

**Freedom of Expression and Inclusion**  
**Free Speech on Campus: What Is It? Why Is It Important? and**  
**How Does It Apply to UNC Greensboro?**



**UNC Greensboro Office of General Counsel**

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## *Preamble*

The United States Constitution stands as a document unique unto itself – without parallel or precedent. The human impact, and national and international scope of the U.S. Constitution cannot be understated. Suffice it to say, it is the most important governance document in the history of our nation and likely the world. The Bill of Rights – comprised of the first ten Amendments to the U.S. Constitution – sets our nation apart from all others and the First Amendment – protecting Freedom of Religion, Speech, the Right of Assembly and to Petition the government for grievances, is what truly defines our national identity and I might add what makes it strong and enduring.

The First Amendment directly impacts each of us. As a college student at Princeton during the 1970's, I exercised what I believed to be my First Amendment right to oppose racism and discrimination by opposing the University's offer to host a debate between Nobel Laureate William B. Shockley, who invented transistor, the most critical component of the transistor radio, and the national director of the Congress on Racial Equality ("CORE") Roy Innis. The Princeton "Shockley- Innis Debate" of 1973 help shape my initial view of and experience with the First Amendment law as it was practiced on a college campus.<sup>1</sup>

In a letter to the editor of *The Daily Princetonian*, Lisa Gok, my classmate and the Chair of the Third World Center Governance Board, and I argued against a student organization of the University (Whig Clio) inviting a speaker who espoused ideas of racial inferiority, the showing of the film "Birth of A Nation" and the invitation to Louise Day Hicks, a well-known segregationist who served as Chair of the Boston School Committee.<sup>2</sup> We argued that the university should not provide a forum for such racist beliefs. Moreover, as an Officer of the Undergraduate Assembly ("UGA") – the student government association, I joined eight of my colleagues in a 9 to 7 vote calling on the university to withdraw the invitation. The President of the University, William G. Bowen, my hero in so many other ways, thought otherwise. The Shockley-Innis debate was held. Louise Day Hicks spoke. And the Birth of a Nation was shown. This was done over the public objections of many classmates, most notably Frederick E. Dashiell, a classmate and lifelong friend, various members of the faculty, both Black and White, we well as members of the Asian, Latino, and Native American Princeton communities.

The story did not end there. Although Princeton offered very little support to those who took a different view on the question of whether the invitation should have been made in the first place (no alternative programming, no statements of public support for members of its student body who were the targets of the Shockley racial inferiority theory, and no promises or plans to utilize the significant resources of the university to even study the issue), President Shirley M. Tilghman, Princeton's first female president and a world renowned molecular biologist,

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<sup>1</sup> See Laird Hart, *University readies for Shockley-Innis Debate Princeton University Library*, <http://theprince.princeton.edu/princetonperiodicals/?a=d&d=Princetonian19731128-01&e=-----en-20--1--txt-txIN-----> (last visited Sep 10, 2018); attached as Appendix A.

<sup>2</sup> See *Letter Against 'racist forums,'* <http://theprince.princeton.edu/princetonperiodicals/?a=d&d=Princetonian19751203-01&e=-----en-20--1--txt-txIN-----> (last visited Sep 10, 2018); attached as Appendix B.

delivered the University's Baldwin Lecture in March of 2010.<sup>3</sup> The Baldwin lecture invited faculty members from across all divisions of the university "to reflect on the issue of race and American culture."<sup>4</sup> President Tilghman explained that the purpose of the Lecture aligned closely with the spirit of the mission of the university's Center for African American Studies. She shared the following findings in her speech: "Though there are small, and sometimes significant, differences among all humans, the genetic material or genomes of any two people are 99.9 percent identical. The genetic differences between individuals are significantly greater than differences between groups."<sup>5</sup> Tilghman encouraged the public to be conscientious of potential bias in ongoing scientific research projects and enumerated several past studies that she believed were based on "prejudice, rather than careful observation: 'I am sorry to have to say that too often when science has been brought to bear on the issue, the outcome has not yielded enlightenment.'"

Fred, Lisa, and I went on to law school as many of my fellow colleagues and protesters did and we studied and experienced the benefits and challenges of exercising our rights protected by the First Amendment. The issues debated in 1973 remain the issues of 2018. That experience and my understanding of the U.S. Constitution, particularly the First Amendment, have convinced me that while our advocacy was right, our position on the application of the First Amendment to our college campus was constitutionally wrong.

Our right to protest was then and is now protected by the U.S. and most state Constitutions. My experiences serving as General Counsel at public universities however has taught me that our obligations as university officials go far beyond whether a person has a right to be heard or whether the government in any of its forms should endorse a particular point of view. Most likely they do, and the government should not.

If we simply stop there we miss critical components of many of our university missions: to ensure that students obtain the analytical skills necessary to survive in and contribute to the wellbeing of society and understand their rights and responsibilities, and to prepare students to be global citizens and understand their local and international surroundings. Universities throughout our history have played a critical role in transforming individual lives and communities through education and research and in serving as a precursor for change and modeling values. Institutions of higher education have a unique place in our past, present, and future. How we treat, educate, and model First Amendment principles is important to our continued important place in our local communities and the nation in general.

The significance of freedom of expression on our institutions of higher education – public and private – cannot be over-stated. University of Chicago President Robert J. Zimmer in his

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<sup>3</sup> See Shirley Tilghman, President of Princeton Univ., Baldwin Lecture at Princeton Univ.: *The meaning of race in the post-genome era* (March 9, 2010). (transcript available at <http://www.princeton.edu/president/tilghman/speeches/20100309/>).

<sup>4</sup> Kitta MacPherson, *Tilghman offers scientific views on 'vexing' issue of race Princeton University* (2010), <https://www.princeton.edu/news/2010/03/10/tilghman-offers-scientific-views-vexing-issue-race?cv=1&ion=featured> (last visited Sep 7, 2018).

<sup>5</sup> *Ibid.*

October 26, 2017, testimony to United States Senate explained the importance of free speech on college campuses as follows<sup>6</sup>:

For institutions of higher education, whether public or private, free expression and open discourse are indispensable conditions for accomplishing the missions of education, research, and impact.

Every student at a university deserves an education that deeply enriches their capabilities. This necessitates acquiring knowledge but, more importantly, acquiring general skills and habits of mind that are going to enhance their approach to future challenges. They must learn to recognize and evaluate evidence of various sorts; challenge their own and others' assumptions; effectively argue their position; grasp both power and limitations in arguments; confront complexity and uncertainty; synthesize different perspectives; understand that context and history matter; think through unintended consequences; and take account of change, tradeoffs, and uncertainties.

If the education that we provide does not give students, the opportunity to acquire these skills and abilities they will be underprepared to make informed decisions in the complex and uncertain world they will confront upon entering the workplace.

Intrinsic to students attaining these skills is an environment of ongoing intellectual challenge, of which free expression and open discourse is an essential part. And likewise, for research at universities to be of the highest quality, unfettered investigation and a willingness to challenge assumptions and the free expression that goes with it is essential.

To limit free expression is, quite simply, to limit the quality of education and the quality of research. This has important implications for our country. Nationwide, innovation is driven by faculty research and an inventive alumni body forged by a level of challenge that demands an environment of free expression. To be challenged is also why so many of the leading ambitious young people from around the world have come to the United States. And such is the ultimate importance and stake for our country around these issues.

We must now consider, though, how to sustain and continue to enhance what we have collectively built over the course of our national history as a uniquely American approach to higher education. Will our higher education system continue to be the best in the world? Will our research continue to be the most impactful? Will we continue to attract highly talented people? Or will we lose focus on the mission of universities and allow other concerns to erode the efficacy

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<sup>6</sup> Robert J. Zimmer, President of Univ. of Chicago, Committee Hearing in Washington, D.C.: Senate Committee on Health, Education, Labor and Pension, *Exploring Free Speech on College Campuses* (October 26, 2017). (transcript available at <https://www.help.senate.gov/hearings/exploring-free-speech-on-college-campuses>).

of our institutions? How we answer these questions will go a long way toward defining how we evolve as a country. The stakes could not be higher.

