

HUSCH BLACKWELL

# Advanced Title IX Training: Title IX and the First Amendment

October 2024

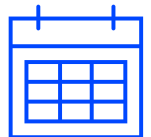
# Agenda

First Amendment and Free Speech Basics

The Intersection of the First Amendment and Title IX

Hostile Environment Harassment

Academic Freedom



# First Amendment and Free Speech Basics

## Module 1

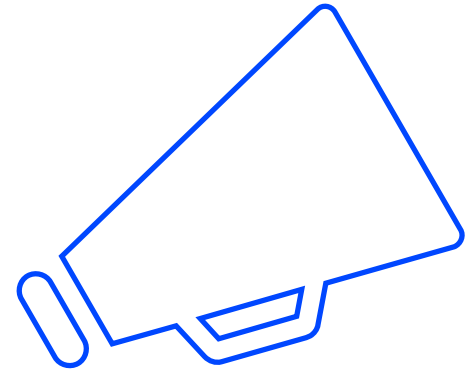
# The First Amendment

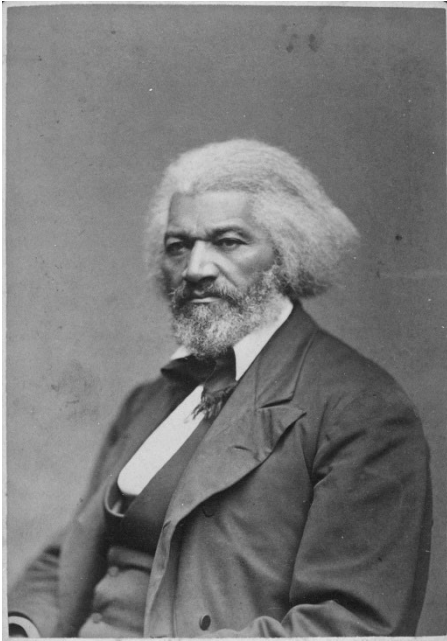


“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; **or abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

# Why do we have Freedom of Speech?

- Self-governance and check on government power
- Natural right/liberty
- Marketplace of ideas/social progress
- Absence of a fair and impartial regulator
- Minimizes violence by providing outlet
- Others?





“No right was deemed by the fathers of the Government more sacred than the right of speech. It was in their eyes, as in the eyes of all thoughtful men, the great moral renovator of society and government.”

*Frederick Douglass*

# Examples of Societal and Political Changes that Depended on Freedom of Speech



- Abolition of slavery
- Universal suffrage
- Workers' rights
- LGBTQ rights
- Religious liberty
- Rights for disabled persons
- Anti-war movements
- Animal rights movement

# What is speech?



- Spoken words
- Written words
- Expressive imagery and art
- Clothing with messages
- Expressive performance
- Photography/video recording
- Monetary contributions
- Others?



# Examples

**Students at a high school wear black armbands to protest the Vietnam War.**

**A citizen standing on a public sidewalk films police arresting a homeless person.**

**A website publishes fake and satirical news articles mocking current politicians and world leaders.**



# What is the Freedom of Association?

- Right to associate with persons of like mind/perspective
- Complimentary right to engage in speech collectively



# Who does the First Amendment protect us from?



- Federal, state, and local governmental actors
- Private individuals and private entities are ***not*** restricted by the First Amendment

# Example

**A public community college expels a student because the student engaged in religious speech on the sidewalk in front of the main administration building.**



# Example

**A private religious college expels a student because the student preached religious views that the college views as heretical in front of the main administration building.**



# What are some key Freedom of Speech concepts?

- Hierarchy of speech
- Viewpoint discrimination
- Speech fora
- Government speech
- Non-expressive qualities of speech
- Unprotected forms of speech



# Hierarchy of Speech

- The most protected forms of speech are:
  - Political speech
  - Religious speech
  - Speech on matters of public concern
- Speech on personal issues and petty grievances is the ***least*** protected

# Example

**A student at a public university writes an article in the student newspaper urging Congress to pass a law protecting abortion rights nationwide.**





