

# YOU CAN'T SAY THAT!

Limitations on the First Amendment right to the freedom of speech and their historical beginnings.

A presentation by Student Legal Services

# Disclaimer

The information in this presentation is for educational purposes only. It is NOT intended as legal advice. If you have a specific legal issue or question you should seek advice from an attorney.



WE THE PEOPLE . . .



# THE FIRST AMENDMENT:

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

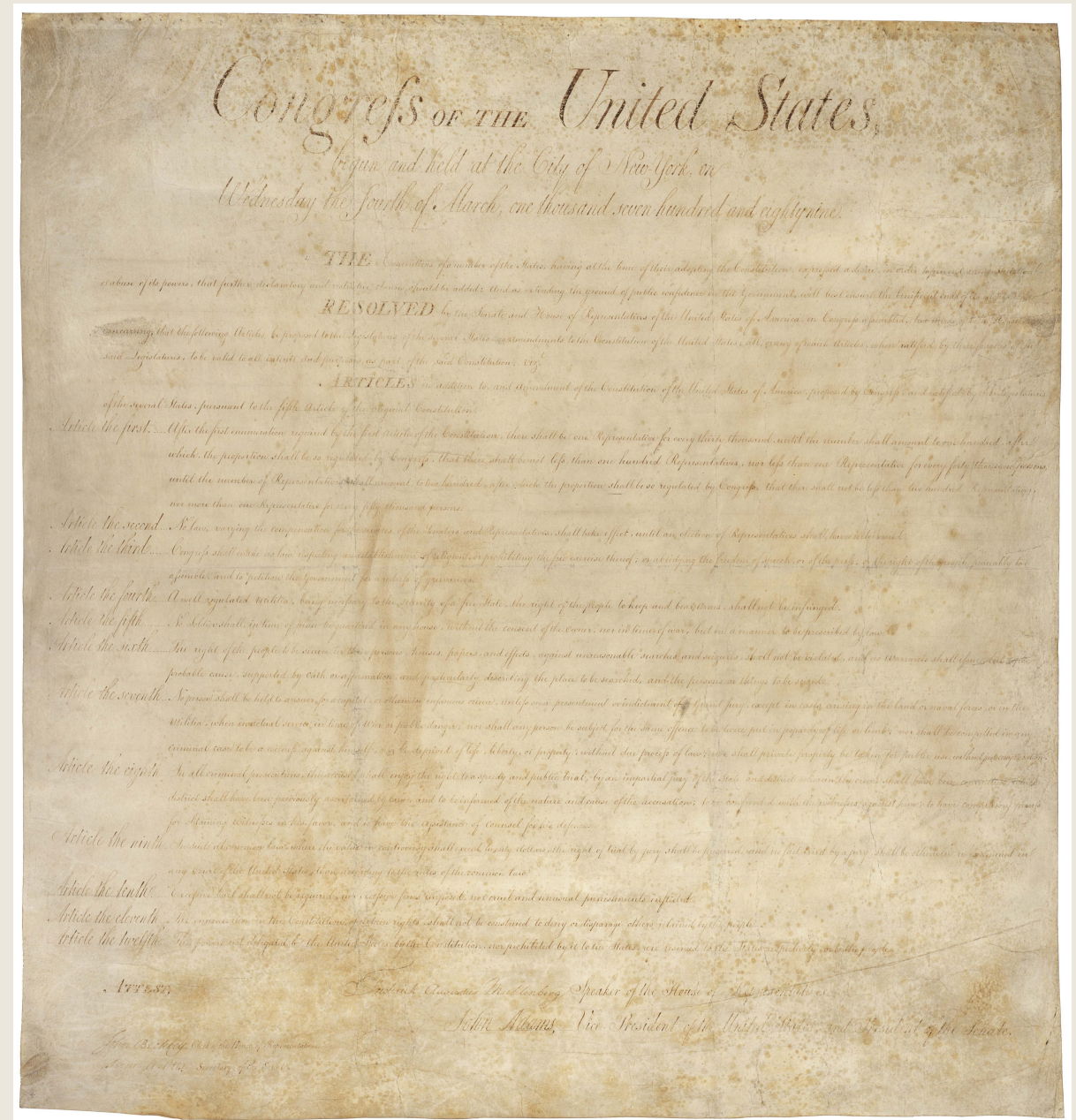
# What does that mean?