*Jerry D. Blakemore.*

### *Statement of Purpose*

The purpose of this paper is to provide a historical context for the development of First Amendment Jurisprudence, to outline the current state of the law as it relates to colleges and universities and to provide real life example of application of First Amendment rights and responsibilities. In addition, this paper will address the issues of inclusivity as they relate to the First Amendment and their application to the campuses of colleges and universities.

This paper is based on the current state of the law and should be read as such. The application of Constitutional law to our campuses and any other setting is highly fact based and this paper is not intended to provide legal advice. Constitutional law is evolving just as our society continues to evolve and as a result our understanding of what is and is not constitutionally protected speech will be better defined over time. The Office of General Counsel does add its opinions regarding trends and areas that courts are likely to address and identifies issues that colleges and universities are likely to face in the future.

## **CHAPTER I: THE FIRST AMENDMENT AND INCLUSIVITY. A 45 Word First Amendment and Its Exceptions: The Underpinning of Our Democracy**

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 the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.<sup>7</sup>

The words of the First Amendment set forth six independent, constitutionally protected rights: (1) the right to be free from governmental establishment of religion (the “Establishment Clause”), (2) the right to be free from governmental interference with the practice of religion (the “Free Exercise Clause”), (3) the right to free speech, (4) the right to freedom of the press, (5) the right to assemble peacefully (which includes the right to associate freely with whomever one chooses), and (6) the right to petition the government for redress of grievances. These six rights are often in conflict. In such instances, courts are required to balance the competing rights; and in the end, the balance achieved is generally in favor of freedom of expression.

As a creation, or arm, of North Carolina State, UNC Greensboro must abide by the First Amendment. Constitutional rights and, specifically, the First Amendment, apply to students as well as to employees and others properly on campus through application of the Fourteenth Amendment. This means that UNC Greensboro may not curtail the First Amendment rights of its faculty, students, or employees, unless it does so within certain narrow limits that courts have established and approved.<sup>8</sup>

In the case of college campuses, the United States Supreme Court has recognized some differences between a college campus and other public forums, such as parks, public streets, or municipal theaters. The Court has held “A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.”<sup>9</sup> Thus, UNC Greensboro as a public institution must govern itself consistent with the First Amendment protections of the United States Constitution, and in so doing its actions should be guided by both constitutional law and its mission. In addition, to the U.S. Constitution, UNC Greensboro is also responsible for ensuring that North Carolina Constitutional protections are respected.

The American Council on Education (ACE), which represents more than 1,700 college and university Presidents, Chancellors, and other higher education executives from both the private and public sectors recently hosted their first Regional Summit on Freedom of Expression and Inclusion. They provided participants with a wealth of information including summaries of

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<sup>7</sup> U.S. Const. Amend I.

<sup>8</sup> See UNCG Policy on Free Speech, Public Assembly, Petitioning, and Amplified Sound:

UNCG is committed to making the majority of its outdoor spaces available to members of the University community and invited guests for purposes of speech, assembly, and petitioning activities, except as may be necessary to protect its property and to avoid interference with scheduled activities of students, University personnel, and invited guests. This policy also addresses reasonable times, places, and manner for the use of sound which is amplified (electronic, mechanical, public address) and sound which could be disruptive to academic classes in surrounding buildings.

<sup>9</sup> *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981).



First Amendment cases, the results of various studies and surveys and their conclusions. ACE shared the following conclusion which I believe captures our current mindset regarding the First Amendment and the challenges that our campuses throughout the nation face.

*“Recent events on college campuses—and in greater civil society—have too often juxtaposed the values of diversity and inclusion against those of freedom of expression, when these values can and should be mutually reinforcing. While college students believe in the First Amendment, many are willing to entertain restrictions, such as policies that restrict language and behavior that are intentionally offensive to certain groups, when they perceive a conflict with other values and beliefs (Knight Foundation 2018). Caught in the crosshairs are college and university leaders, who want to promote robust discourse in their communities, but do not want to negatively affect the student experience or compromise the learning environment.” (ACE, *To the Point, Campus Inclusion and Freedom of Expression: Controversial Speakers*)*

#### A. ACE Conclusion

This conclusion by ACE accurately represents the challenge faced by colleges and universities. The conclusion that these rights and values are “mutually reinforcing” provides us a way to approach assuming that constitutional rights are exercised and protected and that the values of inclusivity and diversity are understood and practiced. Ultimately, the leadership of our institutions of higher education will need to establish policies and practices that accomplish **both**- not balance one over the other.

#### B. North Carolina Constitution

The State of North Carolina has various constitutional provisions related to First Amendment rights. Relevant North Carolina Constitutional Provisions include: Sec. 12. *Right of assembly and petition.* The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.<sup>10</sup>

Sec. 13. *Religious liberty.* All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.<sup>11</sup>

Sec. 14. *Freedom of speech and press.* Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.<sup>12</sup>

These provisions are similar to the First Amendment of the U.S. Constitution and differ in substance only with respect to the provisions related to secret political societies found in Sec.

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<sup>10</sup> N.C. Const. Art. 1, § 12.

<sup>11</sup> *Id.* at § 13.

<sup>12</sup> *Id.* at § 14.

12, which was a direct response to slavery and the specific reference found in Sec. 13 related to worship of an almighty God. Regarding the provisions related to freedom of speech and press, the NC Constitution is explicit on the requirement of being held responsible of any abuse of these rights.

### *C. Relevant North Carolina State Laws*

Although as should be the case, much of the attention on the First Amendment is focused on the U.S. Constitution and U.S. Supreme Court jurisprudence, all public entities of the State of North Carolina are governed by U.S. appellate courts (i.e., Fourth Circuit Court of Appeals), state courts and the North Carolina Constitution. In addition, there are specific state laws that provide additional requirements for public institutions including Constituent Institutions of the University of North Carolina. There are at least two relevant laws that are important for our discussion. They are “An Act to Restore and Preserve Free Speech on the Campuses of the Constituent Institutions of the University of North Carolina” (Campus Free Speech Law) N.C. Gen. Stat. § 116-300 and the “North Carolina Heritage Protection Act” (HPA) N.C. Gen. Stat. § 100-2 (2015).

### *D. Campus Free Speech Law*

The Campus Free Speech Law was passed by the NC General Assembly in July 2017. This new law was directed specifically at public colleges and universities and required that we establish standards for approving or prohibiting speech, mandates the creation of certain campus responsibilities including the designation of a responsible officer, training, annual reports, and other administrative requirements. The following represent specific requirements that public universities and colleges are required to adhere to under the new law:

- Ensure the fullest degree of intellectual freedom and free expression.
- Avoid shielding individuals from speech protected by the First Amendment.
- Do not take any action that would require public expression of a particular social view.
- Ensure that any restriction on speech is clear, necessary and publish and provide alternative means of expression.
- Permit spontaneous expression.
- Maintain a campus open to any speaker invited by the University consistent with legal restrictions.
- Mandatory free speech training for all new students.
- Mandatory free speech policy.
- Establish and implement a wide range of penalties for violations of free speech policy and rights.
- Establish procedural safeguards for persons violating free speech policy.

