Vincent Munoz:

I think what we need to do is explain how our principles of free speech, free inquiry will help serve the cause of justice.

Betty Friendan:

The First Amendment, the constitutional freedom of speech and freedom of conscience that is the bulwark of our democracy.

Bettina Aptheker:

There was a passion in what was being said, affirming this [inaudible 00:00:27] what people considered a sacred constitutional right, freedom of speech and freedom of association.

Michelle Deutchman:

From the UC National Center for Free Speech and Civic Engagement, this is SpeechMatters, a podcast about expression, engagement, and democratic learning in higher education. I'm Michelle Deutchman, the center's executive director and your host. Not even two weeks ago, the Supreme Court term ended and with it so did race conscious admissions in colleges and universities as well as President Biden's college loan repayment plan. While not surprising, these decisions served as a one-two punch for higher education. Dire predictions about the impact of these rulings abound as do conversations about how best to maintain diversity in college and university classes without running afoul of the new restrictions. There has been much thoughtful reporting, writing, and podcasting about these decisions and others from the last term. So today, SpeechMatters will focus on some other issues percolating in the lower courts that will likely make their way to the Supremes sooner rather than later.

Today's guest, Brian Soucek, professor of Law and Chancellor's Fellow at UC Davis School of Law and former center fellow will join us to contextualize and explain First Amendment legal challenges to diversity statements and faculty hiring bias response teams and Florida legislation on divisive concepts. But first, let's turn to class notes, a look at what's making headlines. Just days after the Supreme Court ruled on affirmative action, lawyers for civil rights filed a new admission suit against Harvard, challenging its legacy admissions policies. The complaint argues that preferential treatment for applicants who are children of alumni or related to donors discriminates against students of color by giving an unfair advantage largely to white applicants. In other legal news, last week a federal district court judge enjoying the White House, government agencies and other officials from communicating with social media companies. The injunction bans interactions including "meeting with social media companies for the purpose of urging, encouraging, pressuring or inducing the removal, deletion, suppression or reduction of content containing protected speech posted on social media platforms."

The attorneys general of Missouri and Louisiana filed the suit arguing that the White House and others were colluding with social media companies to shut down conservative speech on social media platforms. The White House claims that communications were made in order to help curb disinformation. Experts worry that this decision combined with the lack of safeguards on most platforms will lead to an uptick in disinformation online. Finally, during the most recent legislative session, at least 26 bills were introduced across the country with the goal of limiting drag performances in order to allegedly protect children. In a First Amendment victory, a federal district court judge ruled that a Tennessee law contravened the First Amendment because it was overbroad and vague. Although the law is only enjoined in Shelby County, the decision sends a message to the entire state about the law's enforceability.

Now it's time to formally introduce today's guest, Brian Soucek. As I mentioned at the top, Brian is Professor of Law and Chancellor's fellow at UC Davis School of Law, where he's taught for a decade. Brian's work has been cited by the US Supreme Court in the sixth and seventh circuits, referenced and excerpted in leading case books on immigration law, civil procedure, and sexual orientation law. He recently served as chair of the University of California's system-wide committee on Academic Freedom. Brian holds a PhD in philosophy from Columbia University as well as a law degree from Yale Law School. He clerked for the late Mark R Kravitz, United States District Judge for the District of Connecticut and the Hon. Calabresi of the Second Circuit Court of Appeals. In addition to all of this, I am proud to share that Brian was a fellow at the center during 2020, 2021. During his fellowship, he researched and wrote about institutional values, academic freedom, and the First Amendment. Brian is one of my favorite scholars and people. It's a privilege and a lot of fun to have you on the show, Brian. Thanks for joining us today.

Brian Soucek:

Oh, it's my pleasure. It's always great to talk to you, Michelle.

Michelle Deutchman:

So since the Supreme Court's decision and the students for fair admissions case, there has been much focus on diversity through the lens of affirmative action. Today I want us to look through the lens of another vehicle that universities are using to increase diversity, and that's diversity statements in faculty hiring and promotion. Brian, I know this is an issue that's near and dear to your heart. In an Atlantic article published last week by Conor Friedersdorf, you are described as the "most formidable defender of mandatory diversity statements." So before we get to the meat of the issue, I want to know what piqued your interest in this topic?