- On its face, the First Amendment guarantees that Congress shall not make any laws that restrict the people's right to free speech.\*
- IN GENERAL:
  - *The First Amendment only applies to the government.*
  - *Private citizens are not subject to the First Amendment.*
  - *Private companies are not subject to the First Amendment.*

*\*The Supreme Court recognizes several exceptions to the First Amendment.*

# A brief history lesson:

- 1776—Declaration of Independence
- 1789—United States Constitution
- 1789—Bill of Rights (drafted)
- 1791—Bill of Rights (ratified)



# Free Speech Theories:

- Search for truth: The best way to uncover the truth is through expression and the free exchange of ideas (Marketplace of Ideas)
- Self-governance: Free Expression is seen as crucial to the democratic process.
- Self-fulfillment: One cannot develop as an autonomous and rational individual without free speech.



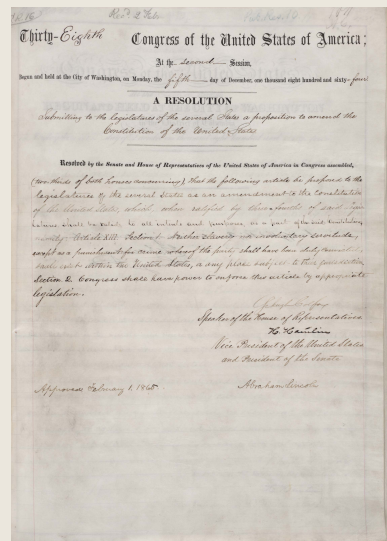
# HISTORY OF FREE SPEECH IN THE U.S.:

The events that shaped our First Amendment free speech rights

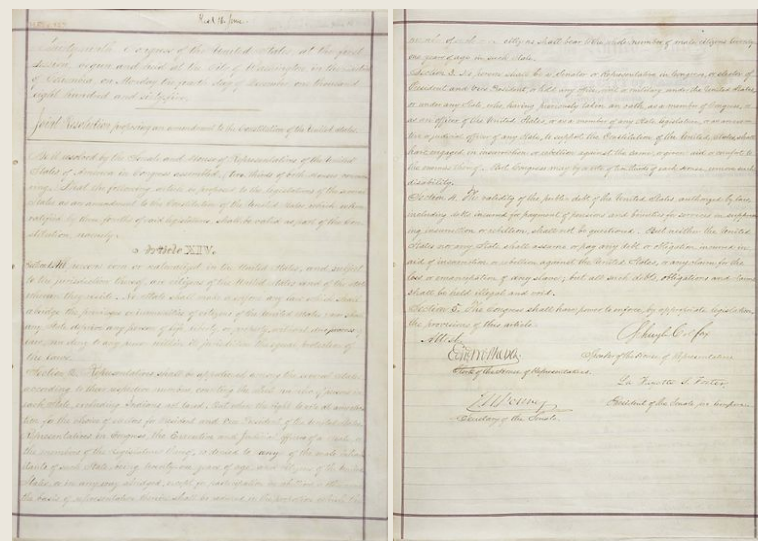


# The Civil War Era:

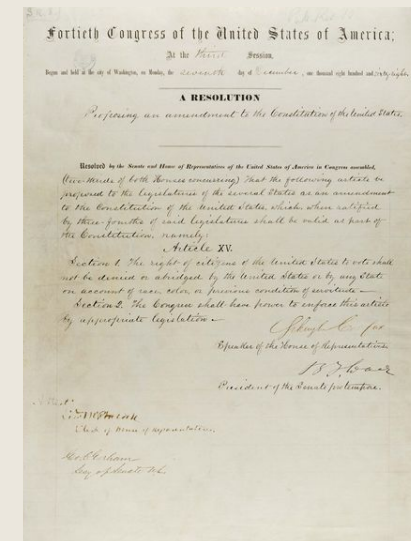
- Abolitionist speech was suppressed in the South.
- Every southern state passed laws prohibiting abolitionist speech.
- U.S. Civil War: 1861 – 1865
- Between 1865 and 1870 the Reconstruction Amendments were ratified.



13<sup>th</sup> Amendment



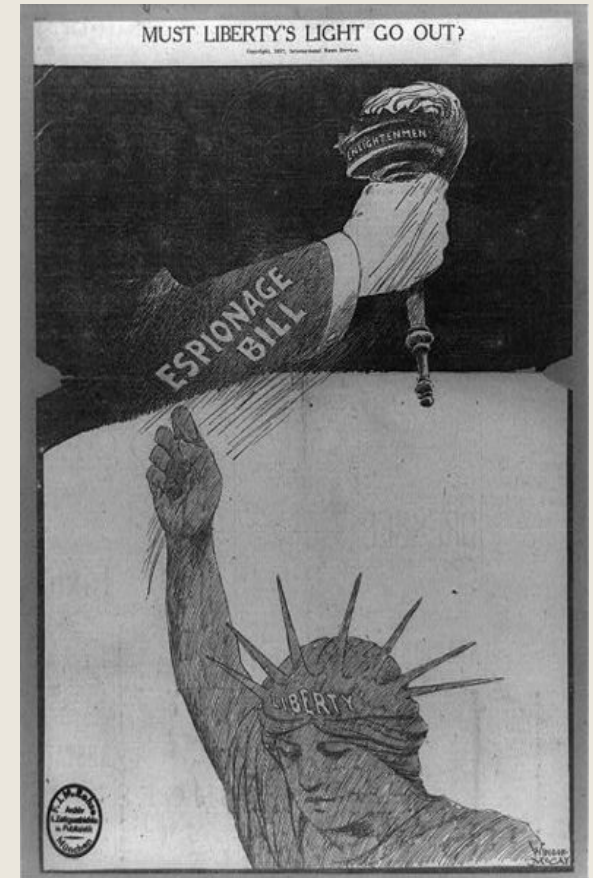
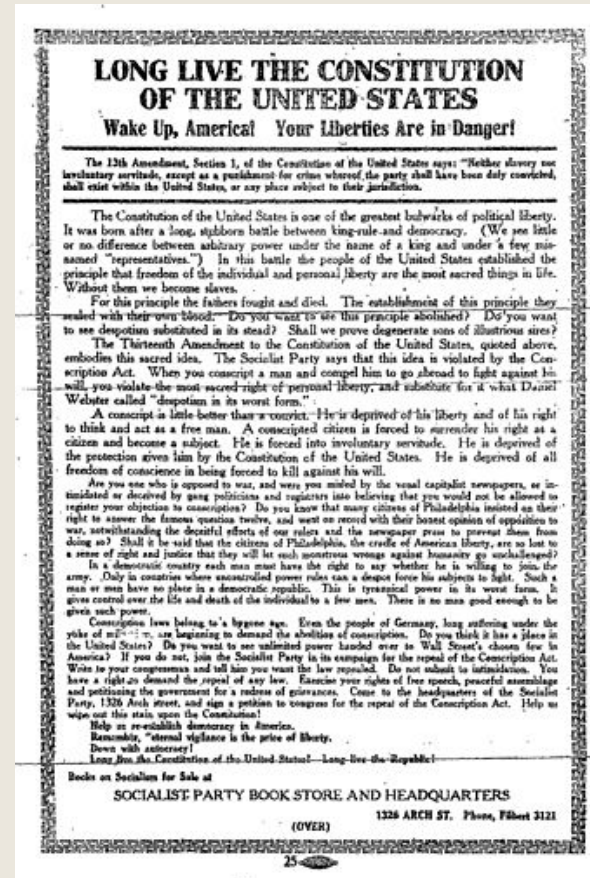
14<sup>th</sup> Amendment



