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**First Amendment – Applicability**

- Public universities:
  - Bound by the Constitution and its protections
  - Governmental entities (subject to protections and laws regarding the government)
- Private universities:
  - Not bound by the Constitution (can prohibit protests, ban offensive speech, expel students with less due process)
  - Subject to federal and state laws regarding corporations (taxation, employment rights and discrimination, etc.)
  - Can subject themselves to certain standards by contract (institutional policies, syllabi) or quasi-contract (general obligation to transact business in good faith)




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**Free Speech – Why?**

- The Supreme Court has called freedom of speech and expression “the matrix, the indispensable condition, of nearly every other form of freedom” that occupies a “preferred place” in our constitutional system.
  - As one constitutional scholar put it: “before the debate even starts, speech has an advantage, even against some very good reasons to limit it.”
- Why???
- Freedom of thought
- Democracy
- History
  - 1937: Cannot prosecute people merely for belonging to the Communist Party
  - 1943: Cannot punish the children of Jehovah’s Witnesses for refusing to say the Pledge of Allegiance
  - 1945: Cannot be convicted of obstructing the draft merely for advising others that the draft was unconstitutional
  - 1952: Cannot convict people of “blasphemy”
  - 1969: Cannot punish students for wearing black armbands to protest the Vietnam War
  - 1971: Can’t engage in prior restraint absent a “grave and irreparable” danger




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### Free Speech – General Legal Principles

- “Congress shall make no law...abridging the freedom of speech.”
  - “Freedom from” and “freedom to”
  - “State action” requirement
  - Constitutionality of UNC Charlotte’s restrictions on protected speech subject to “strict scrutiny”
    - Compelling governmental interest
    - Narrowly tailored
    - Least restrictive means
    - “Strict in theory, fatal in fact”




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### Free Speech – General Legal Principles

Sticky wicket: hate speech v. discrimination/harassment

- Unprotected speech
  - True threats
  - Inciting or Producing an Imminent Lawless Action
  - Fighting Words
  - Obscenity
  - Libel & Defamation
  - Unlawful Discrimination/Harassment
  - Disruption/interference with operations
- UNC Charlotte’s commitment:
  - “In fulfilling our mission, we envision a University that promises . . . [a] robust intellectual environment that values **social and cultural diversity, free expression, collegiality, integrity, and mutual respect.**”




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### Unlawful Discrimination and Harassment

- Unlawful Discrimination
  - The differential treatment of an individual or group of individuals based on a **legally protected status**
    - At the federal level, this means: color, religion, national origin, age, sex\*, familial status, disability status, veteran status, and genetic information
    - Various state and municipal laws can also add additional protected classes (sexual orientation, gender identity, criminal background)
    - Must be conduct, but speech may be evidence of conduct
- Unlawful Harassment (form of discrimination)
  - Quid pro quo harassment
  - Hostile environment
- Unlawful Retaliation
  - Any negative action an employer takes that may deter an employee from engaging in a protected activity (including making claims of discrimination)




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### Free Speech – Forum Analysis and Time, Place and Manner Restrictions

- Types of forums:
  - Traditional public forum
  - Designated public forum
  - Limited public forum
  - Nonpublic forum
- A public university is constitutionally permitted to place reasonable time, place and manner restrictions on speech activities
  - Narrowly tailored/government interest
  - Ample alternative means of expression
- Bottom line: All limitations must be content/viewpoint neutral




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### Threats/Harassment/Fighting Words vs. Protected Speech

- Snyder v. Phelps* (2011) (8-1 decision):
  - Government action: allowing civil liability for speech
  - "The "context" of the speech—its connection with Matthew Snyder's funeral—cannot by itself transform the nature of Westboro's speech. The signs reflected Westboro's condemnation of much in modern society, and it cannot be argued that Westboro's use of speech on public issues was in any way contrived to insulate a personal attack on Snyder from liability. . . . Westboro may have chosen the picket location to increase publicity for its views, and its speech may have been particularly hurtful to Snyder. That does not mean that its speech should be afforded less than full First Amendment protection under the circumstances of this case."
  - A statement's arguably "inappropriate or controversial character ... is irrelevant to the question whether it deals with a matter of public concern."