Brian Soucek:

Well, it really started in some of the service work that you just mentioned in 2017, '18, '19 when I was leading the Academic freedom committee first at UC Davis where I teach and then system-wide throughout the University of California in 2020 to 2021. And it was COVID times. There was a lot going on. We were working with Zoom to try to get our content moderation out of their hands and into our more First Amendment friendly hands. We were dealing with all sorts of things, but one of the biggest hot button issues at the time was absolutely this issue of the University of California's expanding use of contribution to diversity, equity and inclusion statements. So these are statements that either faculty applicants or current faculty members would give either when they're applying for a job or when they're seeking advancement or tenure. So I turn one in every three years when I'm seeking a raise and along with the reports about what articles I've written, what classes I've taught, what my teaching scores have been like, all that kind of thing.

I also make a statement about how my teaching, research and service work have contributed to the University of California's concern with diversity, equity, and inclusion. And now that those are mandatory across the University of California, there have been increasing critics of their mandatory requirements who say that they violate the First Amendment, that they're loyalty oaths, that they're viewpoint discriminatory, that they violate academic freedom. And because these were for one thing, distinctly legal claims, and I'm a legal scholar who works on the First Amendment and is deeply interested in academic freedom, I thought, well, let's go beyond the blog posts and the op-eds and even these committee meetings that we're having and really step back and look from a legal standpoint, how good are these claims that what we're doing is unconstitutional?

Michelle Deutchman:

Thank you so much for starting to set the table. I am now going to ask you if you could dive a little deeper into some of the arguments specifically made that these statements, especially if they're mandatory in nature, actually violate the First Amendment. And once you do that, we can talk about how you think they're actually going to stand up.

Brian Soucek:

Sure, sure. Well, maybe I could just step back for a second and say something about why we do them in the first place. Because sometimes with the critics, it sounds as if this is something that just came out of nowhere or as if this is an experiment that we've engaged in without any study, and that's not actually the case, at least at the University of California. So this goes back over 20 years. In 2002, the then president of the university convened a committee to start looking at how well we were doing in terms of reaching underrepresented minority students in the population at large and that led to formal policies. By 2007, we have a diversity statement system-wide that says that diversity is integral to the university's achievement of excellence. And once we had decided that and stated that, then the question was, well, how are people like me?

How are the faculty at the UC contributing to something that's integral to the university's achievement of excellence? And so through a whole lot of shared governance, we started changing the academic personnel manual, which governs how we evaluate applicants and our peers through the peer review process in order to make it explicit that contributions to diversity, equity, inclusion, DEI contributions, we'll call them, that those are getting credit when people are going up for tenure. So that if you are spending a lot of your time mentoring underrepresented students, for example, that you're getting credit for something that the university really values. And then once it was in the academic personnel manual, then the question is, well, why aren't we asking people to report those contributions? And that's what's increasingly been the case to the point where, as I said earlier, now on all 10 campuses, people are making these reports, both when they apply for jobs and then when they go for advancement.

So that's where this came from. Now, critics have said, I think basically three different charges if you separate them out. One is that this is viewpoint discrimination in violation of the First Amendment so that we are seeking people in the kind of bold disclaim, somebody might say, we want only faculty members who agree with Ibram Kendi or something like that. Some have said, we only want people that agree with the Supreme Court's opinion, Justice Powell's opinion in Bakke that gave us the diversity rationale for affirmative action for as long as that lasted. That these are requirements that we're imposing on all faculty members. Whether you're a law professor like me or you're a cell biologist, we don't care. We want you to hue the line of anti-racism or something like that. That's the viewpoint discrimination claim. It's related, maybe just a rhetorical difference for those who claim that this is a return to UC's loyalty oaths from mid 20th century during the Cold War, dark time in higher institutions' past.

And so many have said that this is something similar where we will only give you a job if you take a particular very particular political stance. And then finally, there's this claim that this violates academic freedom that we are in imposing some kind of external criterion on what should be, according to critics, pure judgments of academic merit, which would ordinarily be something defined from within each discipline. And these statements, the critics allege, are coming top down often from administrators, it is alleged, and being imposed on an unwilling faculty.