15<sup>th</sup> Amendment

# Red Scare, War, and Resistance:

From the time the First Amendment was ratified until World War I, the Supreme Court had little exposure to cases involving the freedom of speech. The vocal resistance to US involvement in WWI and the first “Red Scare” about communists, socialists, Bolsheviks, anarchists, and revolutionaries led to Congress passing the Espionage Act of 1917 and the Sedition Act of 1918. Challenges to arrests and prosecutions made under these two acts led to the development of the Supreme Court’s Free Expression jurisprudence.





# The Evolution of Justice Holmes:

## Restricting speech:

- *Schenck v. United States* (1919) – Clear and present danger
- *Debs v. United States* (1919)
- *Frohwerk v. United States* (1919)

## Protecting speech:

- *Abrams v. United States* (1919)



# CENSORSHIP

# The Comstock Laws

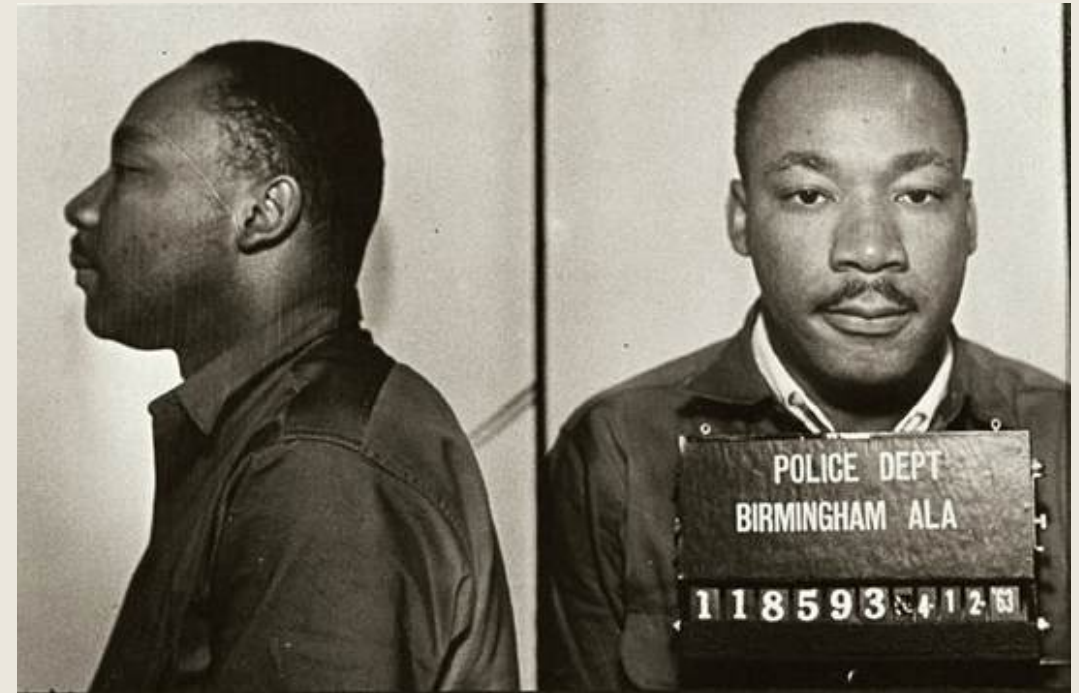
- A series of obscenity laws passed in 1873.
- Gave the government, including the Post Master General, broad discretion in determining whether to deliver obscene materials.
- Led to increased censorship nationwide of many now beloved works.
- Beginning in the 1950s a series of cases in the US Supreme Court changed the scope of obscenity laws.
- The Comstock laws are still technically on the books, but they are rarely enforced.



