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

**Mabey v. Reagan, 537 F.2d 1036** (9th Cir. 1976)

*Rendell Mabey was an untenured philosophy professor at Fresno State College. In his probationary status, Mabey was awarded a teaching contract that was renewed every year. After four years, the university would decide whether to grant tenure and a permanent faculty position. After two years at the college, Mabey did not received another contract. He was not initially provided a reason for the nonrenewal of his contract.*

*In 1970, Fresno State College was deeply divided. In the spring of that year, the acting president of the college was quoted in the* Los Angeles Times *as referring to some of the younger faculty as “punks.” The next day, Mabey sought to speak about the article in a senate faculty meeting but was ruled out of order. During his exchange with the presiding officer, Mabey declared “this whole college is out of order” and that “this college is run by a jerk” and called the presiding officer a “damned liar.” The college subsequently pointed to this incident of “unprofessional conduct” as a reason for the nonrenewal of Mabey’s contract in the fall. The college also asserted that the philosophy department was overstaffed.*

*Mabey filed a lawsuit in federal district court, and after his appeals within the university system were completed, the district court held that Mabey’s speech to the academic senate was constitutionally protected. In the fall of 1974, the court ordered that he be reinstated with back pay. On appeal, the circuit court reversed and remanded the case for further factfinding. The circuit court emphasized that emotional speech in the context of an academic senate was to be expected and constitutionally protected, so long as the professor’s actions were not excessively disruptive or damaged his ability to perform his duties, Mabey was eventually reinstated, but left Fresno State after another year of teaching.*

JUDGE HUFSTEDLER.

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In all but the clearest cases, the decision to terminate a probationary teacher's employment entails the complicated weighing of many factors, almost all of which are subjective. An essential element of the probationary process is periodic assessment of the teacher's performance, including the person's ability and willingness to work effectively with his colleagues. . . .

Although final decision-making authority may rest in one individual, generally many people contribute to the evaluation process. Even neglecting personal jealousy and prejudice, we suspect that the systems of weights each person assigns to various factors are incommensurable; there is probably no consistent ordinal ranking, much less a cardinal one. Thus, there is no precisely calibrated scale whose pointer indicates when an instructor's negative qualities outweigh his positive ones. There is a more or less broad grey area, in which we permit official discretion to operate and decide.

Withal, it is our duty to protect First Amendment values. Initially, our concern is to guard the rights of the terminated instructor. But, more importantly, we examine alleged First Amendment violations because of their potential chill on others, especially those situated like the complainant. Although a person's tenure status is irrelevant to the First Amendment inquiry (*Perry v. Sindermann* (1972)), our close examination is particularly appropriate where, as here, a complex of reasons may as well mask an unlawful motive as legitimately motivate a refusal to rehire, and where all of those in the group are subject to the threat of loss of their jobs for identical ill-defined reasons.

The potential for subterfuge exacerbates our dilemma. On the one hand, our reluctance to intrude deeply into the administrative process may permit an ill-motivated decision-maker spuriously to cite apparently legitimate grounds for non-retention. On the other hand, solicitude for First Amendment rights, and the need for prophylactic rules to prevent encroachments on them, may aid an incompetent or otherwise undesirable employee.

Although motivational analyses can be slippery, the only way to erect adequate barriers around First Amendment freedoms is for the trier of the fact to delve into the motives of the decision-maker. . . . Whenever the state terminates employment to quell legitimate dissent or punishes protected expressive behavior, the termination is unlawful. Other courts have stressed the pretextual nature of the unprotected bases as a theory for invalidating the non-retention. We agree, although we view the triviality of other asserted reasons, or discriminatory application of rules, as evidence that the true moving factors lay elsewhere, rather than as merely diminishing the weight on one side of a balance.

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The behavior at issue here was not symbolic speech in the usual sense. *United States v. O’Brien* (1968). It had a vocal and unmistakably "speech" element embedded in a matrix of movement, interruption of the proceedings and refusal to bow to authority. Although the cognitive content of Mabey's act may be severed from the movement, much of the impact of his expression lies in its emotive content, which is not severable from his mode of expression. We thus consider the totality of Mabey's behavior.

Conduct of various kinds in schools and universities has long been a subject for First Amendment protection. *Healy v. James* (1971). The problem has been to mark out the boundaries of protection, keeping in mind the specialized needs of the academic environment. This surveying task has been complicated because many early cases in the school setting were at pains to establish that the school administrators could not forbid expression that appears tame to the point of innocuousness. Courts often considered more dramatic expression in the context of criminal regulations, but in deciding when a college can refuse to reappoint probationary instructors, the question is different from that posed in the context of state imposition of criminal sanctions.