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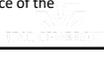
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### First Amendment – Controversial Speech by University Employees

- Did the employee speak pursuant to the employee's "official duties"?
  - Sticky wicket: "private" social media
- If not pursuant to the employee's official duties, is the subject of the speech a matter of "public concern"?
  - Community Concern:** Can the speech can be "fairly considered as relating to any matter of political, social, or other concern to the community," or
  - News Interest:** does the speech center on "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public"?
- If the employee speaks as a citizen on a matter of public concern, does the employee's interest in commenting on the issue (or the public's interest in hearing those comments) outweigh the interest of the university as employer?
- Assuming the employee's interest outweighs the state's interest, was the employee's speech a "substantial factor or motivating factor in a detrimental employment decision"? (employee burden)
- Finally, if the employee established that his speech was such a factor, would the employer have taken the same action against the employee in the absence of the protected speech? (employer burden)




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### First Amendment – Political Speech of University Employees

Sticky wicket:  
mass emails

- Employees can:
  - Register to vote
  - Become a candidate (consistent with University policy)
  - Solicit, receive, and make campaign contributions
  - Participate in political campaigns, organizations, and elections
  - Express opinions privately and publicly on political subjects
- Employees cannot:
  - Use University resources (including time) to support political activities
  - Speak on behalf of the university on political issues
  - Use their position or authority to secure support or opposition for political candidates, parties, or causes
- Senior officers (deans, VCs, chancellor) cannot:
  - Solicit, accept, or receive financial contributions on behalf of any political candidate
  - Endorse or oppose a political candidate in a broadcast or advertisement



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### Academic Freedom – General Legal Principles

Sticky wicket:  
controversial faculty speech

- Components of Academic Freedom:
  - **University** insulation from state interference in making academic decisions
    - Justice Felix Frankfurter: “[T]he four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”
      - *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (Concurring opinion)
  - **Faculty** protection from administrative or political interference
    - Freedom of inquiry and research
    - Freedom of teaching
    - Freedom of extramural utterance and action
  - **Student** freedom to receive and express competing ideas in academic environment



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### Academic Freedom – Faculty Rights and Responsibilities

- Issues generally arise in employment context
- Courts typically use First Amendment free speech analysis:
  - Is the topic a matter of public concern?
  - If yes, weigh the professor’s interest in his/her speech against the university’s interest in efficiently delivering education.
- Contractual rights/due process
- Bottom line: academic freedom comes with responsibility
  - Freedom of inquiry and research
    - Must conform to standards of the field and federal/state regulations
  - Freedom of teaching
    - Must be relevant to the subject at hand, avoid any harassment or discriminatory treatment of students, and protect students’ own academic freedom.
  - Freedom of extramural utterance and action
    - Must be respectful of the opinions of others and ensure made in an individual capacity



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So what can UNC Charlotte do?

- Discipline unprotected speech
- Enforce discrimination laws and policies
- Engage in training and dialogue on the obligation to create inclusive workplace and educational environments
- Proactively establish our values
- Provide proactive and reactive opportunities to celebrate cultural diversity and allow for the respectful expression of differing viewpoints and experiences
- Swiftly and powerfully condemn hateful or stigmatizing speech while encouraging the community to engage in "more speech"

less hate more  speech




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Examples from UNC Charlotte and beyond – Quick and Dirty Free Speech Analysis

- Is it speech or conduct?
- If it is speech, is it protected speech?
  - Unprotected speech
  - Time, place, and manner restrictions
- If it is protected speech by an employee:
  - Is the employee speaking as a citizen?
  - Is the subject of the speech a matter of "public concern"?
  - If the employee speaks as a citizen on a matter of public concern, does the employee's interest in commenting on the issue (or the public's interest in hearing those comments) outweigh the interest of the university as employer?

YOU'RE  
IN CHARGE—  
**NOW**  
WHAT?




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Examples from UNC Charlotte and elsewhere – threats and harassment




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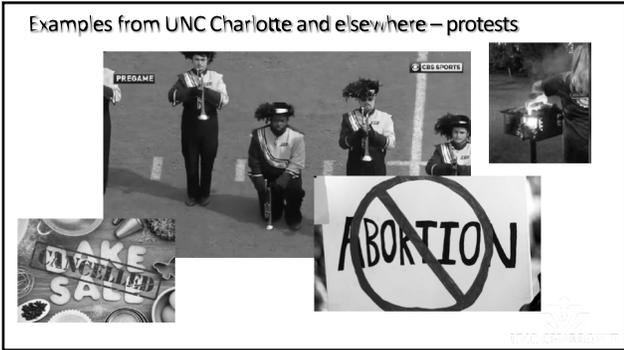
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Examples from UNC Charlotte and elsewhere – protests




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Examples from UNC Charlotte and elsewhere – employee issues




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