



The Current Contours of the First Amendment

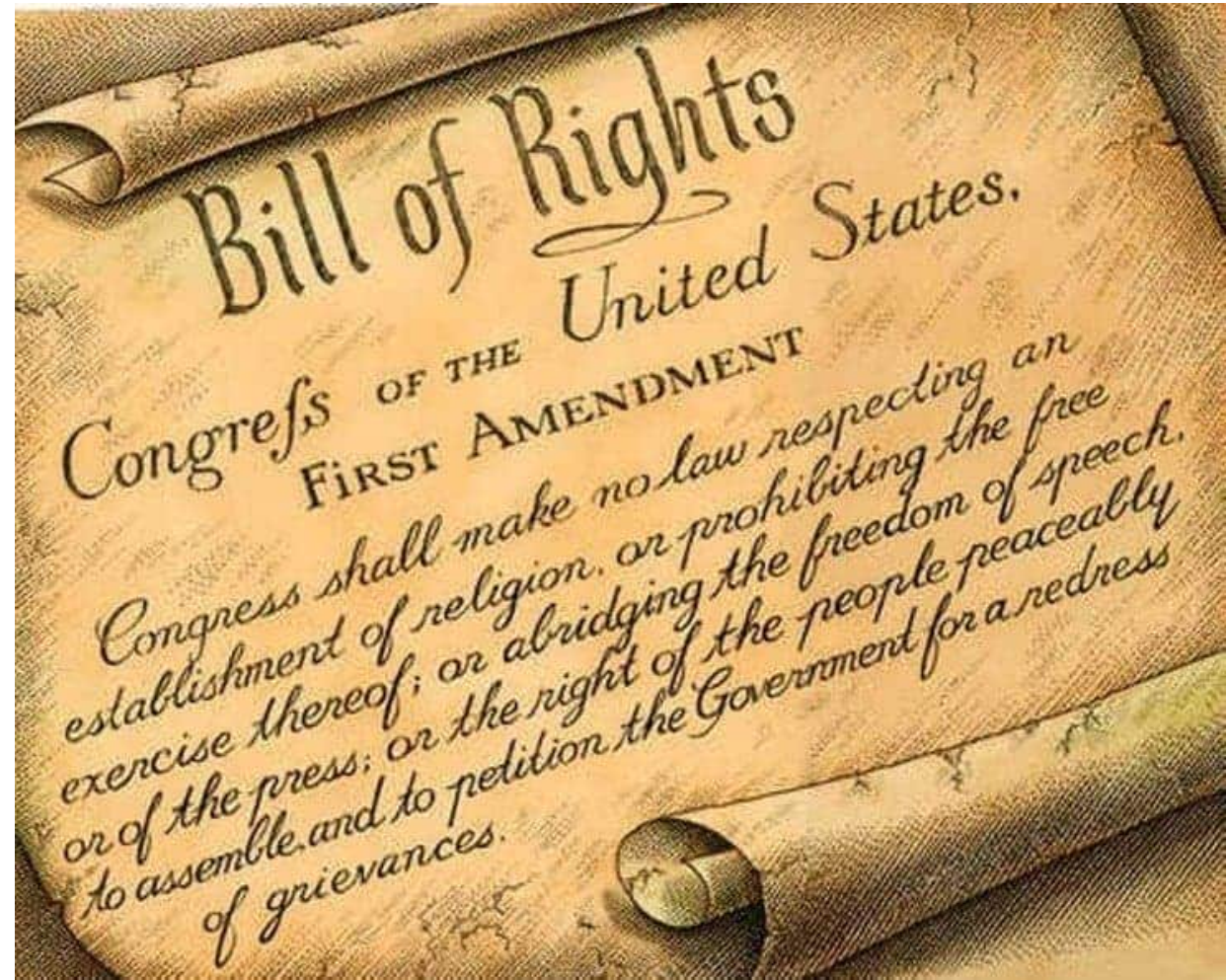
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Agenda

- First Amendment
 - Past
 - Present
 - Future
- Final thoughts





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"All this talk about civility is interfering with my constitutional right to yell at my co-workers."