The University of North Carolina Board of Governors, pursuant to the Act designated the University Governance Committee of the Board as the Board’s Committee on Free Expression and the Committee has proposed for full Board consideration, a report on free speech and free

expression within the University, “2017-2018 Report on Free Speech and Free Expression Within the University”<sup>13</sup> that includes the following proposed findings and recommendations:

#### BOG Governance Committee Proposed Findings

1. *The constituent institutions are committed to promoting and protecting free speech and free expression;*
2. *Disruptions and interference at scheduled speaking or expressive events have been minimal over the past year;*
3. *The constituent institutions are working to provide information to various campus constituencies about rights and responsibilities associated with speech and expression on campus through policies, training, and other outreach;*
4. *The Foundation for Individual Rights in Education (FIRE), which rates college and university speech policies, has awarded its highest rating (“green light”) to 7 UNC constituent institutions, more than any other state;*
5. *Some constituent institutions have incurred additional costs related to security surrounding speakers or expressive events on campus; and*
6. *There is still room to improve, such as:*
  - a. *providing both a central way for people to ask questions or raise concerns about speech and expression at the constituent institutions, and an easily accessed institutional complaint process;*
  - b. *offering a consistent and user-friendly way to access campus speaker/event information; and*
  - c. *providing user-friendly resources for internal groups and/or outside individuals on UNC’s commitment to free expression and information about holding events on campus.*

*The committee also acknowledged that UNC’s constituent institutions have a long record of holding speech or expressive events without significant disruption or interference, and that many successful events tend to not garner significant publicity or public attention. This past year was no exception.<sup>14</sup>*

The findings in the proposed report that relate specifically to UNC Greensboro, include:

1. UNC Greensboro was one of 13 of 16 institutions that did not indicate any barriers or disruptions to free speech within the academic year.
2. One of 13 of 16 institutions with no administrative actions to report.
3. One of 16 institutions that had established and distributed an institutional policy which reinforced our commitment to free speech and free expression.
4. One of seven institutions that has been awarded the highest rating (green light) established by the Foundation for Individual Rights in Education (FIRE).

#### BOG Governance Committee Proposed Recommendations

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<sup>13</sup> Attached as Appendix D.

<sup>14</sup> University of North Carolina Board of Governors, September 13, 2018, p. 3, *REPORT: 2017-2018 Report on Free Speech and Free Expression Within the University*.

1. *Implementing campus hotlines for questions or complaints related to free speech or free expression at the constituent institution (which could be part of a broader institutional hotline program for questions or complaints).*
2. *Assuring each constituent institution has an easily accessed process for filing complaints related to speech or expression (which may be part of an existing complaint or grievance process).*
3. *Encouraging each constituent institution to provide an easily accessible website with information on scheduled speakers and events on campus. While this would not capture spontaneous speakers and events, it could provide a more comprehensive and easily referenced website for campus constituencies.*
4. *Encouraging each constituent institution to develop a standard set of resources for potential speakers describing in a user-friendly way how to access or reserve campus spaces, applicable time, place, and manner restrictions, any information about costs that may be assessed; campus resources for answering questions or providing additional assistance; and UNC's commitment to free speech and free expression.*
5. *Encouraging constituent institutions to regularly review and, as necessary, revise policies impacting free expression to improve clarity and ensure protection of rights to free expression.*
6. *Continuing to provide periodic training, education, and support for Responsible Officers.*
7. *Partnering with the constituent institutions to provide training on the Act and free speech/free expression to members of the Boards of Trustees as part of their orientation process or in other ways that would be helpful.<sup>15</sup>*

The proposed findings and recommendations represent the ongoing obligation of the University to make certain that there is a clear understanding of the commitment to protect and promote free speech, that our policies and practices are clear and consistent, and that both external and internal constituents and stake holders have appropriate access to University resources and facilities in pursuit of their constitutionally protected rights.

#### *E. North Carolina Heritage Protection Act*

The North Carolina Heritage Protection Act (“HPA”) also impacts public university First Amendment practices. The HPA was signed into law by former Governor McCrory in July 2015<sup>16</sup> and is especially relevant to the current discussion of free expression on campuses. The law was enacted two weeks after the Confederate flag was removed from the South Carolina State House, which was precipitated in large part by the church killings in Charleston by an admitted white supremacist.<sup>17</sup> The HPA is similar to the laws passed over the last two decades

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<sup>15</sup> *Id.* at 4.

<sup>16</sup> N.C. Gen. Stat. § 100-2 (2015).

<sup>17</sup> See Stephanie McCrummen & Elahe Izadi, *Confederate Flag Comes Down on South Carolina's Statehouse Grounds*, WASH. POST (July 10, 2015), <https://www.washingtonpost.com/news/post->

by many southern states<sup>18</sup> including: Georgia, Mississippi, South Carolina, Tennessee, Alabama, and Arkansas.<sup>19</sup>

Essentially, the HPA seriously limits the removal, relocation, or alteration of any monument or display of a permanent character.<sup>20</sup> The statute starts with a general provision that essentially establishes a limited set of circumstances in which a monument may be removed. This provision provides that the North Carolina Historical Commission ("the Commission"), a body appointed by the Governor in staggered terms, must approve any sort of modification or removal of a monument.<sup>21</sup> In addition, the Commission also has the power to approve any monument, memorial, or work of art before it becomes state property.<sup>22</sup>

The "Limitations on Removal" subsection of the HPA states that "[a]n object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection."<sup>23</sup> Next, the law details two specific circumstances in which relocation of a monument would be appropriate: "(1) [w]hen appropriate measures are required by the State or a political subdivision of the State to preserve the object [and] (2) [w]hen necessary for construction, renovation, or reconfiguration of buildings, open spaces, parking, or transportation projects."<sup>24</sup>

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nation/wp/2015/07/10/watch-live-as-the-confederate-flag-comes-down-in-south-carolina/  
[https://perma.cc/5M2U-6DWS] (noting the Confederate flag was removed from the State House on July 10, 2015).

<sup>18</sup> See Kasi Elizabeth Wahlers, *North Carolinas Heritage Protection Act: Analyzing the Cementing of Confederate Monuments in North Carolinas Landscape*, SSRN Electronic Journal (2016).

<sup>19</sup> See GA. CODE ANN. § 50-3-1(b) (2015) (preventing removal or alteration of military monuments); MISS. CODE ANN. § 15-15-81 (2015) (preventing removal of military monuments and renaming of public property named after military events or figures); S.C. CODE. ANN. § 10-1-165 (2015) (enumerating certain kinds of memorials that may not be removed or altered, stating that state property named after historic figures may not be renamed, and preventing amendments to the statute without two-thirds vote of the North Carolina General Assembly); Tennessee Heritage Protection Act of 2016, ch. 601, 2016 Tenn. Pub. Acts (codified at TENN. CODE ANN. § 4-1-412 (2016)) (preventing removal of military monuments and renaming of public property but allowing counties and towns a mechanism to seek waiver of this prohibition); S.B. 13, 2016 Leg., Reg. Sess. (Ala. 2016) (prohibiting any alteration to monuments or naming conventions honoring an enumerated list of historical events without first obtaining a waiver); H.B. 1229, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (preventing removal of military monuments or renaming of public property).

<sup>20</sup> Note: Any building named after historical figures is not considered a "monument or display of a permanent character" under this law.

<sup>21</sup> N.C. Gen. Stat. § 100-2.1(a) (2015) (stating that "[e]xcept as otherwise provided in subsection (b) of this section, a monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission.").

<sup>22</sup> *Id.* at § 100-2.

<sup>23</sup> *Id.* The statute continues to state:

An object of remembrance that is temporarily relocated shall be returned to its original location within 90 days of completion of the project that required its temporary removal. An object of remembrance that is permanently relocated shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated. An object of remembrance may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location.

<sup>24</sup> *Id.*

Practically speaking, the effect of the HPA is to prevent any monument, or object of remembrance, from being permanently removed, allowing for relocation of the same in the two narrow circumstances mentioned above.<sup>25</sup> Arguably, the HPA has usurped any authority on the part of any public entity, including units of local government and public colleges and universities from permanently or even temporarily removing monuments from their current location unless determined by the Commission that such temporary removal or relocation is necessitated by either 1) preservation or 2) building repair and related public projects.

