# Summary of Free Speech Law

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**Introduction:** Freedom of speech and the related principle of academic freedom are central to the mission of the University of Kansas as "a comprehensive research and teaching university and a center for learning, scholarship, and creative endeavor."[1] In keeping with this mission, the University strives to promote freedom of thought, inquiry, and expression for all its students, faculty, and staff. The University is also bound by constitutional principles, statutory provisions, and Board of Regents policies that protect freedom of speech. The application of free speech law to the many and varied activities, events, and occurrences at the University may raise complex and difficult issues.

This summary of the legal protections for freedom of speech as they apply to the University has been prepared provided by Richard E. Levy, the J.B. Smith Distinguished Professor of Constitutional Law at the KU School of Law to help members of the University community understand their free speech rights and the limits of those rights. It explains the basic principles of First Amendment law and discusses how those principles apply to some recurring free speech issues. The summary is intended as a resource for students, faculty, and staff, and does not constitute a statement of University policy.

**Freedom of Speech at a Public University.** Freedom of speech and academic freedom are the lifeblood of a public University because teaching, learning, and scholarship can thrive only in an atmosphere of free and open inquiry. As a public institution, the University is bound by constitutional protections for freedom of speech, as well as Board of Regents and University policies that protect speech.[2] The University also subscribes to the principle of academic freedom, which protects freedom of research, instruction, and governance in accordance with the standards of each academic discipline and course content.[3] Pursuant to these legally binding principles, the University must respect the free speech rights of all students, faculty, and staff.

**Content and Viewpoint Neutrality.** A core constitutional requirement of freedom of speech is that any government restriction on speech must be neutral as to content and viewpoint.[4]

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[1] University of Kansas, Mission Statement. Available at http://www.ku.edu/about/mission/.

[2] *See* Faculty Code of Rights, Responsibilities, and Conduct, Art. III, ¶ 1; Code of Student Rights and Responsibilities, Art. III, ¶¶ A, I.

[3] *See* Faculty Senate Rules and Regulations § 6.1.2 ("The University of Kansas subscribes to the 1940 American Association of University Professors (AAUP) statement on Academic Freedom and Tenure . . . ."). Academic freedom has constitutional underpinnings as well. In *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967), the Supreme Court observed that "[o]ur Nation is deeply committed to safeguarding academic freedom," and characterized the principle as being "of transcendent value" and "a special concern of the First Amendment." *See also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (concluding that a governmental inquiry into the contents of a scholar's lectures at a state university invaded his "liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread").

[4] Subject to certain narrow exceptions, "content-based" restrictions on speech can only be sustained if they serve a "compelling" governmental interest and are "narrowly tailored" or "necessary" to accomplish that purpose. *See*, *e.g.*, *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011) ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest."). This standard, commonly

Accordingly, the University must respect the right of all students, faculty, and staff to express ideas without regard to their viewpoint,[5] and may not seek to prevent or punish speech, even hate speech, simply because it disagrees with the speaker's message.[6] These principles protect speech that some or even most people find offensive, they protect novel ideas that challenge accepted premises, and they protect unconventional modes of expression that may seem strange or unfamiliar.[7] While content and viewpoint neutrality limit the University's ability to restrict or punish speech, the University may articulate and promote its own institutional values and may explicitly disavow speech with which it disagrees.[8] Accordingly, the University may control the speech of faculty, staff, or other employees when they speak on behalf of the University.

**Counter-speech.** Freedom of speech protects offensive speech or ideas, but it does not insulate them from the criticism of other people or relieve speakers of the moral and social responsibility to consider the impact of their words on others. Indeed, the same principles that protect offensive speech protect the rights of those who disagree to denounce that speech in forceful terms.[9] In a community dedicated to freedom of thought and inquiry, the remedy for false or offensive speech is "counter speech" and the proper response to a bad idea is a good one.[10] Thus, even when freedom of speech may require the University to tolerate offensive speech or ideas, it does not prevent the University from publicly denouncing them. Likewise, all members of the University community have a right and a responsibility to speak out against speech that violates essential standards of decency or dehumanizes others.

**Unprotected Speech.** While the University may not prohibit speech simply because it is offensive, freedom of speech does not protect threats, harassment, or intimidation.[11] These

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referred to as "strict scrutiny" is almost always fatal to a law restricting speech. *See id.* (observing that strict scrutiny is "a demanding standard" and that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible.").