Both sides in the present case rely on the test given by *Pickering v. Board of Education* (1968). . . . The Supreme Court balanced Pickering's interests as a citizen to speak out on matters of public concern against what it saw as the school board's interests. . . . A college relies in large measure on faculty self-governance and its contributions to administrative decisions. This is analogous to, but different from a high school's need for "discipline by . . . superiors." Although attenuated, an attack on those processes attacks the educational process as well. The college also has an interest in the free speech rights of the faculty. Open channels of communications are necessary for scholarly research, for teaching, and for the self-governing system.

*Pickering* did not establish the limits of a teacher's right to exercise First Amendment rights within the school. . . .

The present case differs in two respects from *Tinker v. Des Moines Independent School District* (1969)*.* First, the setting was a college, not a high school. *Tinker* emphasized "appropriate discipline." We doubt that discipline is the operative concept in a college, but some degree of coherence is necessary for the proper functioning of the institution. In a similar vein, *Pickering's* criteria included harmony between and among faculty and administrators. This sort of harmony is not peculiar to academic institutions. Any collective activity requires at least some mutual regard to fulfill its missions. The level of respect depends on the degree of interdependence among the participants. In a college, that interdependence may be less than in a high school. A concern present in a college, but absent in high schools is that usually colleges have a research goal as well as a purely instructional one. Substantial interference with scholarly research may also be proscribed.

The second difference is that the alleged First Amendment restraint was applied to a teacher, rather than to a student. There may be situations where a teacher's right to free expression is subject to greater constraints than a student's, for example, where the teacher’s in-class behavior is at issue. We need not consider that point. Mabey, like Pickering, was not acting in a strictly academic capacity. Students did not participate in the meeting, presumably because the faculty could be more candid in their absence. In *Adamian v. Board of Regents* (9th Cir. 1975), we acknowledged that complete serenity does not obtain in all aspects of academic life; the academic senate is one place where expression of opinions should be most unfettered. We observed:

"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."

Despite its name, the senate was simply the representative body of the academic employees of the College. We have no reason to think that tempers will not occasionally flare at such meetings.

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. . . . [Previous cases in which faculty speech was found not to be protected] exhibit either premeditated disruption or a long-standing lack of concern about potential disruption. This is not to say that one act, sufficiently egregious, may not sink to the unprotected level. Rather, the cases imply that an isolated impassioned statement is unlikely to create sufficient disruption to meet the "material and substantial" test of *Tinker.*

Another factor, implicit in *Adamian*, is the presence of violence or an incitement to violence. Teaching and scholarly research can thrive only in an environment with at least a minimum of stability and calm. At some point conduct can become sufficiently violent to cause a breakdown of these necessary conditions, but *de minimis* interference does not mark that point. . . .

*Pickering* directs that the court balance the various negative factors against the complainant's interest in free expression. *Tinker* and its progeny teach that the court must focus on actual, not potential or hypothetical, disruption. We have no doubt that the proper functioning of schools and universities requires some discretion from all involved, but unrealistic sensitivity to the fragility of schools and universities is inappropriate. Robust intellectual and political discussions can and should thrive on college campuses. These discussions will not always be models of decorum. Moreover, often those with the power to appoint will be on one side of a controversial issue and may find it convenient to use their opponents' momentary stridency as a pretext to squelch them. The court must closely examine the asserted disturbing activity to insure that the reasons advanced meet the "substantial and material" disruption standard.

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Mabey, at least momentarily, did disrupt the senate meeting. The question is the severity of the disruption. The senate presumably considered problems of the academic community and this particular community was already embroiled in a high level of strife. . . . He spoke angrily, but he did not use obscenity. Sarcasm seems to have been his main weapon; he tried to turn the epithets of the article against its supporters. Even drawing all inferences favorable to the appellants, we cannot say that Mabey tried to disrupt the meeting; when it became clear he would not be permitted to speak out of order, he left and the meeting continued.

There was no evidence at the time of the summary judgment that Mabey either used or incited violence. We recognize that violence means different things in a library than it does on a football field, but his tone, although biting and insulting, does not appear to pass into the realm of violence. We note that the grievance hearing transcript provides little or no additional ammunition for the violence charge.

*Pickering* emphasized disharmony between the instructor and those with whom he is in daily contact. Mabey undoubtedly antagonized and alienated some administrators and faculty. There was evidence, however, that this outburst did not hurt his relations with his closest colleagues, those in the philosophy department. Just six months after the incident, they recommended him for another year. There were no further outbursts, nor any violence. On the other hand, it may be that the incident so damaged his relations with senior administrators that his position would have been untenable. Without a closer look at the facts than the summary disposition has allowed, we cannot say whether this happened.

*Reversed*.