*Casaundra M. Maimone and Kristen S. Bonatz.*

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<sup>25</sup> See Kasi Elizabeth Wahlers, *North Carolinas Heritage Protection Act: Analyzing the Cementing of Confederate Monuments in North Carolinas Landscape*, SSRN ELECTRONIC JOURNAL (2016).

## CHAPTER II: Free Speech: It's Origins and Why It's Important

Freedom of expression, which includes verbal and nonverbal behaviors that express an individual's opinion, point of view, or identity, is considered a fundamental constitutional right within the American democratic system. The Supreme Court has described the freedom of speech as "the matrix, the indispensable condition, of nearly every other form of freedom."<sup>26</sup> As such, freedom of expression occupies a "preferred place"<sup>27</sup> in our constitutional system - speech claims inherently carry more weight than the arguments typically used to justify limiting it.

There are many legitimate and compelling reasons to limit an individual's speech: speech can be used in ways that pose palpable dangers, threaten national security, invade privacy, incite violence, and offend fundamental societal values such as respect for human dignity. Striking the appropriate balance between "the indispensable condition" and legitimate and compelling reasons to limit expression involves a complex set of legal doctrines that are inherently difficult to navigate, an endeavor that often becomes even more complex when applied in the context of a modern campus environment. Despite the challenges, Erwin Chemerinsky and Howard Gillman, in their book, *Free Speech on Campus*, argue that history has shown us that the alternative to freedom of expression is disastrous to society.<sup>28</sup> Government censorship and control of ideas have been used throughout history to prevent challenges to power, prevent the circulation of new ideas and thwart social progress in general. On the other hand, proponents of free speech have typically worked towards making societies more democratic, diverse, tolerant, educated, and progressive.

### A. The History of Free Speech in America

There have been profound differences with respect to perspectives on the freedom of expression throughout history. The history of free speech in America is necessary to understand why freedom of speech is so important, especially in the context of today's debate over free speech on college campuses.

#### 1. Free Speech in America Before the Twentieth Century

As discussed in the book *Free Speech on Campus*, during the fifteenth century the social and political elites in Europe had to contend with the invention of the printing press, a technological breakthrough that revolutionized the way in which ideas and information were communicated, circumventing the hierarchy of the church and monarchy, which had previously exercised a great deal of control over the dissemination over the same.<sup>29</sup> The spirit of freedom of speech gained its wings with the invention of the printing press. Prior to this technological breakthrough the power of information and communication were controlled by the monarchy and the church hierarchy, leaving common persons with no voice to advocate for themselves. However, the printing press served as potential political and social equalizer by giving any literate person the ability to read and decide the meaning of information for his- or herself, as

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<sup>26</sup> *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

<sup>27</sup> *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

<sup>28</sup> Erwin Chemerinsky & Howard Gillman, *Free Speech on Campus* at 22 (2017).

<sup>29</sup> *Id.* at 28.

well as produce and distribute his or her own ideas. Therefore, even though the control of information expanded beyond the grips of the monarchy and clergy it remained in the hands of the literate.

The founders of the American government put in action the potential for all citizens to have a voice in the American government through the First Amendment and the right to a free public education. By providing, at least in theory, equal access to a public education and allowing the right to express ideas, our government laid the foundation for a truly participatory democracy.

## **2. Free Speech in America During the Twentieth Century**

In the early 20th century prior to World War I, the American government championed the instillation of fear of the recent immigrants from Eastern and Southern Europe. Through propaganda, Americans were persuaded that these immigrants “would bring ‘anti-American’ practices and ideas into the country, including socialism and anarchism.”<sup>30</sup> President Woodrow Wilson championed this fearmongering in his 1915 state of the union address. In his address, President Wilson promoted the creation of laws to impinge upon the First Amendment rights of Americans under the guise of protecting the country from the “poison of disloyalty” being poured into the “arteries of our nation life” by “the increasing presence of American citizens who were “born under other flags.”<sup>31</sup> Through the use of these anti-immigrant viewpoints, there was the creation and the passage of the Espionage Act of 1917, the Sedition Act of 1918, and many similar state statutes.<sup>32</sup> Post World War I another fear tactic, The Red Scare, was utilized to inspire “continued restrictions on political dissent, especially with respect to the advocacy of socialist or anarchist views.”<sup>33</sup>

## **3. Free Speech in America Today**

In the second part of the Twentieth Century, courts and civil advocates worked to cultivate a change in American culture that would extend the rights provided by the First Amendment to all citizens.<sup>34</sup> In many ways, the most important beneficiaries of this evolving conception of free speech were the most marginalized and oppressed citizens and those who most strongly challenged conventional American culture, including religious minorities, labor unions, and civil rights demonstrators.<sup>35</sup> The civil rights movement in particular serves as a poignant reminder that free speech protects the weak and powerless the most, despite the fact that the same rights do sometimes protect the strong and powerful.

While many of today’s advocates for censorship believe that denying free speech is a way of protecting vulnerable populations, it is important to understand that social progress has come about not by silencing certain speakers but by ensuring that every speaker, irrespective of content

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<sup>30</sup> *Id.* at 35.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 40.

<sup>35</sup> *Id.*



or views, is provided an opportunity to express their position and have their say, albeit subject to intellectual scrutiny, in addition to time, place, and manner restrictions.<sup>36</sup>

Dr. King's message of equality or civil rights was thought of as offensive, even radical and entirely outside the norms of society. If the government (federal, state, or local) would have been allowed to censor or punish speech that was thought of as offensive or tended to cause harm or danger, the civil rights movement could not have gotten off the ground.

*Jerry D. Blakemore and Casaundra M. Maimone.*

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<sup>36</sup> See *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981) (noting that the Supreme Court “has long recognized the validity of reasonable time, place, and manner regulations on [the use of traditional public forums] so long as the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication”).

## CHAPTER III: Free Speech for University Employees<sup>37</sup>

### A. General Summary of the Law

#### 1. Public Employees Generally

“When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom,” however citizens do retain the right “to speak as a citizen addressing matters of public concern.”<sup>38</sup> Two cases, *Pickering v. Board of Education* and *Connick v. Meyers*,<sup>39</sup> provide the balancing tests used for public employees’ First Amendment rights when public employees assert that the state, as their employer, has violated their First Amendment rights. First, is the public employee speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest? Second, does the interest of the employee as a citizen in commenting on matters of public concern outweigh the government’s interest in providing effective and efficient services to the public? Third, is the speech a substantial factor in the adverse employment decision about the employee?

In 2006, the U.S. Supreme court confirmed that governmental employees’ speech rights is limited in *Garcetti v. Cellabos*.<sup>40</sup> Cellabos was a district attorney who asserted that he was bypassed for a promotion because he had criticized the legitimacy of a search warrant.<sup>41</sup> The Supreme Court held that because Cellabos made that criticism as a public servant, and not as a private citizen, his speech was not protected.<sup>42</sup> In reaching this decision, though, the court noted that “there is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by” the Supreme Court’s “customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”<sup>43</sup>

In short, if the employee who suffers an adverse action (dismissal, demotion, a letter of reprimand, suspension, etc.) spoke as part of the employee’s job duties, and that speech touched on a matter of public concern, the interests between the employee’s free speech and the employer’s interest in avoiding disruption to the work environment need to be “balanced.” Is the speech more important or the avoidance of disruption more important? If the former, the University loses. If the latter, and the employee would not have suffered an adverse action if they had not spoken, the University has violated the employee’s free speech rights. *Thus, the University may regulate the speech of University employees.*

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<sup>37</sup> See Appendix E for a chart comparing the First Amendment Rights for Students, Faculty, and Staff.