# Example

**A student at a public university dislikes a particular student and refers to them by a sexual epithet in the hallway of a residence hall.**



# Viewpoint Discrimination



- Targeting speech because of the viewpoint it expresses
- Viewpoint discrimination is presumptively unconstitutional and almost never tolerated by courts

# Example

**A public university's dean of students approves a student organization's invitation of an outside speaker who will advocate for laws that protect the rights of transgender persons to participate in sports consistent with their gender identity.**



# Example

**A public university's dean of students disallows a student organization from inviting an outside speaker who will advocate for laws that restrict participation on sports teams based on biological or assigned sex because the dean of students believes the speaker's message is "wrongheaded" and "not consistent with our university's inclusive culture."**



# Example

**A public university's student code of conduct prohibits students from engaging in acts that impede administrative processes. Students hold a protest that involves speech criticizing various decisions made by the president. The students are charged with a conduct violation. If the students had engaged in speech praising the president, they would not have been charged.**



# Fora Analysis



- Speech in certain “forums” is more protected than speech in other forums
- Hierarchy:
  - Traditional public forum
  - Non-traditional public forum
  - Limited forum
  - Closed forum

# Example

**Students at a public technical college pass out pamphlets and hold signs on the open sidewalk in front of the student union. Student groups often engage in politicking and other forms of speech on this sidewalk and have since the building's construction over 100 years ago.**



# Example

**Students at a public technical college barge into the administrative suite, walk past the reception desk, and hold a “sit in” in the president’s office chanting political slogans and waiving banners.**



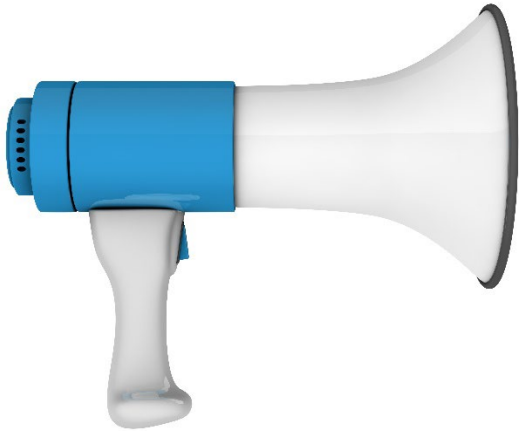


# Example

**A student is enrolled in an undergraduate class on American Politics. The faculty member occasionally invites group discussion on various political topics. One day, while the faculty member is lecturing and has not invited group discussion, a student begins chanting political slogans and urging classmates to vote for a particular candidate.**



# The Government's Own Speech



- Government is allowed to speak its own viewpoint
- Government has broad discretion to regulate the speech of its employees when they are acting in the course and scope of their duties

# Example

**After a controversial speaker comes to campus and advocates for defunding the Title IX office, the university's president issues a statement on behalf of the university articulating the importance of the Title IX office and the work it does. The statement expressly refers to the speaker's views as "misguided" and indicates the university plans to increase funding for the Title IX office.**



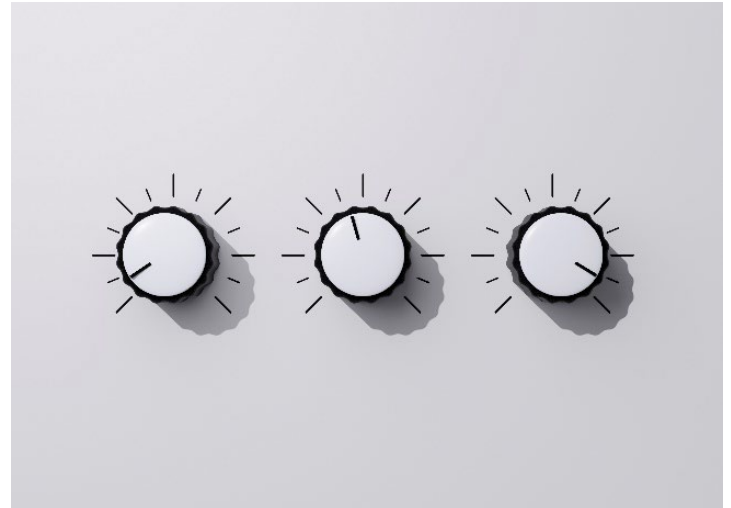
# Example

**An athletics director at a public university believes that a particular student athlete has been treated unfairly in a Title IX investigation. During an all-employee meeting of the athletics department, and while standing in front of the group, the athletics director urges employees *not* to report instances of alleged sexual misconduct to the Title IX office and instead urges reporting to local police alone.**