First Amendment: Past



First Amendment of U.S. Constitution

“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 peaceably to assemble, and to petition the Government for a redress of grievances.”



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* The First Amendment has been interpreted to cover all government action, both state and federal, including UNC Charlotte as a public institution.



Establishment Clause

- The government cannot establish a religion
- Different interpretations:
 - Separatist view: a solid wall of separation between religion and government
 - Accommodationist views:
 - Nondiscrimination: Nondiscriminatory support or aid of all religions constitutionally permissible
 - Noncoercion: Establishment Clause bars government from coercing anyone to practice (or not to practice) a religion



Establishment Clause

- The *Lemon* test (1971) permits government conduct that aids/assists religion only if:
 - (1) primary purpose is secular,
 - (2) principal or primary effect neither advances nor inhibits religion, and
 - (3) no excessive government entanglement with religion
- *Lynch v. Donnelly* (1984) – concurring opinion focused on endorsement test (second prong)
 - All the discussion regarding context of the display humorously became known as the “reindeer rule”





Free Exercise Clause

- The government cannot prohibit the free exercise of religion
- General rules:
 - States may enforce a neutral law of general applicability even if it happens to burden someone's religious exercise as long as it has a rational basis to do so
 - If a rule/law is not neutral or not of general applicability, then it must satisfy strict scrutiny
 - The rule/law must be narrowly tailored to meet a compelling governmental interest (government almost always loses that argument)



Free Speech/Expression Clause

- The government cannot abridge the freedom of speech
- Examples of unprotected speech:
 - True threats
 - Obscenity
 - Defamation (libel or slander)
 - Unlawful discrimination/harassment
 - Disruption



Free Speech/Expression Clause

- Traditional public forum (e.g. streets, sidewalks, Belk plaza)
 - Reasonable time, place, and manner restrictions
 - Content-neutral, viewpoint-neutral
- Limited public forum (e.g. university website, SGA meeting)
 - Reasonable time, place, and manner restrictions
 - Specified topic or specified invitees, viewpoint-neutral
- Nonpublic forum (e.g. classrooms, staff meetings, offices)
 - May or may not be permitted to speak
 - Restrictions still must be viewpoint-neutral



Free Speech/Expression Clause

- Rules for government as employer:
 - If employee is speaking completely within scope of job duties, employer can control the message (limited exception = faculty members in classroom)
 - If employee is speaking outside job duties and on a matter of public concern, then the employee's interest is weighed against the employer's interest
- Government may speak for itself and completely control that message

First Amendment: Present



Scenario 1 – Establishment?

Certain rural parts of a state do not operate their own school districts. Instead, the state offers tuition assistance to parents to send their children to private schools or other public schools. To receive the tuition assistance, parents must send their children to a “nonsectarian” school. Two families file a lawsuit, arguing that the exclusion of schools that provide religious instruction violates the Free Exercise Clause.



Scenario 1

Carson v. Makin (2022)

- U.S. Supreme Court held (6-3) that Maine violated the First Amendment, because it provided a public benefit to private schools unless they were religious; it discriminated on the basis of religion and its program did not survive strict scrutiny



Scenario 2 – Establishment?

City hall permits outside groups to utilize a flag pole on its grounds for certain ceremonies. In 12 years, 50 different flags have been flown on that pole for 284 different ceremonies. The city has no written policy regarding use of the flag pole, and there is no record of the city ever refusing to fly a requested flag. The director of Camp Constitution asked to raise its flag during an event at the plaza to “commemorate the civic and social contributions of the Christian community” and was refused because the flag promoted Christianity. He sued, arguing violation of Free Speech Clause.



Scenario 2

Shurtleff v. City of Boston (2022)

- U.S. Supreme Court unanimously held that Boston violated the Free Speech Clause
- Using a “holistic inquiry,” members of the public would not necessarily think the flag was conveying the government’s own message because it has “allowed . . . other flags to be raised with some regularity” and the city has exercised almost no control over the message because this is the first refusal
- Because the flag-raising was not government speech and the city had actually created a public forum, the city’s decision based only on the flag’s Christian affiliation discriminated against Shurtleff in violation of the Free Speech Clause



Scenario 3 – Establishment?