<sup>38</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 417-18 (2006).

<sup>39</sup> *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (establishing the balancing test that is to be applied when a public employer seeks to regulate an employee’s speech) and *Connick v. Myers*, 461 U.S. 138 (1983) (holding that “a State cannot condition public employment on a basis that infringes the employee’s constitutionally protected interest in freedom of expression”).

<sup>40</sup> *Garcetti*, 547 U.S. 410 (2006).

<sup>41</sup> *Id.* at 414.

<sup>42</sup> *Id.* at 424.

<sup>43</sup> *Id.* at 425.

## 2. Political Activity

Consistent with the principles, that consider whether a public employee is speaking as an employee or as a citizen and whether that speech is on a matter of public concern, state law,<sup>44</sup> state human resources policy<sup>45</sup>, and policies of the University of North Carolina<sup>46</sup> regulate employees' political speech and activity. Specifically, no employee may (1) use the authority of his/her position or university property to secure support for, or to oppose, any person or issue in any election; or (2) coerce, solicit, or compel a State employee to support or contribute to a political candidate, party, or cause. In addition, no university or State funds, equipment, or services ("Resources") (e.g. vehicles and other equipment, campus mail, computers and email, postage, photocopying and fax, etc.) may be used for political activities.<sup>47</sup> *Thus, as it relates to limiting political speech of public university employees, the law is clear, political speech can be limited.*

## 3. Faculty – *Adams v. UNCW*

The United States Fourth Circuit Court of Appeals considered this very issue in *Adams v. Trustees of the University of North Carolina – Wilmington*.<sup>48</sup> Adams was a tenured associate professor who converted to Christianity after he received tenure.<sup>49</sup> He claimed he was denied promotion to full professor due to his political and religious speech.<sup>50</sup> He had strong teaching and research reviews, and included religious and political information in his dossier for promotion.<sup>51</sup> Lack of scholarly research was cited by his department as it reviewed his dossier, and that was identified as the predominant reason for denial of Adams' promotion, though the lack of support from the faculty was also noted.<sup>52</sup> The court held that *Garcetti* did not apply because the Supreme Court "left open" the question of whether its principles apply to the academy,<sup>53</sup> and so applied *Pickering* to Adam's case.<sup>54</sup>

The Court determined that Adams was paid to be a scholar and a teacher, regardless of the setting for his work – i.e., his blog. Other than the fact that faculty necessarily speak and write pursuant to official duties, Adams' speech "was not tied to any more specific or direct employee duty than the general concept that professor will engage in writing, public appearances, and service within their respective fields."<sup>55</sup> The Court went on to note that

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<sup>44</sup> N.C. Gen. Stat. § 126-13 *et. seq.*

<sup>45</sup> North Carolina Office of State Human Resources, *State Human Resources Manual*, Employment and Records, Section 3, page 26 "Limitation of Political Activity" (1967) (available at [https://files.nc.gov/ncoshr/documents/files/Limitation\\_of\\_Political\\_Activity.pdf](https://files.nc.gov/ncoshr/documents/files/Limitation_of_Political_Activity.pdf)).

<sup>46</sup> *The UNC Policy Manual*, Section 300.5.1 ("Political Activities of Employees") and Section 300.5.2 ("Candidacy for Elective Office; Officeholding (Elective and Appointive Public Office)").

<sup>47</sup> *The UNC Policy Manual*, Section 300.5.1 at II.B.2.

<sup>48</sup> *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550 (2011).

<sup>49</sup>*Id.* at 553.

<sup>50</sup>*Id.* at 558.

<sup>51</sup>*Id.* at 553-56.

<sup>52</sup>*Id.* at 555.

<sup>53</sup>*Id.* at 563.

<sup>54</sup>*Id.* at 564.

<sup>55</sup>*Ibid.*

“[s]peech is a matter of public concern when it involves an issue of social, political, or other interest to a community.”<sup>56</sup> Adams’ blog posts and columns discussed matters that were clearly of public concern: “academic freedom, civil rights, campus culture, sex, feminism, abortion, homosexuality, religion and morality”.<sup>57</sup>

While the court determined that the denial of promotion was not the result of intentional or purposeful discrimination or that Adams was treated differently from others who were similarly situated in violation of Title VII,<sup>58</sup> it did determine that he was speaking on a matter of public concern, which is a clearly established constitutional right. Thus, the administrators were not entitled to qualified immunity and Professor Adams was able to sue them.<sup>59</sup> The court noted that it did not want to revisit the “subjective and scholarly judgments involved in University tenure and promotions decisions”.<sup>60</sup> This is in part because “courts have been reluctant to trench on the prerogatives of state and local educational institutions [because of the courts'] responsibility to safeguard their academic freedom . . . [since it is not] suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making.<sup>61</sup> For this reason, “the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion. Rather, the court’s review has been narrowly directed as to whether the appointment or promotion was denied because of a discriminatory reason.”<sup>62</sup> *Given the court’s explicit thinking on this matter, it is critical that the University generally, and faculty in particular, clearly outline the academic criteria and related expectations and standards, which are, or could be a part of any professional evaluation or performance review.*

## **B. Academic Freedom**

The Court in *Adams* noted that academic freedom is a “term that is often used, but little explained, by federal courts” because Supreme Court has not established “a First Amendment right of academic freedom that belongs to the professor as an individual, but rather . . . [it] appears to have recognized only an institutional right of self-governance in academic affairs.”<sup>63</sup> Therefore, Academic Freedom is implicated by the freedom of assembly of the First Amendment. Although there is a technical legal argument that academic freedom is not a constitutionally protected right, there is little dispute that academic freedom as a matter of principal and practice is an integral and necessary part of the fabric of our institutions of higher education. Academic freedom is less of a guaranteed constitutional right and more of a contractual and cultural component of the American higher education system.

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<sup>56</sup>*Id.* at 564.

<sup>57</sup>*Id.* at 565.

<sup>58</sup>*Id.* at 560.

<sup>59</sup>*Id.* at 565.

<sup>60</sup>*Id.* at 557.

<sup>61</sup>*Id.* at 557, citing *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (internal citations and quotation marks omitted).

<sup>62</sup> *Smith v. Univ. of North Carolina*, 632 F.2d 316, 345-46 (4th Cir. 1980) (internal citations omitted).

<sup>63</sup> *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550, 557 (2011).

The origins of academic freedom in this country can be traced to the 1915 American Association of University Professionals (“AAUP”) Statement of Principles on Academic Freedom and Academic Tenure. The 1915 Statement was revised in 1925 in an effort to promote public understanding and support for Academic Freedom and again revised in 1940. For purposes of UNC Greensboro, the principles of academic freedom are reflected in a long-standing agreement between the University leadership and the Faculty. The provisions of this agreement are set forth in university regulations, handbooks, and other publications. For example, the UNC Greensboro Promotion, Tenure, Academic Freedom, and Due Process Regulations (2015)<sup>64</sup> and UNC Policy Manual Sections 600 and 601 are consistent with and model in part after the AAUP Statements of Principles.

It is the policy of UNC Greensboro to support and encourage full freedom (within the law) of inquiry, discourse, teaching, research, and publication for all members of the academic staff of this institution. The university is dedicated to the transmission and advancement of knowledge and understanding. Academic freedom is essential to the achievement of these purposes. This institution therefore supports and encourages freedom of inquiry, to the end that the faculty may responsibly pursue these goals free from internal or external restraints that would unreasonably restrict their academic endeavors.