# Non-Expressive Qualities

- The non-expressive qualities of expressive speech can be regulated
- Reasonable time, place, and manner restrictions allowed



# Example

**A group of students is protesting in favor of sexual assault victims on the sidewalk in front of the administration building. Some students begin blocking the sidewalk and won't allow others to pass unless they accept a pamphlet. One student has a megaphone and places it within inches of others' faces and screams slogans into it. The group's pamphlets are stacked on the ground and begin blowing all over in the wind, littering the sidewalk, gutter, and lawn.**



# Example

**A student in a residence hall marches down the hallway at 11:30 pm loudly shouting slogans in favor of unionization efforts by graduate students. The residence hall has quiet hours that commence at 10:00 pm.**



# Example

**An administrator uses an all-student email list to send an email urging all students to vote for a particular political candidate. University policy restricts use of the email list to official communications and prohibits staff from using university resources to provide material support to a political candidate.**





# Unprotected Speech

- Defamation, slander, and libel
- “Fighting words”
- “True threats”
- Incitement
- False advertising
- Obscenity



# Example

**Student A publicly accuses Student B of rape because Student A is angry that Student B would not engage in an exclusive relationship with Student A after a sexual encounter. Student A knows there was no rape and made the statement out of spite and anger.**



# Example

**Professors Ruiz and Soto get into a heated argument over the extent to which women are discriminated against in the profession. Professor Ruiz gets within two inches of Soto, pushes his finger into Soto's chest, and says "I'm going to beat your ass . . . Let's take this outside right now."**



# Example

**A student with a bullhorn begins speaking against the military actions of Russia. The student attracts a crowd and uses increasingly inflammatory rhetoric to whip the crowd up. Once the crowd is agitated and ready to act, the student urges the crowd to march to the Department of Russian studies and “tear that place to shreds.” The crowd barges into the Department’s offices, tipping over bookshelves, damaging computers, and breaking three windows.**



# Example

**An officially recognized student organization that has a residential house hosts a “porn night” where graphic, pornographic videos are displayed to attendees. While most of the attendees are over the age of 18, a handful of the attendees are minors visiting their siblings. State law prohibits the display of pornography to persons under the age of 18. Organizers of the “porn night” are charged with a conduct code violation based on the violation of state law.**



# Hate Speech



- No general “hate speech” exception to the First Amendment
- Speech is not unprotected simply because it is offensive, inappropriate, nasty, etc.

# Example

**A local religious group comes onto the campus of a public university and marches on a public sidewalk with signs that have various anti-gay and anti-trans messages including statements indicating “God Hates \_\_\_\_.”**



# Group Scenario

A student organization at a public university applies to host a controversial speaker who will talk about the “dangers of the radical trans-agenda.” The institution has historically allowed many outside speakers, including speakers advocating for LGBTQ rights. The Dean of Students approves the application on the condition that the student organization pay \$15,000 to compensate the university for the additional police presence needed to control an anticipated counter-protest resulting from the speaker’s “particularly inflammatory message”. On the night of the event, counter-protestors barricade the doors to the auditorium. When the speaker asks campus police to clear the entrance, they refuse and direct the speaker to vacate campus “for safety reasons.” The speaker leaves campus and gives a truncated speech at a nearby public park.





