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

**Demers v. Austin, 746 F.3d 402** (9th Cir., 2014)

*David Demers was a tenured associate professor in the College of Communications at Washington State University (WSU). In 2006, Demers wrote a short pamphlet called “The 7-Step Plan,” which he distributed to colleagues on campus. The university was at the time debating whether to separate Communications from the College of Liberal Arts and make it a free-standing college and whether to restructure the Communications faculty in the process. Demers’ pamphlet was an intervention in that debate, urging the creation of a freestanding communications school that would be more focused on vocational and professional aspects of the field. In 2007, Demers circulated parts of his book-in-progress, “Ivory Tower,” which was critical of the academy (and WSU) as largely irrelevant to solving real-world social problems.*

*Demers subsequently filed suit in federal district court against several university officials arguing that they had given him poor performance reviews and otherwise penalized him in retaliation for the views he expressed in those two works. He argued that such retaliation in response to constitutionally protected speech would be improper. The university responded that Demers had become negligent of his academic duties after receiving tenure and in any case those writings were not constitutionally protected speech since they were created as part of his government employment. The district court agreed and granted summary judgment to the university. On appeal, the circuit court held that academic writing by professors at state universities was generally protected by the First Amendment, and thus the district court would need to engage in further analysis to determine whether WSU had acted improperly in this case.*

JUDGE FLETCHER.

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Until the Supreme Court's decision in *Garcetti v. Ceballos* (2006), public employees' First Amendment claims were governed by the public concern analysis and balancing test set out in *Pickering v. Board of Education* (1968), and *Connick v. Myers* (1983). *Garcetti*, however, changed the law. The plaintiff in *Garcetti* was a deputy district attorney who had written a memorandum concluding that a police affidavit supporting a search warrant application contained serious misrepresentations. The plaintiff contended that his employer retaliated against him in violation of the First Amendment for having written and then defended the memorandum. The Court held in *Garcetti* that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

However, *Garcetti* left open the possibility of an exception. In response to a concern expressed by Justice Souter in dissent, the Court reserved the question whether its holding applied to “speech related to scholarship or teaching.” Justice Souter had expressed concern about the potential breadth of the Court's rationale, writing, “I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’“

Demers presents the kind of case that worried Justice Souter. Under *Garcetti*, statements made by public employees “pursuant to their official duties” are not protected by the First Amendment. But teaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are “a special concern of the First Amendment.” *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y*. (1967). We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court. . . .

The Supreme Court has repeatedly stressed the importance of protecting academic freedom under the First Amendment. It wrote in *Keyishian*:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”

It had previously written to the same effect in *Sweezy v. New Hampshire* (1957):

The essentiality of freedom in the community of American universities is almost self-evident․ To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation․ Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

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We conclude that *Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed “pursuant to the official duties” of a teacher and professor. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*. The *Pickering* test has two parts. First, the employee must show that his or her speech addressed “matters of public concern.” Second, the employee's interest “in commenting upon matters of public concern” must outweigh “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

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The *Pickering* balancing process in cases involving academic speech is likely to be particularly subtle and “difficult.” The nature and strength of the public interest in academic speech will often be difficult to assess. For example, a long-running debate in university English departments concerns the literary “canon” that should have pride of place in the department's curriculum. This debate may seem trivial to some. But those who conclude that the composition of the canon is a relatively trivial matter do not take into account the importance to our culture not only of the study of literature, but also of the choice of the literature to be studied. Analogous examples could readily be drawn from philosophy, history, biology, physics, or other disciplines. Recognizing our limitations as judges, we should hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego.

The nature and strength of the interest of an employing academic institution will also be difficult to assess. Possible variations are almost infinite. For example, the nature of classroom discipline, and the part played by the teacher or professor in maintaining discipline, will be different depending on whether the school in question is a public high school or a university, or on whether the school in question does or does not have a history of discipline problems. Further, the degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a university professor. Still further, the evaluation of a professor's writing for purposes of tenure or promotion involves a judgment by the employing university about the quality of what he or she has written. Ordinarily, such a content-based judgment is anathema to the First Amendment. But in the academic world, such a judgment is both necessary and appropriate. Here too, recognizing our limitations, we should hesitate before concluding that we know better than the institution itself the nature and strength of its legitimate interests.

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We conclude that *The 7–Step Plan* prepared by Demers in connection with his official duties as a faculty member of the Murrow School was “related to scholarship or teaching” within the meaning of *Garcetti*. . . .

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In Demers's view, the teaching of mass communications had lost a critical connection to the real world of professional communicators. His *Plan*, if implemented, would restore that connection and would, in his view, greatly improve the education of mass communications students at the Murrow School. It may in some cases be difficult to distinguish between what qualifies as speech “related to scholarship or teaching” within the meaning of *Garcetti*. But this is not such a case. . . .

The first step in determining whether the *Plan* is protected under the First Amendment is to determine whether it addressed a matter of public concern. . . .

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We begin by noting two obvious points. First, not all speech by a teacher or professor addresses a matter of public concern. Teachers and professors, like other public employees, speak and write on purely private matters. If a publicly employed professor speaks or writes about what is “properly viewed as essentially a private grievance,” the First Amendment does not protect him or her from any adverse reaction. Second, protected academic writing is not confined to scholarship. Much academic writing is, of course, scholarship. But academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring. Depending on its scope and character, such writing may well address matters of public concern under *Pickering*. Indeed, in *Pickering* itself the teacher's protected letter to the newspaper addressed operational and budgetary concerns of the school district. The Court in *Pickering* noted that the letter addressed “the preferable manner of operating the school system,” which “clearly concerns an issue of general public interest.” Further, the Court wrote that “the question whether a school system requires additional funds is a matter of legitimate public concern.”

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There may be some instances in which speech about academic organization and governance does not address matters of public concern. . . . But this is not such a case. Demers's *Plan* contained serious suggestions about the future course of an important department of WSU, at a time when the Murrow School itself was debating some of those very suggestions. We therefore conclude that the *Plan* addressed a matter of public concern within the meaning of *Pickering*.

Based on its holding that Demers's *Plan* did not address a matter of public concern, the district court granted summary judgment to defendants. As to the three questions it would have had to reach had it held otherwise, the district court wrote that there were questions of material fact. Those questions were whether defendants had a sufficient interest in controlling or sanctioning Demers's circulation of the *Plan* to deprive it of First Amendment protection; whether, if the *Plan* was protected speech under the First Amendment, its circulation was a substantial or motivating factor in any adverse employment action defendants might have taken; and whether defendants would have taken such employment action absent the protected speech. The district court may address those questions, as appropriate, on remand.

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*Reversed in part.*