The following represent key components of the UNC Greensboro Academic freedom regulations:

**Component # 1**

Consistent with the AAUP, UNC Greensboro Tenure Regulations and UNC Code, Sections 600 and 601, each faculty member is expected to possess intellectual and professional integrity, and a willingness to consider the welfare of the total institution. Faculty members do not discriminate against or harass colleagues, and respect and defend the free inquiry of their associates.<sup>65</sup>

**Component # 2**

In the exchange of criticism and ideas, faculty members show due respect for the opinions of others and strive to be objective in their professional judgment of colleagues.<sup>66</sup>

**Component # 3**

The University shall protect faculty in their responsible exercise of the freedom to teach, to learn, and otherwise to seek and speak the truth.<sup>67</sup>

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<sup>65</sup> The University of North Carolina Greensboro, *Promotion, Tenure, Academic Freedom, and Due Process Regulations, The University of North Carolina at Greensboro* (“Due Process Regulations”) at section 1.B.i.

<sup>66</sup> *Due Process Regulations* at section 1.B.i; *See generally*, The American Association of University Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Comments*. Available at: <https://www.aaup.org/file/1940%20Statement.pdf>.

<sup>67</sup> *Due Process Regulations* at section 1.A.ii.

### C. Scenarios

- SCENARIO: *In connection to her employment at a public research institution, a professor conducts research on climate change. The professor is considered an expert on the subject matter and is invited to speak on several high-profile television programs, where she is critical of proposed federal legislation that runs counter to her research results. Now, legislators are threatening to withdraw federal grant money if you do not take remedial action against the professor for speaking out.*<sup>68</sup>

*Speech within scope of employment?:* As explained above, consistent with *Pickering v. Board of Ed.*, a court will analyze the competing interests at play between a public employee, as a citizen commenting on matters of “public concern” and the government, as an employer, in promoting the efficiency of public services.<sup>69</sup>

*Academic freedom:* At UNC Greensboro, and consistent with the *Code of the Board of Governor of the University of North Carolina*, faculty “shall enjoy protection against unjust and arbitrary application of disciplinary penalties”<sup>70</sup> and prior to dismissing, suspending, or demoting a faculty member, the University must demonstrate that the activities of the faculty member constituted (a) “incompetence, including significant, sustained, unsatisfactory performance after the faculty member has been given an opportunity to remedy such performance and fails to do so within a reasonable time,” (b) neglect of duty (failure to meet classes or perform “other **significant** faculty professional obligations,” or (c) “misconduct of such a nature that it indicated that the faculty member was unfit to continue as a member of the tenured faculty including violations of professional ethics, mistreatment of students or other employees, research misconduct, financial fraud, criminal, or other illegal, inappropriate or unethical conduct.”<sup>71</sup>

In our federal court of appeals circuit, the university could risk a claim of a violation of the application of the faculty member’s First Amendment rights if it were to take disciplinary action against her while she is speaking on a matter of concern; moreover, it is hard to see how her performance in this scenario constitutes incompetence, neglect of duty, or misconduct that indicates she is unfit to continue as a member of the tenured faculty.

- SCENARIO: *A faculty member writes publicly about an activist student at your institution, whom the faculty member has not taught. He describes students generally as “snowflakes” and points out various demographic characteristics of this particular student in criticizing her behavior. The student complains -- as do others -- that this is harassing, cyberbullying and inappropriate behavior by a faculty member. In addition, the professor makes controversial political comments, which then get circulated on social media and make national headlines. Political groups accuse the university of institutional*

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<sup>68</sup> Scenarios modified from Alexander R Bilus et al., FIRST AMENDMENT LANDSCAPE AND LAND MINES: QUICK TAKES ON (AT LEAST) 15 SITUATIONS GENERAL COUNSELS NEED TO RECOGNIZE AND POTENTIAL CONSEQUENCES FOR CONSTITUTIONAL VIOLATIONS, [https://www.nacua.org/docs/default-source/legacy-doc/conference/june2017/07e\\_17-06-50.pdf?sfvrsn=c4366ebe\\_6](https://www.nacua.org/docs/default-source/legacy-doc/conference/june2017/07e_17-06-50.pdf?sfvrsn=c4366ebe_6) (last visited Aug 27, 2018).

<sup>69</sup> *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

<sup>70</sup> *Due Process Regulations* at section 8.A.

<sup>71</sup> *Due Process Regulations* at section 8.A.i–8.A.iii (emphasis added).

*bias. The professor refuses to apologize, asserting that the speech is “free speech” protected by academic freedom.*<sup>72</sup>

*First Amendment rights of professors:* See the discussion above regarding the fundamental principle that citizens do not relinquish all of their First Amendment rights by virtue of accepting public employment, the fact that the state, in its capacity as an employer, has greater authority to restrict the speech of its employees than it has as a sovereign to restrict the speech of the citizenry as a whole, and the balancing tests that apply in these situations.<sup>73</sup> This however, does not mean that faculty do not have the responsibility to be civil upholders of academic values in their interactions with others.<sup>74</sup> Accordingly, the faculty member’s politically controversial speech would not warrant disciplinary action. Speech targeting a particular student may not be related to a matter of public concern and would not demonstrate that the faculty member is seeking to maintain an environment where each member of the academic community’s rights are respected. Accordingly, the conduct by the faculty member outlined in this scenario *may* need to be evaluated to determine if it is mistreatment of a student, such that it would constitute misconduct of such a nature that it warrants disciplinary action. The university will have to demonstrate that the speech is “sufficiently related to a faculty member’s academic responsibilities as to disqualify the individual from effective performance of university duties.”<sup>75</sup> Questions to consider are whether it calls into question the faculty member’s efficacy as a teacher? Does it “adversely reflect on the individual’s honesty, trustworthiness or fitness to be a faculty member?”

#### **D. Best Practices**

1. Clearly indicate what you can and cannot include in a tenure dossier and provide a rational basis for that requirement. Remember that “[t]here may be instances in which a public university faculty member’s assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching.”<sup>76</sup>

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<sup>72</sup> Scenarios modified from Alexander R Bilus et al., FIRST AMENDMENT LANDSCAPE AND LAND MINES: QUICK TAKES ON (AT LEAST) 15 SITUATIONS GENERAL COUNSELS NEED TO RECOGNIZE AND POTENTIAL CONSEQUENCES FOR CONSTITUTIONAL VIOLATIONS, [https://www.nacua.org/docs/default-source/legacy-doc/conference/june2017/07e\\_17-06-50.pdf?sfvrsn=c4366ebe\\_6](https://www.nacua.org/docs/default-source/legacy-doc/conference/june2017/07e_17-06-50.pdf?sfvrsn=c4366ebe_6) (last visited Aug 27, 2018).

<sup>73</sup> See *Adams*, 640 F.3d 550 at 564; *Urofsky*, 216 F.3d at 401 and 409-10; *Pickering*, 391 U.S. at 568.

<sup>74</sup> *Due Process Regulations* at section 1.B. See in particular section 1.B.i.:

Each faculty member is expected to possess intellectual and professional integrity, and a willingness to consider the welfare of the total institution. Faculty members do not discriminate against or harass colleagues, and respect and defend the free inquiry of their associates. In the exchange of criticism and ideas faculty members show due respect for the opinions of others, and strive to be objective in their professional judgment of colleagues. They accept their share of responsibilities for the governance of the institution.

In addition, Section 1.B. iii. and iv remind us that faculty “are expected to recognize that accuracy, forthrightness, and dignity befit their association with the University and their position as people of learning” and to “work to maintain an environment in which academic freedom flourishes and in which the rights of each member of the academic community are respected.”

<sup>75</sup> *Due Process Regulations* at section 8.A.iii.(b)

<sup>76</sup> *Adams*, 640 F.3d 550, 563.