Michelle Deutchman:

Fantastic. You really broke that down. And I am just going to add in the layer that this issue is getting additional attention right now in light of a complaint that was filed against University of California at Santa Cruz in May. And my understanding, and Brian, correct me if I'm wrong, is that this is the first major free speech challenge to a public institution that requires diversity statements. And for the benefit of our listeners, I'm going to do a quick review of the facts, which is that John [inaudible 00:12:33], a professor of psychology, applied for a position at UC Santa Cruz. He was not hired and now alleges that the university's hiring practices violate the First Amendment by imposing, Brian what you've described, this ideological litmus test and engaging in prohibited viewpoint discrimination. And so I'm curious, Brian, we're going to do a little bit of prognosticating about what you think a court should do that might be different than what they will do, but let's start with should.

Brian Soucek:

Well, one of the things that I've argued about the viewpoint discrimination point is that universities are a strange place. Our business is to engage in viewpoint discrimination in some ways. The entire process of judging candidates who want jobs or giving somebody tenure is to evaluate the quality of their views. And so viewpoint discrimination in this sense can't mean the same thing that it means when we are hiring a new colleague in the parking office or something like that where their political or political-ish views just should have nothing to do with their candidacy for the job. That's not the case when it comes to so many positions, really any position within the university, whether it's your views on biochemistry or if it's your views on asylum. If we're hiring somebody for our asylum clinic, those views become relevant, not for the biochemist, but yes, for the new director of the asylum clinic.

So the real question here I've argued is how relevant is what we're asking about? How relevant is it to the job in question within this particular field? And what I was saying earlier about contributions to diversity being internal to the mission of the university is relevant. I mean, that's to say that yes, even for the biochemist, there are going to be ways in which that professor can contribute to make sure that a diverse set of students are flourishing in biochemistry, that we're addressing issues that are relevant to the diverse population of California, that kind of thing. So there is this kind of relevance across the board in the university, although it will play out in different ways. To me, the strangest part of this particular lawsuit that you just mentioned is that this plaintiff was applying for perhaps the job within the UC system where this might be the most relevant.

I mean, this is amazing because the Pacific Legal Foundation who brought this case has literally been advertising for a plaintiff to sue the University of California for years now. And they might have found the worst possible plaintiff because after all, they say in the complaint that he's committed to "colorblindness and viewpoint diversity," that he has stated views on "colorblind inclusivity and merit-based evaluation" that are incompatible with the views of the university. And that's all well and good except for the fact that the position that he is applying for, wanted to apply for at University of California Santa Cruz was an assistant professorship in developmental psychology where they're looking to add to the program's long-established strengths in studying the lived experiences of children and youth from diverse backgrounds. They're particularly interesting in scholars whose research addresses diversity in human development. They look at things that promote healthy development in the context of inequities related to gender, ethnicity, race, social class, and/or sexuality.

That's the position, that's what he was applying for or would have had there not been a DEI statement according to the complaint. So the idea that somebody could say, I'm colorblind and walk in and do that job, I mean, I just can't imagine a worse candidate. And it's not just that, but at one point, some of the publicity around this has pointed to a blog post that the plaintiff wrote where he said, "Well, here's a DEI statement I could write." And most of it is just a rant against DEI statements, but I was struck reading it

because at some points he says, "I value outreach that encourages diversity and inclusion of underrepresented minorities in higher education." And then he goes on to describe his own work and says that it's aimed at improving our understanding of how underrepresented minority groups and other immigrant populations talk about their early life and attachment experiences. This allows us to identify aspects of resilience in diverse underrepresented populations that can inform prevention and intervention science and promote child, family, and community health amongst these populations.

I mean, Michelle, I think I could sit down with this guy for an hour and bang out just a tremendous DEI statement. From what I just read, it sounds like this guy isn't colorblind at all. He is deeply invested in work that is engaged with how certain interventions affect different racial groups differently, et cetera, et cetera. And that's what DEI statements are meant to do. And the reason I bring it up, Michelle, is because I think there's just so much misunderstanding about what the University of California and others are looking for when they ask for this. And the fact that this very plaintiff has shown that he has all the makings of what we're looking for, he could go then and say, I think these DEI statements are a waste of time. Once he's hired in faculty governance, he can write op-eds. Certainly any number of UC people have written op-eds on this subject, but maybe the diversity statement itself isn't the place to go on that rant. Maybe the DEI statement itself is the place where you talk about all this great work you're doing on resilience in a diverse population.