# Questions



# The Intersection of the First Amendment and Title IX

## Module 2

# What is the nature of the Constitution?

- Foundational document that defines the authority of government
- Imposes limits on federal and state executive, legislative, and judicial actions



# What is the nature of a statute like Title IX?



- Effectuate some legitimate exercise of legislative power
- Within the bounds set by the Constitution itself
- Title IX is enacted pursuant to the Constitution's Spending Clause

# Title IX's Codification of Constitutional Supremacy

Nothing in [the Title IX regulations] requires a recipient to:

- (1) Restrict any rights that would otherwise be protected from government action by the First Amendment to the U.S. Constitution;
- (2) Deprive any person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or
- (3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

34 C.F.R. § 106.6(d)

# “Offensive” Speech and Title IX

“Free speech rights apply in the classroom (e.g., classroom lectures and discussions...). In addition, First Amendment rights apply to the speech of students and teachers... Title IX is intended to protect students from sex discrimination, not to regulate the content of speech. [T]he offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR.”

2003 Revised Sexual Harassment Guidance at 22 (emphasis added)

# Example Harassment Policy

“Harassment can include any unwelcome verbal, written, or physical conduct which **offends, denigrates, or belittles an individual** because of [sex]. Such conduct includes, but is not limited to, unsolicited derogatory remarks, jokes, demeaning comments or behaviors, slurs, mimicking, name calling, graffiti, innuendo, gestures, physical contact, stalking, threatening, bullying, extorting or the display or circulation of written material or pictures.”

# *Saxe v. State College Area School District*

“The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”





# Examples of Speech Restrictions Courts Have Invalidated As Inconsistent With the First Amendment

- Speech that [is]:
  - “Offensive”
  - “Hateful”
  - “Denigrates”
  - “Insults”
  - “Hurtful”
  - “Belittles”



# Higher Education Act

“It is the sense of Congress that no student attending an institution of higher education on a full- or part-time basis should, on the basis of participation in protected speech or protected association, be excluded from participation in, be denied the benefits of, or be subjected to discrimination or official sanction under any education program, activity, or division of the institution directly or indirectly receiving financial assistance under this chapter . . . .”

## Title I, Section 112

# Constitutional Jurisdictional Limits

- Constitution generally limits a public school's authority to sanction off-campus speech unless it has a disruptive effect on campus or otherwise in operations
- The fact that people are offended or upset about off-campus speech is probably insufficient to establish a disruptive effect
- Special rules may exist for students in certain professional schools that have adopted professional conduct codes (e.g., law; medicine; counseling; social work; nursing)

# Example

**A student at a public university posts a vulgar rant on the student's private social media feed attacking feminism and using various expletives to refer to women. The post is not directed at any particular person and does not reference the university at all. Another student reports the post to the Title IX Coordinator as "offensive."**



# Example

**The institution’s law school has adopted a special student code of conduct that mirrors some provisions of the rules of professional conduct that apply to lawyers. A law student posts a vulgar rant on social media referring to male law school faculty collectively as “a bunch of rape-enabling pigs.”**



# Title IX's Jurisdictional Reach

- Title IX applies to sex discrimination in the “education program or activity” of a federal funding recipient
  - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in a private location that is not part of an education program/activity



# Group Scenario

Zane creates a “deepfake” photograph of Camile, a star basketball player, who receives nearly \$1 million in NIL. The image depicts Camile in a bikini with enhanced features but does not constitute pornography. Zane publishes the deepfake on a member’s only online forum. Unbeknownst to Zane, another student at the university is a member of the forum, knows Camile, and reports the existence of the deepfake to Camile. Camile does not share any classes with Zane but is acquainted with Zane through a mutual friend. Camile files a Title IX complaint alleging hostile environment harassment. Zane lives off campus, and there is no indication Zane used the institution’s computer network to generate or upload the deepfake. While the reporting party saw the deepfake, the reporting party did not save it, and Camile has not actually seen it. Zane removed it from the forum as soon as he became aware of the complaint.