2. Faculty may be assigned administrative duties that do not carry the academic freedom protections afforded in teaching, scholarship, and research. It would not be protected speech to write to your Dean complaining about the Department Head's course assignment requirements.
3. Speech outside the scope of employment may be protected by the First Amendment, even if that speech is controversial or not aligned with university policies or mission.
4. Disagreeable speech remains protected, but disciplinary action may be warranted if the circumstances are severe enough.
5. The best practice would be to regulate employee speech only when it does not touch upon a matter of public concern.
6. Always ensure the safety and well-being of students. Make sure that students are aware of all relevant campus resources, and avoid being accused of compelling student speech.<sup>77</sup>

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<sup>77</sup> See Alexander R Bilus et al., FIRST AMENDMENT LANDSCAPE AND LAND MINES: QUICK TAKES ON (AT LEAST) 15 SITUATIONS GENERAL COUNSELS NEED TO RECOGNIZE AND POTENTIAL CONSEQUENCES FOR CONSTITUTIONAL VIOLATIONS, [https://www.nacua.org/docs/default-source/legacy-doc/conference/june2017/07e\\_17-06-50.pdf?sfvrsn=c4366ebe\\_6](https://www.nacua.org/docs/default-source/legacy-doc/conference/june2017/07e_17-06-50.pdf?sfvrsn=c4366ebe_6) (last visited Aug 27, 2018).



## CHAPTER IV: Free Speech for University Students

### A. General Summary of the Law

Both the United States Constitution and the North Carolina Constitution afford students constitutionally protected rights and responsibilities. Student expression has played a significant role in shaping the public debate on issues ranging from war and peace to gender equity and racial, ethnic, and immigration discrimination. The constitutionally protected rights of expression and assembly as well as all other rights and laws apply to student's athletics as well. Student athletics have a unique role in the academics and in Constitutional jurisdiction.

There are two long-standing precedential U.S. Supreme Court cases concerning student expression. In *Tinker v. Des Moines Independent Community School District*,<sup>78</sup> the court held that students do not shed their ability to express themselves at the schoolhouse gates. And in *West Virginia State Board of Education v. Barnette*,<sup>79</sup> the court ruled that schools cannot make students perform acts of patriotism like saluting the flag or saying the pledge of allegiance. These cases, decided in 1969 (Tinker) and 1943 (Barnette), make clear that schools' ability to restrict the free expression rights of their students is limited.

However, a number of other significant questions must be asked when it comes to free expression activities on campus. First, the type of *forum* will affect the level of restriction that may be placed on speech on campus. In assessing whether any restrictions on protesting are permissible, a court will analyze whether the site of the protest is a traditional public forum, limited public forum, or nonpublic forum.<sup>80</sup>

A nonpublic forum is only subject to reasonable, viewpoint neutral exclusion of protestors.<sup>81</sup> "The government need not wait until a dangerous situation develops to restrict access in a nonpublic forum. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."<sup>82</sup> Recently, a district court found that asking a protester to leave a graduation ceremony and distribute materials on the sidewalk was reasonable and was in conformance with Temple University's prior practice; Temple was not required to wait until the protestor's activities created a safety problem.<sup>83</sup>

A limited or "designated" public forum, on the other hand, is one that is not traditionally public, but the government has purposefully opened to the public, or some segment of the public, for expressive activity.<sup>84</sup> In *Am. Civ. Liberties Union v. Mote*, the Fourth Circuit found that the University of Maryland's own policies contemplated expressive activity by non-University

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<sup>78</sup> *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

<sup>79</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624.

<sup>80</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

<sup>81</sup> See *Commonwealth v. Tate*, 2014 Pa. Super. Unpub. LEXIS 527 (Pa. Super. Ct. September 26, 2014) (holding that a private college made itself into a public forum under Pennsylvania constitution by sponsoring a public event).

<sup>82</sup> *United States v. Bjerke*, 796 F.2d 643, 650 (3d Cir. 1986).

<sup>83</sup> *Sabatini v. Reinstein*, 222 F. Supp. 3d 444 (E.D. Pa. October 7, 2016).

<sup>84</sup> *Warren v. Fairfax Cty.*, 196 F.3d 186, 193 (4th Cir. 1999) (citing *Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666, 667 (1998)).

individuals, and thereby created a limited public forum where previously the University had been a nonpublic forum.<sup>85</sup> Most public spaces at universities are considered designated public forums.

But even on a university campus, which courts will likely consider a designated public forum, the right to free expression is not unlimited. Universities may impose what are known as “time, place, and manner” restrictions that ensure the continuous proper functioning of the campus. To restrict speech based on time, place, and manner, governmental entities, including public universities, must assure that the restrictions are content neutral, narrowly tailored, serve a significant governmental interest, and allow other alternative methods of communication.<sup>86</sup>

## B. Scenarios

- *SCENARIO: Students, faculty members, and community members begin consistent protests at the site of a confederate monument on a public university campus in the southeastern United States. The group demands that the statue be removed from campus due to its connections to slavery and the Civil War. In response to the protests, a group of counter-protesters begin consistently defending the presence of the statue, often placing the two opposing groups in the same location. Tensions between the groups mount and the university becomes concerned that violence may result.*

*First Amendment Rights of Protesters:* Assuming the location of the statue is an area generally appropriate for free expression activities (*i.e.* a designated public forum) and not in a classroom building, a locked athletics facility, or an otherwise-restricted area of campus, both groups have a right to assemble and peacefully protest. If university policy has outlined reasonable “time, place, and manner” restrictions, these can likely be enforced. Examples might include a restriction on the “time” of day that the protests may take place in order not to disrupt quiet hours in dormitories or classes during the day. A “place” restriction might take the form of barriers separating the two groups. And finally, a “manner” restriction might limit the use of amplified sound.

## C. Best Practices:

1. Develop and enforce equitable institutional policies regarding protest on campus.
2. Analyze your campus periodically and be knowledgeable regarding the nature of the spaces on campus. Determine whether they are traditional public forums, limited public forums, or nonpublic forums (you will need to know the history of any expressive activity by university affiliated and non-affiliated groups in these spaces)? This will determine when and whether, if at all, persons or groups may be excluded from certain spaces on campus. Educate administrators, student leaders, and students generally regarding university policy and the rights and responsibilities under the Constitution.

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<sup>85</sup> *ACLU v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005).

<sup>86</sup> *See Cox v. New Hampshire*, 312 U.S. 569 (1941).

3. Maintain a current action plan to ensure security and safety on campus in the face of escalating situations during protest.

*Action plan for security:* Finally, is there a plan for response by campus security? Particularly where there is a possibility of off-campus protestors, a plan should be in place for appropriate action. Pre-event discussions should include prior communications with the campus community, best practices for crowd management, contingency plans should the situation escalate, and possible repercussions for students, employees, and unaffiliated individuals who do not adhere to campus policies.

#### **D. Current Challenges and An Approach for Student Affairs Professionals**

One of the most difficult things that student affairs professionals – those that chose a profession that trained them to “help” students – deal with in their careers is when a student comes to them in distress as a result of something that has happened to that student. In these moments, technical legal issues are only a part of a university’s responsibilities. Often, the precipitating event for that distress may have been direct or indirect speech from a classmate, an instructor, an outside speaker, or a campus activity that harmed that particular student in ways great or small. And chances are that the First Amendment protects the speech in question, which may be anything from a perceived micro-aggression to truly abhorrent speech. Student affairs professionals, though, must keep in mind that their primary role is to support the student, not to reflexively take action against the speaker. This is true even when the speech itself may seem to conflict with a university’s stated “core values” or “mission.” While those goals are laudable and important to a campus’ culture, they do not supersede the First Amendment.