A high school football coach had a practice of praying at the 50-yard line following each game. Many of his players, as well as others, often joined him. Spectators and media have, in the past, knocked down students in an effort to join the coach on the field for his prayer. Other coaching staff talked with their families or engaged in other non-work activities following games. The school district told him to stop praying after the games (or wait until everyone had left the stadium), he refused, and his employment contract was not renewed. The coach sued, arguing that the school had violated the Free Speech and Free Exercise Clauses.



Scenario 3

Kennedy v. Bremerton School District (2022)

- U.S. Supreme Court held (6-3) that school district violated coach's rights to free speech and free exercise
- District's rule was not neutral and instead targeted coach's religious conduct
- Coach's prayer was not within job duties and took place "during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech."
- Court said that *Lemon* test (for Establishment Clause violations) had been "long ago abandoned"
- Important that no students expressed concerns about being coerced, and prayer was not "publicly broadcast or recited to a captive audience"



Scenario 4 – Free Exercise/Speech?

A devout Christian baker refused to bake a wedding cake for a same-sex couple because he claimed that doing so would violate his religious beliefs. The state civil rights agency ruled that the baker had violated the state’s antidiscrimination laws. In making that determination, members of the civil rights commission made numerous comments that were disrespectful of religion, including comparing the baker’s “invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust.” In past decisions, the civil rights commission had permitted bakers to refuse to create cakes “with images that conveyed disapproval of same-sex marriage.”



Scenario 4

Masterpiece Cakeshop v. Colorado Civil Rights Comm'n (2018)

- U.S. Supreme Court held (7-2) that the commission's actions violated the Free Exercise Clause
- Ruling was fairly narrow, because the baker "was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection" and he did not receive that in this case
- (Note that Justices Kennedy, Ginsburg, and Breyer have been replaced by Justices Kavanaugh, Barrett, and Jackson since this opinion was issued)



Scenario 5 – Free Speech?

Member of community college board was outspoken in his critiques of the board and filed two lawsuits against the college and individual trustees alleging bylaws violations. The board adopted a resolution stating that the board member's "conduct was not only inappropriate, but reprehensible." The board member sued, alleging that the board violated the First Amendment by retaliating against him for his speech.



Scenario 5

Houston Community College v. Wilson (2022)

- U.S. Supreme Court unanimously held that the board did not violate the First Amendment
- “Elected bodies in this country have long exercised the power to censure their members”
- Wilson’s right to speak freely “cannot be used as a weapon to silence other representatives seeking to do the same”



Quick hits

- *Davison v. Randall* (4th Cir. 2019)
 - Fourth Circuit Court of Appeals held that a school board member could not block a user on her private Facebook page because she had created a public forum there (invited constituent comments, listed her governmental email address, etc.)
- *Meriwether v. Hartop* (6th Cir. 2021)
 - Sixth Circuit Court of Appeals held that faculty member plausibly alleged that the university violated the First Amendment (speech & exercise) by disciplining him for failing to use student's preferred pronouns

First Amendment: Future



Upcoming cases

- *303 Creative LLC v. Elenis*
 - Web designer in Colorado who claims her religious beliefs prevent her from designing wedding websites for same-sex couples
 - U.S. Supreme Court only agreed to hear the free speech claim (not free exercise question or whether Court should overrule *Employment Div'n v. Smith*)
- Gender pronoun cases have not made it to the Supreme Court yet, but this Court has signaled strong support for an expansive interpretation of the Free Exercise Clause



Take Aways (religion)

- Do not treat religious speech differently than similar non-religious speech
- Do not demean or ridicule someone's request for a religious accommodation (it undermines the general application of a neutral policy)
- What might constitute a violation of the Establishment Clause is not very clear (so consult!)



Take Aways (speech)

- Offensive and even hateful speech is generally protected by the First Amendment
- The institution (through specific people) may speak for itself, including to rebuke speech inconsistent with its values
- The institution may not discriminate based on viewpoint in a public forum or limited public forum, including social media sites
- Faculty member speech within a classroom is more protected than other types of employee speech within job duties (but it's not without limits)

Questions?



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