



November 3, 2023



College Campus Protests & The First Amendment

Mary-Rose Papandrea

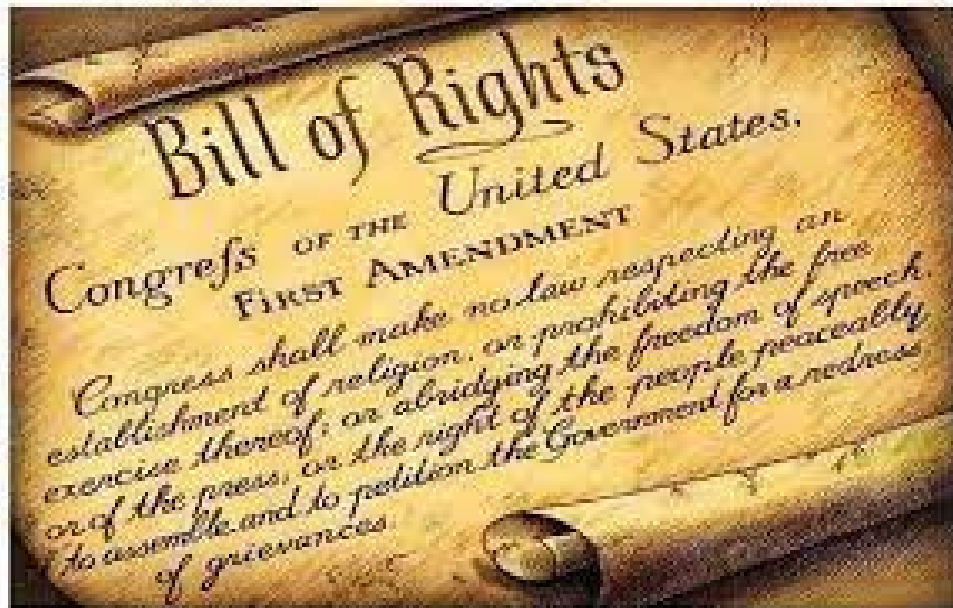
Samuel Ashe Distinguished Professor of
Constitutional Law

Disclaimers



- ❖ I don't have enough time to cover many important aspects of the 1A.
- ❖ I will not address 1A rights of professors or academic freedom.
- ❖ Some questions in this area are unsettled.
- ❖ I will focus on what the law is, and not what it should be or what it may be in the future.

First Amendment Limits UNC's Power



- ❖ UNC is a “state actor”
- ❖ Private universities are not
- ❖ First Amendment does not restrict private actors

Protections of the First Amendment



The First Amendment

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Some of the Purposes & Theories of the First Amendment



Purposes

- ❖ Criticize the government & government policies
- ❖ Influence the political process & shape government policies
- ❖ Express minority / dissenting views

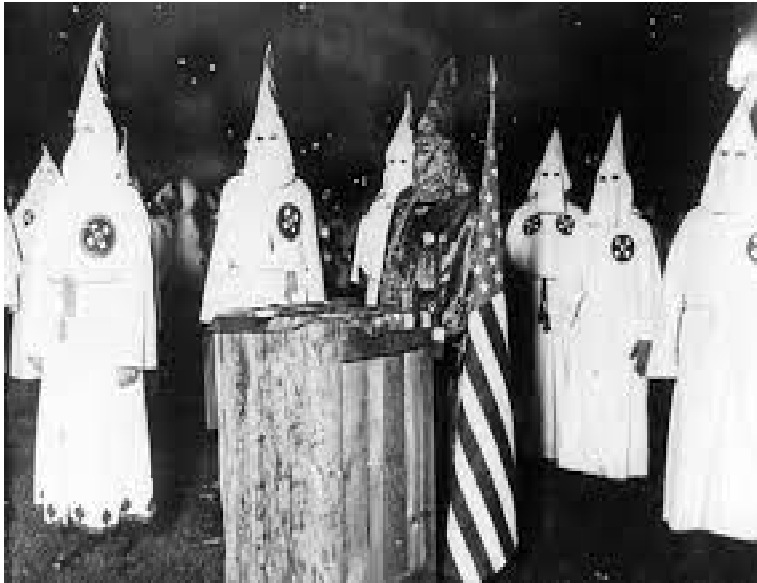
Theories

- ❖ Marketplace of ideas
- ❖ Self governance
- ❖ Check the government

Unprotected Category of Speech: Incitement



Brandenburg v. Ohio



Required elements:

- (1) express advocacy
- (2) imminent harm
- (3) likelihood of producing illegal action
- (4) intent to cause imminent harm

Advocacy for illegal action is protected unless these elements are met.

Unprotected Category of Speech: True Threats



Test:

- ❖ Where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm
- ❖ Intent = Recklessness standard
 - ❖ Speaker “consciously disregarded a substantial risk that his communications would be viewed as threatening violence.”

Unprotected: Material Support for Terrorism



Holder v. Humanitarian Law Project

- ❖ Government can restrict expressive activity that provides “material support” to a terrorist group.
- ❖ Important caveat: The expressive activity must be coordinated with or controlled by that terrorist group.

...
NOT carved out from 1A:
“Bad words” and Offensive / Hate Speech

Cohen v. California



Snyder v. Phelps



“Speech” includes Symbolic Expression



Tinker v. Des Moines Indep. Sch. Dist.



Texas v. Johnson



Remedy for Speech We Do Not Like: Counterspeech, Not Censorship



Content-Neutral Regulations of Expressive Conduct



United States v. O'Brien



Test:

- ❖ If it furthers an important or substantial governmental interest
- ❖ If the governmental interest is unrelated to the suppression of free expression
- ❖ If there is a sufficient nexus between the restriction and the interest
- ❖ No less restrictive alternatives that would the interest just as well

Content-Neutral Time, Place and Manner Restrictions



[Same] Test:

- ❖ If it furthers an important or substantial governmental interest
- ❖ If the governmental interest is unrelated to the suppression of free expression
- ❖ If there is a sufficient nexus between the restriction and the interest
- ❖ No less restrictive alternatives that would the interest just as well

Special Rules for Universities



Tinker standard

- ❖ Recognizes the “special characteristics of the school environment”
- ❖ Can regulate speech that “materially and substantially disrupts the work and discipline of the school.”
- ❖ An “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”

Healy v. James:
University as “Quintessential Marketplace of Ideas”



Limits of Free Speech Rights at Public Universities



Healy v. James

- While universities have a legitimate interest in preventing disruption, they face a “heavy burden” to demonstrate appropriateness of their actions.
- Can regulate expressive activities that “infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.”

Discriminatory Harassment



Davis v. Monroe County Board of Education

- 1) unwelcome,
- 2) discriminatory on the basis of a protected status, and
- 3) “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school.”

University grounds: Limited Public Forum



- ❖ Restrictions on expression by members of the public permissible
- ❖ Restrictions must be viewpoint neutral and reasonable in light of the objective uses of the forum.