# Civil Rights Era:

## Attempts to Stifle Speech:

- Sunflower, MS (1962)— Civil Rights leader Robert Moses was arrested for handing out leaflets announcing a voter registration drive. The police arrested him for “distributing literature without a permit.”
- Birmingham, AL— Sheriff Bull Connor obtained an injunction from a state judge ordering 133 specific people not to engage in “parading, demonstrating, boycotting, trespassing and picketing” or to participate in “kneel-ins” in churches.
- Selma, AL— John Lewis was arrested for carrying a sign outside the courthouse reading “One Man/ One Vote.”

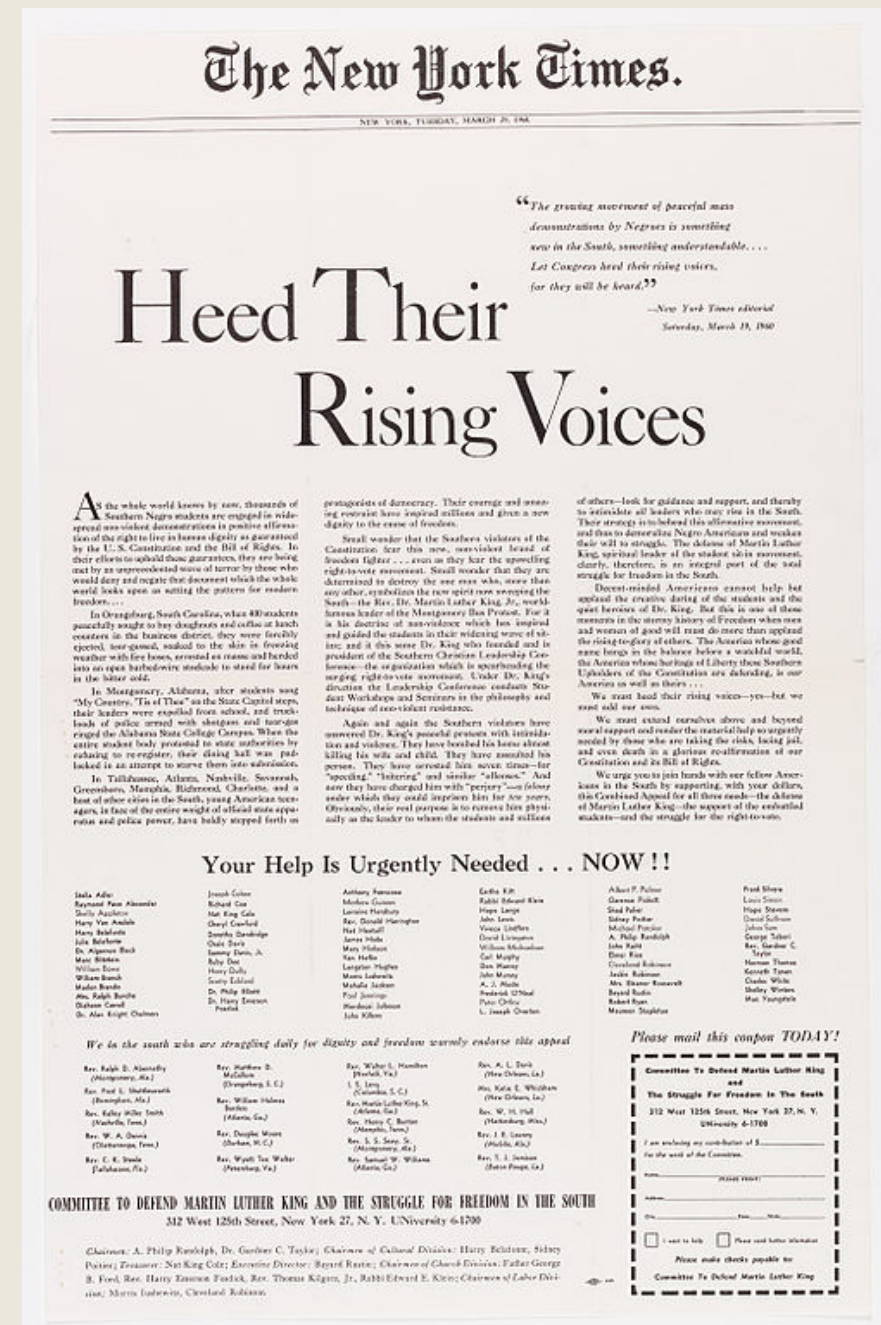




## Protecting speech:

- *NAACP v. Alabama* (1958)
- *Garner v. Louisiana* (1961)
- *NAACP v. Button* (1963)
- *New York Times v. Sullivan* (1964)
- *Brandenburg v. Ohio* (1969)

*"If I lived in ... any totalitarian country ... Maybe I could understand the denial of certain basic First Amendment privileges, because they hadn't committed themselves to that ... But somewhere I read of the freedom of assembly ... of the freedom of speech ... of the freedom of press. Somewhere I read that the greatness of America is the right to protest for right. And ... we aren't going to let dogs or water hoses ... [or an] injunction turn us around. We are going on."* MLK , I've Been To the Mountaintop, April 3, 1968, Memphis, Tenn.



# Berkeley Free Speech Movement

## Free speech on campus

- Starting in 1964, students on the University of California Berkeley campus organized and protested the school's prohibition on political activity by students on campus.
- The students fought the administration's policy by asserting their constitutional First Amendment rights to free speech and assembly.
- After many demonstrations and negotiations, the students won. This paved the way for the open college campuses we enjoy today.



Mario Savio, key member in the FSM

# YOU CAN'T SAY THAT!

## Recognized Exceptions to the First Amendment

# Not all speech is protected.

Over time, the government and the courts have recognized certain exceptions to the First Amendment:

- Obscenity
- Fighting words\*
- Defamation
- Child pornography
- Perjury
- Blackmail
- Incitement to imminent lawless action
- True threats
- Solicitations to commit crimes
- Plagiarism of copyrighted material



Notice what's not on the list?