Student affairs professionals can take heart, however, in knowing that they are not betraying those values, but rather reinforcing them, by both supporting the student in need and upholding the right to free speech. This dichotomy may take some getting used to but is vital to the very heart of the Academy’s role as a marketplace of ideas and a venue for free and open inquiry. In more practical terms, as Todd Davis, Associate General Counsel at UNC Greensboro, often says to his clients, “we *model* our *values*, but we *enforce* our *policies*.” In sharper tones, CNN Contributor Van Jones reminds us “We owe it to you to keep you from physical harm, but we don’t owe it to you to keep you from ideas you find abhorrent. We want you to be strong, not safe. Because the world is going to demand that you be strong.”

#### **E. Athletics**

Athletics is a critical component of colleges and universities, and student athletes play an important role in representing the university, defining the character and value of the university and meeting the reaching and service missions of the university. The success or failure of an athletic program or major sport within that program can have profound and lasting impact on the university. Student athletes have a highly visible and often complicated role in shaping and implementing the reputation and character of the university. Student athletes are always both students and athletes. They have rights and responsibilities as both students and athletes and the First Amendment of the U.S. Constitution, the Constitution of the State of North Carolina, and

the Campus Free Speech Law apply to them in both their university capacities -- student and athlete.

The constitutionally-protected rights and individual responsibilities associated with these and other laws and regulations apply not only to the student athlete but also extends to athletic related functions which involve students including but not limited to the marching band, the spirit teams, graduate student assistants, and other related functions.

Given the unique role that student athletes play in the university, it is not surprising that there are circumstances that are characteristically within the purview of athletics. Current examples include: 1) student athletes who may wish to wear certain items or to alter team uniforms to express a view or protest a certain action, 2) to kneel or pray, or 3) to refuse to participate in a certain activity associated with an athletic event. The case law is clear on these examples.

- SCENARIO: *Members of your University's football team and the marching band "take a knee" during the national anthem at a home football game. Some fans object and demand the university act. Students get academic credit for being in the band, and some of your employees may have known in advance of the planned protest.*

### *Compelled Speech*

In *Tinker v. Des Moines Independent Community School District*, the court ruled that students don't shed their ability to express themselves at the schoolhouse gates. And in *West Virginia State Board of Education v. Barnette*, the court ruled that schools cannot make students perform acts of patriotism, like saluting the flag or saying the pledge of allegiance.<sup>87</sup> This includes students at sporting events, which the Supreme Court indirectly reaffirmed in the 2000 case of *Santa Fe Independent School District v. Doe*.<sup>88</sup>

While athletes and members of other student organizations do accept certain limitations when they participate in their endeavors, the case law seems clear that when it comes to free expression, the rights of student athletes and other students participating in official university activities are like those of any other students. In *Barnette*, an opinion written by Justice Jackson in the midst of World War II when patriotism and an interest in national unity were at an apex, he stated that

[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. ...Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.<sup>89</sup>

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<sup>87</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>88</sup> *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

<sup>89</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

Additionally, universities need to be particularly careful when attempting new regulation of free expression in the athletics arena given the high-profile nature of these cases. Most recently, for example, Southern Illinois University attempted to impose strict new prohibitions on the ability of athletes and cheerleaders to show any sign of activism during competition.<sup>90</sup> After announcing the policy in late August in the hopes it would be in place for the fall semester, the university was forced to withdraw the new policy just one day after it was announced following uproar from students and free-speech defenders who questioned the constitutionality of such a policy.

*Best practices:*

1. Ensure any restrictions on students' free expression are based on legal and reasonable time, place, and manner restrictions, not on eliminating prohibited expression based on its content. In other words, a restriction preventing a member of the marching band from a form of protest that includes a refusal to march, or play his/her instrument, as part of the program might be reasonable. But a restriction on the band member's ability to join in a peaceful chant of protest with other student's during a portion of the game when they are not required to play or perform would likely not be reasonable.
2. Work with legal counsel, university communications, and a wide array of stakeholders before attempting to impose or enforce new policies restricting the rights of student-athletes and students participating in other university activities.

*Todd E. Davis.*

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<sup>90</sup> See *Chronicle of Higher Education Website* at <https://www.chronicle.com/article/Southern-Illinois-U-Says-It/244404>.

## CHAPTER V. Current Trends and Future Challenges

One of the trends that Colleges and Universities have experienced is increased scrutiny by federal and state legislators. This is especially true of public universities and has already resulted in legislative action that have typically provided additional reporting requirements, policy development directed by the legislature or its designate, and overall increased oversight. This trend is coupled with an increase in the interest of parties outside the university to speak on campus and the administrative cost that is associated with such visits. An issue of significant legal and administrative concern that universities are now facing is who is responsible for the costs associated with the exercise of these constitutionally protected rights? Security costs are the costs that are most familiar, but the cost of protecting, maintaining, and managing both particular events and the ongoing management costs can be prohibitive for many institutions of higher education.

In addition to the trends related to the implementation of our constitutionally protected rights, most of the students who populate our colleges and universities today represent an entirely different generation from those of us born before the turn of the century. Their views on who should be protected and from what are not consistent with constitutional jurisprudence. As pointed out by Chemerinsky and Gillman in their book *Free Speech on Campus*: “This generation has a strong and persistent urge to protect others against hateful, discriminatory or intolerant speech, especially in an educational setting.”<sup>91</sup>

A 2015 Yale survey found that 71% of students support disciplinary action against “any student or faculty member on campus who uses language that is considered racist, sexist, homophobic or otherwise offensive.”<sup>92</sup> These findings have profound implications on how colleges and universities educate and ensure that individual constitutional rights are protected. Moreover, the views of the current students may impact how society and ultimately the courts define unlawful harassment, hate speech and, just as important, what we consider civil and respectful. The views of the current generation of college students with respect to issues of inclusivity and freedom of expression generally differ from those of previous generations. The following chart represents current college student thinking and it is important to note that promoting an inclusive society is shared by 82% of the students surveyed while protecting rights associated with freedom of expression surveyed at %74. This comparison is likely to be important in defining campus policies and ultimately court decisions.

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<sup>91</sup>Erwin Chemerinsky & Howard Gillman, *Free Speech on Campus* at 10 (2017).

<sup>92</sup>*Id.* at 9.

**FIGURE 1.** How important do you consider each of the following to be in our democracy?\*



\*No respondents selected "not that important"

Source: Pulse Point Presidential Survey on Campus Inclusion and Free Speech, American Council on Education, 2018

Finally, the speed with which social media allows students to consume speech and ideas has changed the way universities must plan for and respond to events on campus. Students' ability to engage issues in real time, and on occasion to assemble more quickly than ever before in protest, solidarity, or solemnity, will require universities to closely monitor current events and do as much proactive education as possible.<sup>93</sup>

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<sup>93</sup> See also, *id.* at 130, 150-152 (attached as Appendices F & G).

## *Conclusion*

The First and Fourteenth Amendments to the U.S. Constitution have had and continue to have a profound impact on who we are as a nation. The Supreme Court has described freedom of speech as “the matrix, the indispensable condition, of nearly every other form of freedom.”<sup>94</sup> As such the First Amendment and its application to the States, particularly those provisions related to freedom of expression and assembly are an integral part of our lives as students, faculty, staff, and administrators on our campus here at UNC Greensboro and throughout our UNC system and the nation.

Public institutions of higher education and in most instances, private institutions as well, play a significant role in both ensuring the protection of rights, educating students, faculty, and staff about our rights and responsibilities and fulfilling our mission of education, research, and service. We must be mindful of not only all laws and regulations governing our conduct as a public university, but our mission and responsibilities to teach, to learn, and to serve and advocate for our principles and values. We hold uniquely honored positions in our nation and the communities that we serve and therefore have an even greater responsibility to fulfill our mission of service.

Constitutional jurisprudence is highly fact based and often requires an in-depth and comprehensive understanding of our purpose and mission, our constitutionally protected rights and responsibilities, and our values and expectations as institutions of higher education.

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<sup>94</sup> *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).



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