[5] Under established freedom of speech doctrine, the general rule against content-based restrictions on speech is subject to certain limited exceptions. Specifically, the government may proscribe certain "narrowly defined" categories of speech, such as obscenity, defamation, true threats, and incitement. *See*, *e.g.*, *United States v. Alvarez,* 132 S. Ct. 2537, 2544 (2012) (listing these categories as including "advocacy intended, and likely, to incite imminent lawless action," "obscenity," "defamation," "speech integral to criminal conduct," "fighting words," "child pornography," "fraud," "true threats," and "speech presenting some grave and imminent threat the government has the power to prevent").

[6] *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating a hate speech ordinance as improper viewpoint discrimination, even if it only applied to "fighting words" that could otherwise be proscribed, because it targeted a particular point of view).

[7] *See*, *e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2012) (extending First Amendment protection to funeral picketing); *United States v. Stevens*, 559 U.S. 460 (2010) (extending First Amendment protection to animal crush videos); *Texas v. Johnson*, 491 U.S. 397 (1989) (extending First Amendment protection to flag-burning as a means of political protest); *Cohen v. California*, 403 U.S. 15 (1971) (extending First Amendment protection to jacket using obscene language to protest the draft).

[8] *See Pleasant Grove, Utah v. Summum*, 555 U.S. 460, 467-68 (2009) (observing that freedom of speech "does not regulate government speech" and that "[a] government entity has the right to speak for itself, [and] is entitled to say what it wishes . . . and to select the views that it wants to express").

[9] For example, the Report of the University of Kansas Diversity, Equity, and Inclusion Advisory Group, April 27, 2016, discusses an incident involving an undergraduate who tweeted in response to "chalking" that she found offensive. As the report emphasized, free speech protects both messages. *See id.* at pp. 15.

[10] As Justice Brandeis famously stated in *Whitney v. California*, 274 U.S. 357, 375, 377 (1927), "the fitting remedy for evil counsels is good ones" and "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

[11] *See*, *e.g.*, *Virginia v. Black*, 538 U.S. 343, 363 (2003) (upholding convictions for cross-burning with the intent to intimidate because, in view of its history, "burning a cross is a particularly virulent form of intimidation").

concepts are defined narrowly. For example, only threats of physical violence qualify as "true threats" and then only if the speaker has "some understanding" of their threatening character.[12] Such conduct is prohibited by state and federal law and University policies, which may be enforced against speech that creates a hostile educational or work environment.[13] Likewise, freedom of speech does not convey a right to vandalize or deface property, to interfere with the lawful expression of others, or to engage in other illegal conduct, no matter how important or valuable the message.[14] Even when speech is unprotected, however, University policies or rules that may apply to expressive activities must provide clear guidance so as to prevent their application to protected speech and to prevent arbitrary or discriminatory enforcement.[15]

**Speech of University Employees as Private Citizens.** University employees, including faculty, staff, and student employees, retain their rights as private citizens to speak on matters of public concern.[16] Thus, the University may not discipline employees simply because it disagrees with the content of their speech on matters of public concern (even speech that criticizes University leaders) when that speech occurs outside the workplace and in their private capacities.[17] Nonetheless, if employees' speech outside the workplace interferes with the University's ability as their employer to fulfill its educational mission, the University may take appropriate disciplinary action.[18] Protection for employees' speech as private citizens only includes speech on "matters of

[12] *See Counterman v. Colorado*, 600 U.S. 66, 69 (2023) (concluding that in a criminal prosecution based on a true of violence "[t]he State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.")

[13] *See* University of Kansas Sexual Harassment Policy, http://policy.ku.edu/IOA/sexual-harassment (defining harassment to include speech that is "so severe, pervasive and objectively offensive that it has the purpose or effect of substantially interfering with a person's academic performance, employment or equal opportunity to participate in or benefit from University programs or activities or by creating an intimidating, hostile or offensive working or educational environment"); University of Kansas Policy on Racial and Ethnic Harassment, http://policy.ku.edu/IOA/racial-ethnic-harassment-policy.

[14] *See*, *e.g.*, Wilson v. Johnson, 247 Fed. Appx. 620, 2007 WL 1991057 (6th Cir. 2007) (upholding state university's policy prohibiting vandalism as applied to student's antiwar messages painted on university buildings).

[15] *See*, *e.g.*, *FCC v. Fox Television Stations, Inc*., 132 S. Ct. 2307, 2317 (2012) ("When speech is involved, rigorous adherence to [the requirements of the vagueness doctrine] is necessary to ensure that ambiguity does not chill protected speech."); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) ("The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere.").

[16] *See*, *e.g.*, *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465 (1995) ("Even though respondents work for the Government, they have not relinquished "the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest."); *Pickering v. Bd. of Educ*., 391 U.S. 563, 568 (1968) (rejecting premise that teachers "may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work").

