AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech/Advocacy

**Church of the American Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197 (2nd Cir. 2004)**

*In 1994, Jeffrey Berry formed the American Knights of the Ku Klux Klan as a “political membership association that advocates on behalf of the white race and the Christian faith.” In 1999, the American Knights applied for a parade permit in New York City for a demonstration to be held at the county courthouse. The permit was denied on the grounds that the planned event would violate New York’s anti-mask law, which made it criminal offense to anyone wearing a mask to congregate in a public place, except in the context of a masquerade party or like entertainment.*

*The American Knights filed suit in federal district court seeking to enjoin enforcement of the anti-mask law. A district judge issued a preliminary injunction, but it was stayed by a panel of the circuit court. Meanwhile, the American Knights held their demonstration with their regalia but without their masks. After the event, the district court granted a permanent injunction barring future enforcement of the anti-mask law in such circumstances. On appeal, the circuit court reversed. Although masks might be part of an expressive activity, the circuit court did not find it essential to the expressive activity of the Klan, nor was the court willing to include mask-wearing as within the constitutional protections for anonymous speech. Moreover, the police could deny a parade permit to those who announced that they would be violating the anti-mask law even if the police rarely enforced the law by arresting those who in fact wore masks at public demonstrations.*

JUDGE CABRANES.

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New York’s anti-mask law, reenacted in its current form in 1965, can be traced back in substance to legislation enacted in 1845 to thwart armed insurrections by Hudson Valley tenant farmers who used disguises to attack law enforcement officers. . . .

New York’s anti-mask law was therefore indisputably aimed at deterring violence and facilitating the apprehension of wrongdoers; the parties agreed, and the District Court properly held, that the statute was not enacted to suppress any particular viewpoint. . . .

It is well established that “[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.” *Virginia v. Black* (2003). As the Supreme Court has cautioned, however, “[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” *United States v. O’Brien* (1968). In determining whether particular conduct is sufficiently expressive to implicate the First Amendment, therefore, the test is whether “‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’” *Texas v. Johnson* (1989). . . .

The District Court determined that “[t]he hooded masks are an integral part of the message that links the American Knights to the KKK and its horrific ideology,” and concluded that “clearly the masks constitute expressive conduct.” . . .

We agree with the District Court that the regalia of the American Knights, including the robe, mask, and hood, are expressive; they are expressive in the way that wearing a uniform is expressive, identifying the wearer with other wearers of the same uniform, and with the ideology or purpose of the group. We do not doubt that a person who viewed a member of the American Knights wearing such regalia would likely grasp that association. New York’s anti-mask statute does not, however, bar members of the American Knights from wearing a uniform expressive of their relationship to the Klan. The statute only proscribes mask wearing.

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Not only is the message conveyed by the mask duplicative of the robe and hood, we think the mask adds no expressive force to the message portrayed by the rest of the outfit. The mask’s asserted message is already being conveyed unequivocally: Inasmuch as the robe and hood draw an association between the American Knights and the Klan that is clear and unmistakable to any viewer, the addition of the mask cannot make that association any clearer. . . .

Additionally, the expressive quality of the mask, as part of the American Knights’ regalia, is diminished by the fact that mask wearing appears to be, to some extent, optional among American Knights. . . .

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In numerous decisions, the Supreme Court has recognized a right to anonymous speech grounded in the First Amendment freedoms of speech and association. In the seminal case*, NAACP v. Alabama* (1958), the Court held that the State of Alabama could not compel the NAACP to reveal to the State’s Attorney General lists of its members’ names and addresses. The Court found that “compelled disclosure” of the NAACP’s Alabama membership “is likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.” . . .

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These Supreme Court decisions establish that the First Amendment is implicated by government efforts to compel disclosure of names in numerous speech-related settings, whether the names of an organization’s members, the names of campaign contributors, the names of producers of political leaflets, or the names of persons who circulate petitions. In contrast, the Supreme Court has never held that freedom of association or the right to engage in anonymous speech entails a right to conceal one’s appearance in a public demonstration. Nor has any Circuit found such a right. We decline the American Knights’ request to extend the holdings of *NAACP v. Alabama* and its progeny and to hold that the concealment of one’s face while demonstrating is constitutionally protected.

. . . . While the First Amendment protects the rights of citizens to express their viewpoints, however unpopular, it does not guarantee ideal conditions for doing so, since the individual’s right to speech must always be balanced against the state’s interest in safety, and its right to regulate conduct that it legitimately considers potentially dangerous. Because “every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities,” a conduct-regulating statute of general application that imposes an incidental burden on the exercise of free speech rights does not implicate the First Amendment.

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. . . . A selective enforcement claim requires, as a threshold matter, a showing that the plaintiff was treated differently compared to others similarly situated. *See id.* The American Knights argues that the police department denied it a permit on the basis of the American Knights’ viewpoint, and points to several instances in which participants in other events covered their faces with masks or the equivalent, and were not arrested. As examples, the American Knights cited:

Iranian students protesting the Shah in 1977, protestors rallying after the funeral of Amadou Diallo in 1999, protestors opposing the rally held by the plaintiff in this action on October 23, 1999 who wore rubber face masks satirizing Mayor Giuliani, and pro-Palestinian protestors who wore kefiyahs or head scarves on October 13, 2000 when they gathered at Times Square and again on October 20, 2000 when they assembled at the Israeli Consulate.

Defendants respond that there was no differential treatment—a prerequisite to selective enforcement—because in the situations cited, the participants did not provide advance warning of their intent to wear masks. We agree. . . .

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*Reversed*.