Michelle Deutchman:

Well, listen, I think the first thing is, I always say this when people ask me, oh, is it legal? Is it not legal? And my answer most of the time is the devil's in the details. And I think that that is a very condensed summary of your excellent law review piece, which is that you have to think about what's the question? How's it being asked? And like you said, is it relevant to the actual job description? And there is a kind of delightful irony in the way that you can use, we can use the facts of this case to actually make an alternate point. And of course that's why we're having you on, which is that there is so much misunderstanding because people's attention span is about 100 characters long and what they hear and what they know unfortunately are often the same things.

You already touched on why this is not a loyalty oath, but I do want to ask you to respond to another thing that was sort of alleged in this Atlantic piece, which ultimately concludes that mandatory DEI statements are profoundly anti diversity because they require "everyone to get on board and embrace the same values and social justice priorities." And I would just like you to share your thoughts on that logic.

Brian Soucek:

Great. Well, two things. The first is in my work on the Academic Freedom Committee, one of the things we did was to work with several other committees throughout the faculty Senate to amend the then existing recommendations on UC's use of diversity statements. And we made a couple big changes, I'd say two high level changes. One is to really stress that both in searches and in advancement, what we're looking for when we evaluate a DEI statement is somebody's actions and plans as opposed to their beliefs. And there's so many reasons for that. Beliefs are so easily gamed. Beliefs could give rise to these viewpoint discrimination problems. Beliefs, If I asked you to pledge basically a loyalty oath as critics think we're doing, it would give you no space to say something against DEI statements outside the context of the statement like I was just describing. You'd be a hypocrite for saying one thing in your statement and something else in the Wall Street Journal, but that's not what we're doing.

Say anything you want against it in the Wall Street Journal, we're still going to ask you within the statement, what have you done to advance this part of the university's mission? And to me, that's just

no different than what we do in teaching statements. I might think that I teach way too much, and I might say that in the Wall Street Journal, but when it comes to my teaching statement, they're not asking me, do you think teaching is the most important part of your job? They're saying, what have you done to allow your students to flourish? How has your teaching led to flourishing students? And I say, oh look, my scores are great. I changed my syllabus, I did all these things and we're done. So that's one thing, this focus on actions and plans as opposed to beliefs, I don't care about your beliefs. The president of another great public university told me recently that she had asked ChatGPT to do a DEI statement, and she said it wasn't bad. And my thought is, if ChatGPT can do it for you, then you're not doing the thing we're looking for.

Because ChatGPT I'm quite sure could pair at a whole bunch of talking points about diversity, but that's just not what we care about here. So that's basically answer one, that I don't think we're having everybody get on board and sing the same song. I'm asking you what you as an individual within your individual field has done. And that's the second point, that I don't think it's the same thing throughout the university. Or rather if we're talking about the same ultimate goal, which is making sure a diverse set of students are flourishing and that we're doing research and getting our research out to a diverse set of people, getting research that matters to the diverse population of this state, if those are our goals, which they are the stated goals of the University of California, then yes, I do think we're meant to all get on board with those insofar as we're doing our job. Doesn't mean you can't argue against the goals, it means your job consists of this.

If it means, as I think The Atlantic piece suggested, that what we're requiring by embracing the same values and social justice priorities is that somehow the means are all the same, how we go about this is the same, or even that the particular needs of each department is the same, then I think that's just totally wrong. Because ultimately what I'm looking for is for each department to decide here's what the philosophy department needs in order to be a department where a more diverse set of people are flourishing and where we're reaching a more diverse set of research interests and needs. And that's going to be a completely different answer than in chemistry or engineering or in the medical school. And having those conversations within each discipline is part of the point here in order to identify where your shortcomings are. And then that's how you're then going to write a rubric about how will we evaluate these statements when we're considering them?

We see what our particular needs are and then we see... And that's no different than in a scholarship review or something where you say, well, the needs within our field are X, Y, and Z, and the needs within our department are, I need a Plato scholar, an ancient scholar, something like that. And we go out and try to find that person and give extra weight to people that can meet those needs.

Michelle Deutchman:

So it's definitely not one size fits all.

Brian Soucek:

I would hope not. And that's what we've recommended that these be bottom up, not top down in the rubrics that are used for evaluation so that they're being evaluated as much like any other measure of academic merit, scholarship statements, teaching statements, et cetera, all the things that we're used to.