# Questions





# Hostile Environment Harassment

## Module 3

# What is sexual harassment?

Conduct on the basis of sex that is:

Quid pro  
quo  
harass-  
ment

Hostile  
environment  
harassment

Sexual  
assault

Dating  
violence

Domestic  
violence

Stalking

# What is hostile environment harassment?

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity. (2020)

Unwelcome, sex-based conduct that, based on the totality of circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity. (2024)

# Potentially Harassing Speech

- Joking
- Lewd comments
- Sexualized emails and social media exchanges
- Unwelcome display of imagery
- Defacing bulletin boards
- Persistent sexual/romantic pursuit
- False gossip and rumors



# Example

**Ross is a student who is gay. Lorena, another student, repeatedly calls Ross “a queer” and loudly refers to Ross as a “fa\*” when Ross is within earshot. Lorena also writes anti-gay slurs and jokes on Ross’s white board and frequently warns other male students about how Ross is likely to pursue them sexually.**



# Example

**Lorena is a student with conservative religious views. Lorena hosts a Bible study in the common room of the residence hall. During the Bible study, Lorena espouses her belief that “gay sex” is a sin. Ross is aware of Lorena’s religious views and has overheard her discuss them with others. Lorena is also politically active and has made several social media posts referencing the “gay agenda in Congress.” Ross has seen the social media posts.**



# Question for Discussion

**What features render the first example hostile environment sexual harassment?**

**What features render the second example First Amendment-protected speech?**



# Example

Charlie is an art student who often creates art depicting social phenomenon. Charlie creates a provocative collage about a prominent vocal artist accused of sexually assaulting women at various “sex parties.” The collage depicts nudity and has other explicit sexual content, along with depictions of the artist being arrested and tried in court. Charlie titles the piece “*Famous and Rich Boys Will Be Boys.*” The piece is displayed in the hallway of the Art and Design building. Several students complain that the piece creates a hostile environment.





# Example

**Riz is an economics major whose friend Clive is accused of sexual assault by Deven. Riz creates a doodle “comic strip” on a piece of paper with the title “Faker” at the top, showing Deven actively and vigorously engaging in sex with Clive, then getting angry when Clive won’t snuggle with Deven, and then going to the Title IX Coordinator to report a rape. Riz stuffs the doodle under Deven’s windshield wiper, then creates several other “comic strips” of similar nature and slides them under Deven’s door and places them in Deven’s mailbox.**



# Question for Discussion

**What features render the first example First Amendment protected speech?**

**What features render the second example hostile environment harassment?**



# Example

**Professor Stedman teaches a gender studies course that includes frequent class discussion. During a class discussion, Jamie expresses the view that modern feminism is really predicated on anti-male sentiment rather than women’s empowerment and that men are now the oppressed sex—especially on college campuses where female enrollment now substantially outpaces male enrollment. Cathy retorts that men should not be heard to complain since they “dominated women for centuries.” Jamie responds, “see, that’s what I mean . . . You’re just spiteful.”**



# Example

**Professor Stedman teaches an American History class that includes frequent class discussion. During a discussion on tax policy, Jamie expresses the view that income tax should be abolished. Cathy argues that the income tax should be raised and implies that Jamie only opposes the income tax because he's greedy. Jamie responds angrily and calls Cathy a “stupid bit\*\*” and a “dumb cu\*\*” before storming out.**



# Question for Discussion

**What features render the first example First Amendment protected speech?**

**What features render the second example potential hostile environment harassment?**



# Example

**Chaz writes for the student newspaper and learns through sources that a prominent athlete, Jordan, has been accused of sexual assault by three separate students. Chaz writes an article naming Jordan which reads, “Where there’s smoke, there’s fire. Rape reports are almost never false, and for Jordan to be accused three times means Jordan is a rapist. The university should remove Jordan from the team immediately.”**



# Example

**Chaz hears from a friend that a relatively unknown member of the field hockey team, Lane, has been accused of sexual assault by another student. Chaz is a victim of sexual assault and believes it is important to identify and shame perpetrators. Chaz superimposes the word “Rapist” on Lane’s team photo and posts the modified image on social media. Chaz has no personal knowledge of whether the allegations are true. Lane is found not responsible for sexual assault.**



