AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Free Speech/Public Property/Subsidies/Employees, and Schools

**Adamian v. Jacobsen, 523 F.2d 929** (9th Cir. 1975)

*Paul Adamian was a newly tenured professor of English at the University of Nevada at Reno. He had recently arrived at the university after refusing to take a loyalty oath at a college in Oregon. He participated in an antiwar demonstration at the campus stadium in 1970. The demonstrators was held during Governor’s Day ceremonies on campus. Governor’s Day was an annual event honoring the ROTC cadets on campus and the veterans from the campus (including recognition of those who had died), often with state politicians in attendance. In 1970, the event fell shortly after four students had been killed by National Guard troops during a demonstration at Kent State University in Ohio. The previous year protestors had held a demonstration at the other end of campus on Governor’s Day, but in 1970 they planned a disruption of the ceremony. Adamian helped lead protesters to rush the field near the end of the ceremony, after a series of loud but less disruptive provocations throughout the ceremony. The next day the ROTC building on campus was firebombed, and days later a house where student activists gathered was likewise firebombed. University officials identified Adamian as an instigator and brought him up on disciplinary charges. A faculty committee found him guilty of violating university regulations but recommended probation. The board of trustees instead terminated him.[[1]](#footnote-1)*

*Adamian filed suit in federal district court arguing that the university had violated his First Amendment rights. A trial judge found the university regulations to be vague and overbroad and ordered his reinstatement. On appeal, the federal circuit court reversed that order. The circuit court concluded that the relevant language from the university’s code of conduct had been borrowed from the American Association of University Professors, which had itself construed that language narrowly so as to protect speech. The circuit court thought the university was properly bound by the AAUP’s narrowing interpretation, and as a result the policy was not facially overbroad but potentially no longer could be used to justify Adamian’s termination.*

*On remand, the district court found in favor of the university and that disruptive speech by a public employee was not constitutionally protected from sanction by the employer. The circuit court did not reverse that judgment, and the Supreme Court declined to hear the case in 1980.[[2]](#footnote-2) Adamian did not find another academic job.*

JUDGE CHOY.

. . . .

The University Code of the University of Nevada requires that tenured professors be dismissed only for adequate cause, and the Board of Regents concluded that "adequate cause existing, (Adamian's) employment as a member of the Faculty of the University of Nevada, Reno is terminated this date." The term "adequate cause" must be interpreted in the context of traditional standards of faculty behavior; its vagueness is a necessary result of the many forms of faculty conduct which might justify dismissal. The Supreme Court's discussion of "cause" for dismissal from the civil service applies equally to academic tenure: “We do not believe that Congress (here, the state) was confined to the choice of enacting a detailed code of employee conduct, or else granting no job protection at all.” *Arnett v. Kennedy* (1974).

Nevertheless, when a statute or regulation by its vagueness or overbreadth threatens to deter the exercise of first amendment freedoms, we require of it greater precision and specificity than would be necessary to fulfill fifth or fourteenth amendment due process requirements. "Adequate cause" is certainly too imprecise a standard if expressive activity is understood to fall within its scope. If we were faced with a federal statute or regulation, we would cure this imprecision by construing it to exclude any application to constitutionally protected speech or conduct. We cannot so construe a state regulation, however; we are required to base our judgment of its facial validity only on its meaning as authoritatively construed by a state court or agency.

The University Code, chapter 4, section 2.3, clarifies the meaning to be given "adequate cause" when that term is applied to a professor's expressive activity:

The faculty member is a citizen, a member of a learned profession, and a representative of the University. When he speaks or writes as a citizen, he will be free from university censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and as an educator, he knows that the public may judge his profession and this University by his utterances. At all times he strives to be accurate, to exercise appropriate restraint, to show respect for the opinion of others, and to make every effort to indicate that he is not a spokesman for this University

Section 2.3, read in isolation, seems only to insure that a professor will be free of censorship when speaking as a citizen; the admonitions of the last sentence appear merely hortatory. The Board of Regents has construed the last sentence as stating adequate causes for dismissal, however, and we must give great deference to this construction of a regulation by the state agency which issued and enforces it. The regents explicitly charged Professor Adamian with having violated this section, and we accept it as defining the university's construction of "adequate cause" for dismissal of a professor based on his non-academic speech or writing.

