitudes toward lesbian lifestyles may be politically charged, but disagreements about them do not reach the level of discrimination based on political persuasion.

Indeed, the court noted that Pompeo’s assertion that professors may not restrict student speech based on opposition to the viewpoint expressed in that speech “is plainly incorrect.” I interpret this to mean that the courts are not going to meddle in pedagogical decisions based on accusations of political correctness.

NOR IS VIEWPOINT NEUTRALITY NECESSARY or even appropriate. On this, the court cited the *Settle* case, which said: ...teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking ... it is the essence of the teacher’s responsibility in the classroom to draw lines and make distinctions — in a word to encourage speech germane to the topic at



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hand and discourage speech unlikely to shed light on the subject. Teachers therefore must be given broad discretion to give grades and conduct class discussion based on the content of speech.

THE COURT'S OPINION ALSO INCLUDED a thoughtful but firm review regarding standards — objective, subjective, and whose — when considering viewpoint discrimination. In short, the court applied a subjective standard, concluding that if the professor deems a paper to be substandard, then it is substandard. The student has no Constitutional right to make statements found to be inflammatory from the professor's point of view without being critiqued or asked to make revisions.

One cautionary note, based on the court's comparison between the facts of this case and a prior ruling, The plaintiff in *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) was a religiously observant Mormon student who objected to swearing as part of an acting class assignment. Ruling in favor of the student who alleged religious viewpoint discrimination, the court noted the demeaning ways the professor and academic administrators treated her.

Her professor told her to “get over” her language concerns. Administrators told her that her request for language accommodations was unreasonable, that other “good Mormon girls” did not object, and that she could continue the program if she modified her values.

Finding in favor of the student, *Axson-Flynn* reminds us that administrators and professors may not degrade or disparage students. The respect the professor showed to the student in *Pompeo* was duly noted by the 10th Circuit Appellate Court.

WHAT THE CASE MEANS

THE POMPEO V. BOARD OF Regents of the University of New Mexico ruling affirms what most professors already know to do, particularly in discussion-based courses:

- Clearly state the pedagogical aims of the course in the syllabus.
- Provide general but fair warning in the syllabus if the course will involve discussions or assignments with materials that are likely to offend some students.
- Establish clear expectations about academic standards, particularly regarding supporting statements and opinions with facts.
- Set the right tone in the class by insisting on civility and respect from students, and then model that tone. Professors may challenge student opinions and statements, but they should not cross a line and denigrate or humiliate a student.

BASED ON OUR RESEARCH AT Tisch College's Institute for Democracy and Higher Education, I would add that professors need better preparation in leading discussions. They should know, for example, how to use the first class to build relationships, trust, and rapport, and to set the tenor and attributes of the learning community the students and professor collectively wish to create for the course. Pedagogical aims, intellectual standards, and expectations for classroom behavior and tone should be discussed and clarified on the first day of class and revisited periodically throughout the term.

PROFESSORS CAN RELAX A LITTLE when discussing politically charged topics. Students do not have the right to unlimited free speech, particularly if the speech is inconsistent with the pedagogical aims of the course, and students cannot claim viewpoint discrimination based on political persuasion unless the professor attacks a student's party affiliation or, for example, candidate choice. It is entirely appropriate for professors to challenge students' political viewpoints to get them to think more critically and to support their opinions with evidence. Indeed, that is the job.

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