# Question for Discussion

**What features render the first example First Amendment protected speech?**

**What features render the second example potential hostile environment harassment?**





# Examples of Factors Distinguishing Between Protected vs. Harassing Speech

- Whether accompanied by conduct
- Whether effect is more than subjective offense
- Whether speech is individually targeted
- Whether target of speech is a private or public figure
- Whether speech is about a matter of public concern
- Whether the speech is germane to an academic discussion
- Whether the subject matter is personalized and petty
- Where the speech occurs

# Names and Pronouns

- 2024 Title IX regulation indicates failure to use chosen names and pronouns may constitute sex-based harassment
- Court decisions are mixed



## *Geraghty v. Jackson Local Sch. Dist. (N.D. Ohio)*

“Title IX is not implicated unless the ‘speech inhibited the students’ education or ability to succeed in the classroom.’ . . . But discomfort does not rise to the level of ‘systematically denying [the student] equal access to an educational program or activity. Further, learning how to tolerate speech is ‘part of learning how to live in a pluralistic society, a trait of character necessary of ‘a tolerant citizenry.’ Finally, it is ‘likely’ that Title IX’s definition of sex discrimination does not ‘extend to discrimination on the basis of ‘gender identity.’” (internal citations omitted)

# Example

**Cal is a transgender female who previously presented as male. Wade is willing to refer to “Cal” as “Cal” instead of the prior name “Calvin” but is unwilling to refer to Cal with “she/her/hers” pronouns and so simply refers to “Cal” by name or uses the gender neutral “they/them/their.”**



# Example

**Cal is a transgender female who previously presented as male. Wade always calls Cal “Calvin”, despite Cal correcting him, and makes a point to call Cal “Dude” and “Bro” in front of others. Wade also refers to Cal with “he/him/his” pronouns, both when speaking to Cal and when speaking about Cal and does so in a mocking tone.**



# Group Scenario

A graduate student and a faculty member have a sexual relationship. After the relationship ends, the graduate student files a Title IX complaint alleging the relationship was non-consensual based on power disparity. The faculty member sues the graduate student in court for defamation, contending the relationship was consensual based on numerous text messages from the graduate student. The lawsuit is widely reported on by media, and the graduate student's attorney makes statements to several local papers. A colleague of the faculty member who has been working on a publication with the graduate student refuses to collaborate further, stating in an email to the graduate student, "I will not be compelled to publish an article with someone who has falsely accused a colleague of rape." The colleague is interviewed by the campus newspaper and gives her opinion that, based on what she's seen in the legal complaint, the graduate student is lying and simply regrets the relationship. The colleague repeats the same sentiments at a faculty senate meeting. The graduate student makes a complaint against the colleague.



# Questions



# Academic Freedom

## Module 4



# What is Academic Freedom?

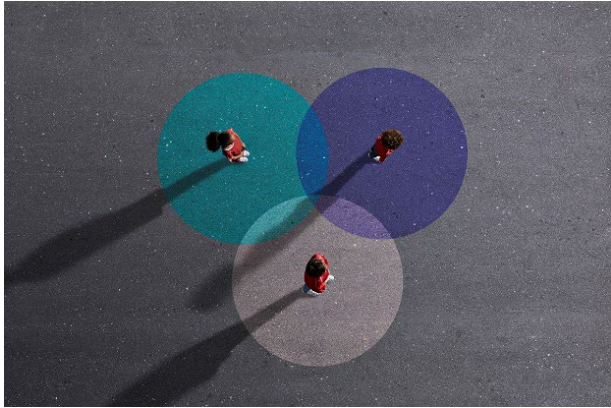
“Academic freedom is the belief that the freedom of inquiry by faculty members is essential to the mission of the academy as well as the principles of academia, and that scholars should have freedom to teach or communicate ideas or facts (including those that are inconvenient to external political groups or to authorities) without being targeted for repression, job loss, or imprisonment.”