Michelle Deutchman:

So I told myself while you were answering the last question that we were going to move on to the next set of issues, but I do want to add in one more quick question. Which is now that we're all reeling from the not surprise affirmative action decision, which of course at its heart is diversity and at the heart of what we're talking about here is furthering and advancing diversity, which is part of the mission of the University of California. I think my question is, is there going to be spillover, do you anticipate from the affirmative action ruling into diversity statements, diversity trainings, other things that universities are doing?

Brian Soucek:

Well, Michelle, my first tweet after the Harvard decision came out was this just in US Supreme Court affirms UC's use of diversity statements. And the reason is because of the final paragraphs in the Chief Justice's opinion for the majority where he steps back and says, "All parties agree. Nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise." And the crucial point that I see him making there is the Supreme Court is saying, controversially of course, that universities can't explicitly take account of the fact of someone's race, a checkbox that says I'm African-American, I'm Hispanic, et cetera. That cannot be something that, to put crassly gives you points, that gives you a thumb on the scale in the evaluation process. However, we have to acknowledge that...

I mean, even the conservative majority of the court here acknowledges that race might be in any number of people's lives, something that has shaped their experiences, that has shaped their character. It might be something that has shaped their ability, whether it's linguistic abilities, whether it's access to a particular community. Just think of all the ways when on the side of scholarship here or teaching or mentorship, that having come from a particular background might give you a certain kind of access or opportunity or skill in terms of addressing the needs of that or other communities. So the difference between saying we're evaluating somebody because of their race versus they've told a story about how their race has made them, the student or professor applicants that they are is a crucial distinction that I think really is going to guide admissions practices going forward after this opinion. And it's exactly what I was just describing, the best use of DEI statements to be, to look at how identity might inform plans and actions, but not just to say, oh, I'm this race, therefore I have a great DEI statement.

Michelle Deutchman:

Well, I'm really glad I asked that because like so many other people, I was busy focusing on that paragraph in terms of essays by students. I hadn't thought to think of it through the lens that you discussed. And I also think, again, 239 pages and it all comes down to that one paragraph. All right, so we're going to progress and we're going to move on to an issue that is in particular near and dear to my heart, having spent a lot of time working on anti-bias curriculum and responding to hate crimes. And I want to talk about this other First Amendment challenge to campus practices that has resulted in rulings by five of the 12 federal courts of appeals. And that is whether universities violate the First Amendment when they utilize bias response teams to respond to reports of bias on campus. I'm going to do a quick overview, which is bias incidents most often refer to expression, that while protected by the First Amendment, has a harmful impact on an individual, a group or campus climate overall because the nature of the speech is ugly or offensive and it contravenes institutional values such as inclusion and belonging.

On numerous campuses bias response teams, BRTs, though they do go by other names, receive these complaints and then make a determination if the incident violates the law or the student code of conduct. If violations are anticipated, the BRT refers the matter to the appropriate office. If the

complaint doesn't contravene the law or the student code of conduct, the BRT might conduct outreach to the person who filed the complaint in order to share resources or to the person who actually made the speech because the matter presents an educational opportunity. Speech First, a nonprofit which identifies its goals as protecting the rights of college students has been filing court cases around the country challenging BRTs and their practices, and unfortunately they have been quite successful. And Brian, I'm hoping you can share with the listeners the arguments that Speech First has been successfully making in court and then we'll get to why these rulings are problematic.

Brian Soucek:

Sure. Yeah, I've shared your fascination with these cases, Michelle, and I think we're in a small club. It's not a set of cases that I've heard many other people talking about. And when I've given talks on this, I've often been told in response, oh, we've never heard of these cases or weren't aware of them. And certainly I know that people in the general counsel's offices at universities are very well aware of them and in some cases are shaping their policies and actions around some of these decisions, but they haven't gotten much press. And I'm glad that we're talking about it here because the latest opinion out of the Fourth Circuit was actually one of the rare losses for Speech First. Virginia Tech won that case as it stands right now, I mean the case is ongoing, but received a favorable ruling out of the Fourth Circuit, but it was two to one with a incredibly fiery dissent from Judge Wilkinson. Which I'm quite sure will attract the attention of the Supreme Court should Speech First decide to seek cert, and it also deepened what is now officially a three to two circuit split.