**HATE SPEECH**



# Application to college campuses:

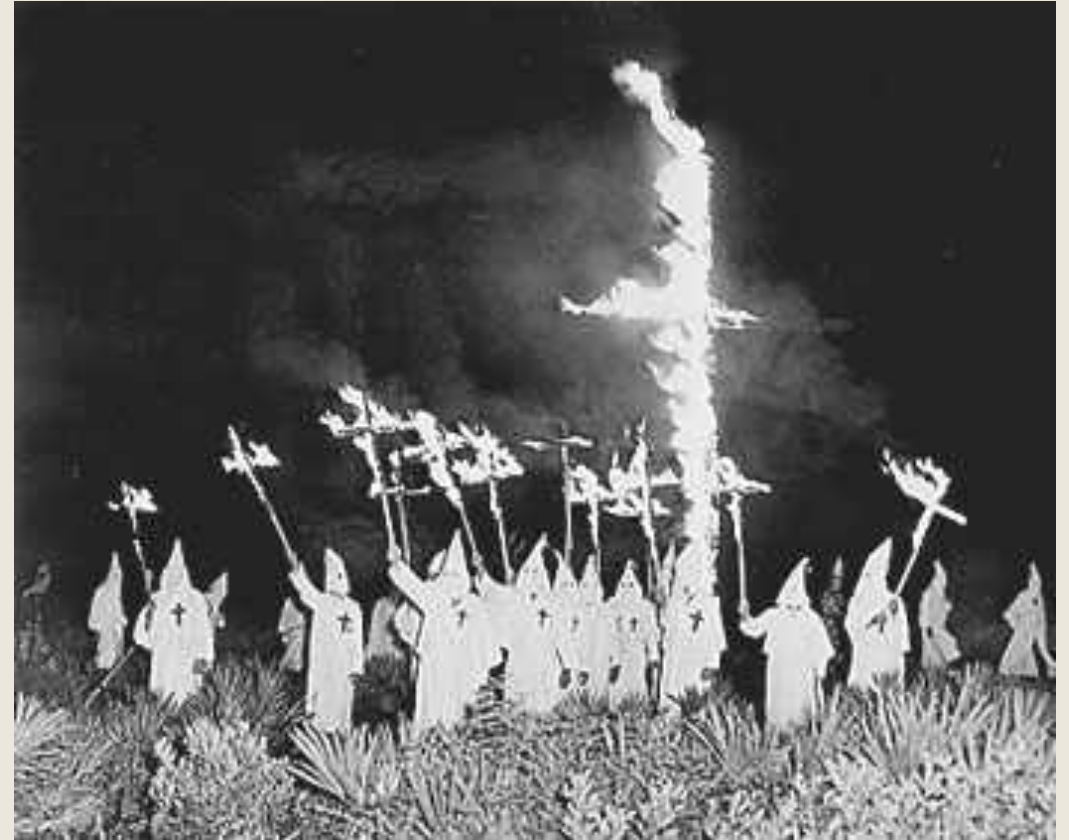
- Low value categories:
  - *True threats*
  - *Incitement*
  - *Harassment*
  - *Interference with classes or events*
  - *Obscenity*
- Content neutral time, place, and manner regulations



Protest to raise the minimum wage at the University of Minnesota

# True Threats:

True threats are statements where the speaker means to communicate a serious intent to commit an act of unlawful violence against a particular individual or group of individuals. The speaker need not actually intend to carry out the violence.



# Incitement:

Advocacy vs. incitement

*Brandenburg test:*