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**WIKIPEDIA**  
The Free Encyclopedia

# What does Academic Freedom protect?



- Freedom in research and publication within field of competence
- Freedom in course design and course content within field of competence
- Freedom to set pedagogy and methods of instruction
- Freedom to speak publicly on matters of public concern without fear of reprisal

# Example

**A gender studies professor publishes an article analyzing the effects of the transgender rights movement on the objectives of “traditional” feminism which argues that the transgender rights movement has undermined certain objectives of “traditional” feminism.**



# Example

**A professor in the Classics Department requires students in a Roman Civilization course to read novels and poems from the Roman era that are sexually graphic and include depictions of rape and incest.**



# Example

**A professor who teaches American History requires students to draft an essay on a current, hotly contested policy dispute and then present the most potent points in support of and in opposition to the policy dispute, whether the student agrees with them or not. Policy issues are chosen randomly, and one student is required to draft an essay and argue points regarding whether there should be a federal statute regulating abortion.**



# Example

**A Math professor is an avid supporter of a particular presidential candidate and spends his free time supporting the candidate's campaign. The professor maintains a personal Facebook account and makes several posts supporting the candidate and attacking the candidate's opponent. The Facebook account includes the disclaimer, "The views expressed herein are solely those of [Math Professor] and do not reflect the views of the University."**



# What are the sources of Academic Freedom?

- First Amendment to the U.S. Constitution
- Contract Law (i.e., faculty handbooks and policies)



# Course Content

“[T]he Department [of Education] recognizes that sex stereotyping in textbooks and curricular materials is a serious matter. However, the imposition of restrictions in this area would inevitably limit communication and would thrust the Department into the role of Federal censor. There is no evidence in the legislative history that the proscription in Title IX against sex discrimination should be interpreted as requiring, prohibiting, or limiting the use of any such material.”

40 Fed. Reg. 24135 (1975)



# Example

**A Chemistry professor requires students to balance chemical equations on the smartboard at the front of the classroom. When female students are at the board, the professor often places his hand around their waist and smells their hair.**



# Example

**A Military Science instructor is teaching a course on hand-to-hand combat. When teaching how to apply and escape from chokeholds, the instructor requires three student volunteers to come forward and allow the instructor to physically demonstrate certain techniques.**



# Does Academic Freedom protect students?



- Probably, although court decisions are mixed
- Likely that “academic freedom” protects at least a student’s right to be free of ideological coercion

# Example

**A faculty member teaching a political science course assigns students to draft a report analyzing the key strengths and weaknesses of each candidate. One student notes a female candidate’s weakness as “her status as a woman” because “the United States has never elected a female president, in part due to deeply rooted sex-based stereotypes.” The faculty member assigns an “F” to the student because the faculty member is a supporter of the female candidate and is insulted by the suggestion that being a woman is a “weakness.”**



# Example

**A faculty member teaching a political science course assigns students to draft a report analyzing the key strengths and weaknesses of each candidate. One student writes that a particular candidate’s weakness is that the candidate is “anti-woman.” The student fails to cite any sources in support of the statement. The faculty member assigns the student an “F” based on the failure to provide any supporting citations as required by the assignment.**



# Group Scenario

Professor Chan is an openly gay faculty member at a Chiropractic College. Professor Chan requires two students, one male and one female, to serve as subjects while Professor Chan demonstrates certain stretching and hip manipulation techniques for the class. During the demonstration, Professor Chan's hands contact the subjects' hips and inner thighs. While demonstrating, Professor Chan cracks a joke and says, "Relax, I'm a professional. I won't take advantage of you." After his demonstration, Professor Chan requires the class to form pairs and practice the techniques on each other. After the class, the male volunteer makes a complaint that Chan's demonstration was harassing. The male volunteer complains that Chan's hands "got closer to my privates than necessary" and "his joke was a sexual innuendo." The male volunteer also reports, "many students were uncomfortable with having to perform this on a person of the other gender." When interviewed, Professor Chan says that the techniques he demonstrated are clinically appropriate and necessitate a provider's hands being close to a patient's groin. He says that adding humor is an important aspect of bedside manner and that students must learn to be comfortable working on patients of the opposite sex. Dr. Chan asserts that the students must experience discomfort as patients in order to learn empathy.



# Questions



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