So, okay, what are these cases? Well, Speech First gets students to pay $5 for a lifelong membership, and then it brings cases on behalf of anonymous students at the various universities that it sues. So it started with Michigan and then went on to Texas, Iowa State, Illinois, central Florida, Virginia Tech, Houston, Oklahoma State, which if you're not a lawyer, you might not realize it's just surgically going circuit by circuit around the country in order to get rulings. In each case it says we have at least three members at the school, students A, B, and C, and each of them are conservative students who would like to say various controversial things. And then they have affidavits from those anonymous students where they talk about some of the controversial things they'd like to say; immigration is too high, God created men and women as separate genders and trans people don't exist, same-sex marriage is a sin, that kind of thing.

And in each case they say, we want to talk about these issues, but we can't because of the policies on our campus. One of which in every case is this bias response team policy, which Speech First tells us over 450 universities have across the country. So they're quite common. And they say, well, we're worried that we will be branded as biased individuals, just look at the name it's a bias response team and that we're going to be compelled to meet with administrators who then might sanction us for these controversial opinions that we hold. That's the claim. In each case, Speech First has sued, immediately sought a preliminary injunction, so temporary relief, putting those policies on hold. In each case, they've lost in the district court, which has allowed them often within a matter of mere months to get up to the court of appeals within their circuit. So it's a great litigation strategy because they get a loss right off the bat and within a couple of months they're able to get before appellate court judges who could then make precedent favoring their side, which is what has happened now in the Sixth Circuit, the Fifth Circuit, and the Eleventh Circuit, and we're still waiting to hear from the Tenth in the Oklahoma State case.

So they're saying basically that the definition of bias incidents here is over broad, that the response teams are intimidating to students and so thereby it quashes their speech. It chills their speech, as we say, and that's why the students although in no case have the students actually been part of any

disciplinary proceeding. These aren't what are called as applied challenges, they're so called facial challenges where you're saying that the policy in all of its applications needs to be struck down. So what we lack in any of these cases is a kind of factual record where there's any allegations about student A said such and such, their roommates or their classmates got offended and complained, the school stepped in by doing this and that. We don't have that in any of the cases. In fact, in many of the cases we have the opposite. We have the president of a university or senior administrators saying, oh, all those controversial things that students A, B, and C want to say, those are absolutely fine on our campus and we wouldn't discipline or even respond to those at all.

And in the courts where Speech First has won, the court of appeals just hasn't bought that. It said no, a reasonable student would fear the power of an administrator to step in and call them. And even though in most of the cases, in all of the cases, the bias response teams have no disciplinary authority and mostly if not in all, they have no power to compel a meeting with a student. They're emailing asking for a voluntary meeting with the student speaker. Despite that, those three courts have found that a reasonable student wouldn't feel brave enough, let's say, to resist the voluntary invitation when it's coming from an administrator. And that's given the students according to those three courts, or rather the organization standing to bring the case because there has to be an injury to bring a case. And here the injury is we've been chilled from speaking because we fear these potential repercussions, which of course haven't happened and in some cases have never happened at the school. But as the Sixth Circuit said in the Michigan case, well the fact that it hasn't happened suggest that the chill is effective, students aren't speaking and that's why it hasn't happened.

Michelle Deutchman:

I have so many words to respond. I think I will just suffice to say you and I have talked about this and about how many different opportunities there are when you are a student in the university where people are going to talk to you about things that you say or write, especially in the classroom and why it's different in this case is confusing to me. But I'm going to let you make that argument in a way by drawing attention to a forthcoming piece that you are having published in the Arizona State Law Journal that talks about something called the double liability dilemma for colleges and universities. And I think that this is just a spectacular way of demonstrating the Catch 22, damned if you do, damned if you don't in terms of where universities and especially administrators are in terms of responding or not responding in the face of bias. And so if you could tell us a little bit more about that dilemma, that'd be great.

Brian Soucek:

Sure, sure. So the problem here, the thing that gives rise to the dilemma is the fact that universities have legal obligations that point two different directions. So of course, we have an obligation, both legal and moral, to have campuses that are places for vibrant discussion, that don't enshrine orthodoxy where lots of controversial opinions can be voiced. The First Amendment guarantees that, but on the other side public universities have obligations under the Equal Protection Clause, pretty much all universities have obligations under Title VI for race and Title IX for gender to ensure that a hostile educational environment doesn't arise on campus. And in 1999, the Supreme Court said that there would be private liability, meaning a student could sue the university if the university was aware, if it had actual knowledge of harassment so severe, pervasive, and objectively offensive that it deprives victims of their educational opportunities or benefits at the school.