The closely related first amendment doctrines of vagueness and overbreadth permit a defendant to assert the invalidity of a statute because of its potential encroachment on first amendment freedoms, even in cases where the defendant's conduct itself is unprotected by the first amendment. We apply these doctrines quite rigorously when a statute is directed at "pure speech," especially to its expressive content. *Gooding v. Wilson* (1972); *Stromberg v. California* (1931). On the other hand, if the state has attempted to regulate conduct for reasons unrelated to any expressive content, and the regulation has an incidental inhibiting effect on expression, in determining its facial validity we must weight the legitimate interest of the state in regulating the conduct against the potential deterrence, or "chill," of the exercise of first amendment freedoms. *Broadrick v. Oklahoma* (1973). The balancing required of us in deciding whether to apply the vagueness and overbreadth doctrines resembles that required in determining whether a statute regulating conduct constitutes an impermissible abridgement of first amendment interests. *Graynerd v. City of Rockford* (1972).

Section 2.3 requires that a professor strive for accuracy, restraint, and respect for the opinions of others. On its face, section 2.3 is directed at "pure speech," not at expressive conduct. The state cannot regulate any protected speech on the basis of content. . . .

Section 2.3 is neutral as to content; it regulates the manner in which that content is expressed, much as do statutes aimed at excessive noise. Therefore, in examining its facial validity, we find it appropriate to apply the more rigorous *Broadrick* test, I.e., whether any overbreadth perceived is " not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

First amendment protections are not "shed . . . at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District* (1969). It is true that we will strike the balance between the interests of the state and of the individual somewhat differently when the citizen is an employee of the state. *Pickering v. Board of Education* (1968). The desire to maintain a sedate academic environment, "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," is not an interest sufficiently compelling, however, to justify limitations on a teacher's freedom to express himself on political issues in vigorous, argumentative, unmeasured, and even distinctly unpleasant terms. Only where expressive behavior "involves substantial disorder or invasion of the rights of others" may it be regulated by the state. Self-restraint and respect for all shades of opinions, however desirable and necessary in strictly scholarly writing and discussion, cannot be demanded on pain of dismissal once the professor crosses the concededly fine line from academic instruction as a teacher to political agitation as a citizen even on the campus itself.

On its face, section 2.3's requirement that a professor exercise appropriate restraint and show respect for the opinions of others is susceptible of interpretations which would render it overbroad under *Tinker*, and would thus deter the vigorous advocacy of unpopular political ideas. We take notice, however, that section 2.3 was adopted almost verbatim from the 1940 Statement of Principles of the American Association of University Professors. In 1963, the Association construed the Statement's language regarding academic freedom in its Advisory Letter No. 11: Extramural Utterances:

It is the view of this Office that the term 'appropriate restraint,' as used above, refers solely to choice of language and to other aspects of the manner in which a statement is made. It does not refer to the substance of a teacher's remarks. . . .

'A violation may consist of serious intemperateness of expression, intentional falsehood, incitement of misconduct, or conceivably some other impropriety of circumstance. It may not lie, however, in the error or unpopularity, even though gross, of the ideas contained in the utterance.'

[A] determination concerning alleged violation of the standard of academic responsibility may not be made except on the basis of the criteria elaborated above. . . . [A]cademic consideration of the extramural utterances of a faculty member shall occur only when the remarks raise 'grave doubts' concerning his fitness for his position. . . . The disciplining of a faculty member for exercising the rights of free speech guaranteed to him as a citizen by the Constitution of the United States necessarily raises such fundamental issues that institutions are cautioned to take such action only under extraordinary circumstances. Neither the error nor the unpopularity of ideas or opinions may provide an adequate basis for such disciplinary action, whatever temporary embarrassment these views may bring to the institution.

The Association's construction so narrows the language of section 2.3 as to eliminate any overbreadth resulting in facial invalidity of the section. The Handbook emphasizes that section 2.3 does not "refer to the substance of a teacher's remarks." Moreover, the Association's repeated assurance that a professor will not be penalized for the error or unpopularity of his ideas reassures us that the Association intended to assure a professor his full measure of first amendment rights. While the Association's construction is itself not entirely free of overbreadth problems, we believe that it circumscribes within constitutional limits, insofar as is practicable, those situations in which a faculty member is subject to discipline. Any overbreadth remaining in the Association's interpretation of proper grounds for dismissal falls short of *Broadrick's* requirement of "substantial overbreadth."

That the University has adopted the Statement of Principles virtually word for word suggests that it also accepts the narrowing interpretation placed on it by the Association. We remand the case to the district court with instruction to hear testimony from the regents in order to determine whether the regents' construction of section 2.3 is the same as that of the American Association of University Professors.

*Reversed*.

1. The events at the University of Nevada are detailed in Brad Lucas, “Rude and Raucous Catcalls: The Disputes of Governor’s Day, 1970,” *Nevada Historical Society Quarterly* 43 (2000): 331. [↑](#footnote-ref-1)
2. Adamian v. Lombardi, 608 F.2d 1224 (9th Cir. 1979). [↑](#footnote-ref-2)