- (1) *The advocacy is directed to inciting or producing imminent lawless action and*
- (2) *is likely to incite or produce such action.*



# Harassment

- Two types:
  - *Quid Pro Quo*
  - *Hostile environment*
- Test:
  1. Unwelcome;
  2. Discriminatory;
  3. On the basis of gender or other protected status (like race);
  4. Directed at an individual;
  5. So severe, pervasive, and objectively offensive, and that so undermines or detracts from the victims' educational experience that the victim-students are effectively denied equal access to an institution's resources and opportunities.



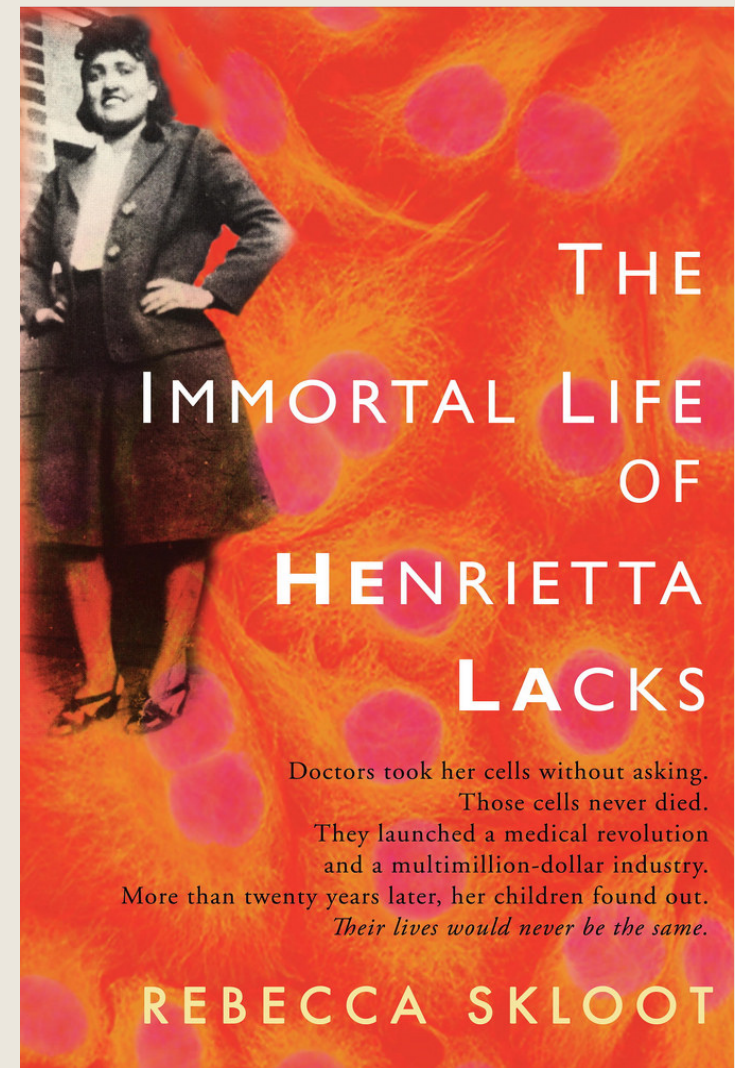
# Interference with classes:

- Prohibitable actions include those that materially and substantially obstruct the work and discipline of the school.
- Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.



# Obscenity:

- Obscenity issues occur on campuses in response to artistic creations or performances.
- The test for obscenity contains three parts that must be met to restrict the speech. The test can be summed up by the last factor: whether the work as a whole lacks serious literary, artistic, political, or scientific value.
- Example: *The Immortal Life of Henrietta Lacks* by Rebecca Skloot was recently challenged by a mother in a Tennessee school district on obscenity grounds.



*“A parent in TN confuses gynecology with pornography & tries to ban my book.” – Rebecca Skloot*



# Content neutral time, place, and manner:

- Universities can generally make content neutral restrictions regarding the time, place, and manner of speech.
  - *Content neutral means—the restriction is not based on WHAT is said but rather restricts the circumstances under which the speech occurs.*
- Examples:
  - *Littering;*
  - *Noise amplifying devices;*
  - *Advertising requirements;*
  - *Location of protests.*



# TAKEAWAY

A framework for understanding free speech on college campuses



# Free Speech on Campus Framework:

- The Supreme Court has not decided this issue. This is a suggested framework for thinking about free speech issues on college campuses.
- Two Zones:
  - *Professional zone— Protects the freedom of expression but imposes an obligation of responsible conduct in formal educational and scholarly settings.*
  - *Free speech zone— Exists outside the scholarly and administrative settings where the only restrictions are those that apply to society at large.*

Framework from [Free Speech on Campus](#) by Erwin Chemerinsky and Howard Gillman (2017).

## Campuses CAN:

- Censor or punish speech that meets the legal definition of harassment, true threats, or other speech unprotected by the first amendment.
- Impose time, place, and manner restrictions on protesters for the purpose of preventing them disrupting the normal work of the campus—including the educational environment and administrative operations.
- Impose content neutral speech restrictions in dormitories designed to produce a supportive living environment for students.
- Ensure that all student organizations, as a condition for recognition and receipt of funding, be open to all students; and can impose sanctions for conduct if it is not protected by the principles of free of speech.

## Campuses CANNOT:

- Censor or punish speech merely because a person or group considers it offensive or hateful.
- Prevent protesters from having a meaningful opportunity to get their views across in an effective way.
- Impose content based speech restrictions in dormitories.
- Deny recognition for a student organization, or impose sanctions against a student organization, for the views or ideas expressed by the organization, its members, or its speakers.

# Questions?

“For we are presented with a clear and simple statute to be judged against a pure command of the Constitution . . . . The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases . . . . Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.”

*Texas v. Johnson*, 491 US 371, 420–21 (1989) (Kennedy, J., Concurring).