[17] In *Pickering*, the Court held that a public school teacher could not be fired for writing a letter to a local newspaper criticizing the school board for spending too much on athletics. This rule does not apply to employees whose work in a close and confidential capacity with a supervisor would be compromised by public disagreement with their supervisor. *See*, *e.g.*, *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir.1997) ("[T]he more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer.") (internal quotation marks omitted).

[18] *See Pickering*, v. *Bd. of Educ*., 391 U.S. at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

public concern" (i.e., matters related to the public interest) and does not extend to speech that addresses only personal or internal matters.[19]

**Official Duties and Academic Freedom.** The First Amendment does not ordinarily apply when faculty, staff, or student employees represent the University, speak on its behalf, or otherwise speak pursuant to their official duties.[20] Nonetheless, principles of academic freedom protect the right to engage in teaching, scholarship, and related activities without improper interference.[21] At the same time, the University has the right and responsibility to provide for the academic integrity and content of its courses, and to ensure that scholarly activities sponsored by the University meet professional norms for intellectual integrity and rigor. Faculty, students, and staff may not speak on behalf of the university or any of its departments through social media or other digital platforms without authorization and must take care to separate their personal views and activities from those of the University.

**Use of University Resources.** In general terms, the University may control or limit the use of its resources, including buildings and grounds, for expressive activities.[22] Many public spaces on campus are forums at which free speech receives maximum protection.[23] In such spaces, anyone may engage in speech without restriction, although the University may prevent disruption of the learning and working environment through neutral policies that regulate the time, place, and manner of speech-related activities and expressive conduct without regard to its content.[24] Other spaces on campus are not forums for speech and the University may impose reasonable regulations to preserve those areas for their intended use, provided that those regulations do not discriminate

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[19] *See Connick v. Myers*, 461 U.S. 138 (1983) (concluding that the circulation of a "questionnaire concerning internal office affairs" was not speech on a matter of public concern and concluding that state employee could be discharged for circulating it among coworkers).

[20] *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

[21] This principle does not apply when principles of academic freedom protect research and teaching. *See Garcetti*, 547 U.S. at 425 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."); *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014) (concluding that faculty member's book that was critical of school's program was protected by the First Amendment).

[22] For example, State statutes, Board of Regents policy, and the University prohibit the use of University resources for partisan political activities. *See* University Policy on Political Activity, available at http://policy.ku.edu/provost/political-activity-KS-statutes.

[23] A public forum is public property, such as the streets and parks, that has been set aside for speech. *See Hague v. Comm. for Indust.Org.*, 307 U.S. 496, 515, 516 (1939) (stating that the "streets and parks ... have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). Although the government has no obligation to set aside other public property for speech, once it does so, the First Amendment applies. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). Some government property is a public forum for limited purposes, and is treated as a public forum if speech falls within the scope of the forum, but as a nonpublic forum if it does not. *See id.*

[24] *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding neutral ban on camping on the mall in Washington, D.C., as applied to protest against homelessness); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding volume restriction on concerts in New York City's Central Park). Even content neutral restrictions on speech in a public forum may be invalid if they restrict more speech than needed to achieve the government's legitimate and important purposes. *See McCullen v. Coakley*, 134 S.Ct. 2518 (2014) (invalidating neutral ban on counseling within a certain distance of abortion clinics because it restricted more speech than necessary to accomplish the government's purpose).

against disfavored viewpoints.[25] Thus, for example, classrooms are not forums for speech and the University may restrict their use, but when it opens unused classrooms for use by student groups, it may not discriminate on the basis of a group's viewpoints.[26]

**Conclusion.** Various societal trends and local or national events implicate freedom of speech and academic freedom in various ways. It is not possible or desirable to address all of the potential free speech issues that may arise on campus or to articulate bright line rules for all occasions. In practice, the application of University policies to complex issues with free speech implications requires careful consideration of competing concerns. In keeping with the University's mission, ensuring an environment in which freedom of inquiry, thought, and expression can flourish must be of paramount importance. Although our understanding of free speech and its implications evolves over time, the central principle remains constant. The discovery of truth is best served by the free exchange of ideas. The University of Kansas reaffirms its commitment to this essential principle.

[25] *See Christian Legal Soc. of the Univ. of Cal., Hastings Coll. Of the Law v. Martinez*, 561 U.S. 661 (2010) (applying forum analysis to uphold content neutral requirement that student groups receiving law school funding must be open to membership for all students); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (invalidating the denial of funding to religiously oriented newspaper published by student organization because the denial discriminated on the basis of viewpoint).

[26] *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that university could not exclude religious groups from policy of allowing student groups to use empty classrooms when available).