So if you reach this level of harassment that is severe, pervasive, and objectively offensive, we and all other universities are on the line, we are liable both to the students and have the possibility of losing all

federal funding from the Department of Education. So huge liabilities on that side. And then of course, liabilities on the speech side if you go too far in shutting down student speech, and that's what universities have been running up against in these Speech First cases. Now, the problem is the bar for liability that was set, severe, pervasive, objectively offensive, didn't say this is the First Amendment line. It said this is the anti-discrimination line, and Speech First and other organizations, FIRE is among them, many others have begun arguing in recent years that this is the line for both things. In other words, above the severe, pervasive and objectively offensive line, it's harassment and you have anti-harassment law liability, but below that the First Amendment gives everything free game.

And so were you to step in before speech hits that line, the harassment line, you're liable under the First Amendment for having abridged students' speech. And the double liability dilemma means that just can't be right, it can't be the case that you are liable for doing something until the point where you're liable for doing nothing, right? That can't be the spot that universities are in that we just have to sit around and wait until the hostile environment has grown so horrible on the basis of race or gender that a student has already been denied their educational opportunities. And so what follows from that? Well, I take it that it means we need to be thinking harder in ways that you were just referring to, Michelle. We need to be thinking harder about what kinds of interventions are appropriate before you get to that line where the hostile environment has arisen.

And this whole thing gets even tougher when you realize that a hostile environment doesn't necessarily come just from one speaker, you could be living in a dorm where all the guys on your hall are each making statements that are racially offensive or gendered in a way that's offensive. None of which individually would rise to the level of severe, pervasive and objectively offensive, but when they come from all 50 people on your dorm and they happen every day, suddenly you want to move out of the place or maybe leave school. Well, what is the school supposed to do in that point? If it can't discipline the students in room one and room two, room three, room four, but collectively all the roommates together have driven somebody from campus we're in a real dilemma. And so that causes us to think through, well, what can you do?

And it surely must be the case, although this is the exact opposite of what the Fifth, Sixth, and Eleventh Circuits found, it surely must be the case that we can have non-punitive voluntary meetings, let's say with the guys in that dorm to say, hey guys, do you even realize that these things that you're saying are perceived as racist? Do you realize that you're having the effect of making one of your dorm mates feel less welcome here? It might be as simple as that, that people don't even realize the effects their words are having and a conversation would change that. Or it might be to let them know we're getting towards a hostile environment here, and at a certain point we're going to have a legal and disciplinary problem. The other thing, and I'll end with this, the other thing that universities surely must be able to do is to speak out themselves. So one way in which a hostile environment can be lessened, dissipated a bit is if you think that the university has your back.

So sure, I'm hearing some hostility on campus. Maybe some other student groups are inviting speakers who I find deeply threatening. The school can't stop that because there might be a First Amendment right for this, there likely is a First Amendment right for those organizations to bring on that offensive speaker. And yet the chancellor speaks up and says, I think that this speaker his speech is deeply incompatible with our campus's values. Here are those values, we support this, that and the other, and suddenly I feel as if the campus has my back and is a place where I belong. There is a danger in these Speech First cases insofar as one of the injuries that they've found is the very name bias response teams. Several of the courts have said, no student wants to be labeled as a biased person, and so that itself is a type of injury in these cases, being labeled a bigot.

Well, if that's the case then that is really an incursion on the institution's own ability to speak. And what we've heard for decades now when it comes to hate speech is the answer to hate speech isn't to ban it, it's to speak back. It's counter speech is the answer. And there's a real thread in these cases that seems to be endangering the possibility of counter speech, and that's something that worries me very much.

Michelle Deutchman:

I absolutely agree with everything you've said, and you had already anticipated where I was going next which is what are things colleges and universities can do? So I'm just going to add two quick things. One is to just-

Brian Soucek:

Can I say one more thing though of what they could do?

Michelle Deutchman:

Yeah, of course.

Brian Soucek:

The other thing I would say besides counter speech, et cetera, is don't settle. And I realize that this is easier for me to say than for some schools to do, particularly schools that are in currently hostile states with currently hostile state governments. And yet in every one of these cases so far, when a preliminary injunction was entered, which is just temporary relief, the school has gone on to settle. It's given up its bias response team, or in many cases it's changed the language of its harassment policy. And because of that, we never get to the part of the litigation that's two-sided where we get to hear both from the speakers who want to say these controversial things, but also the students who may or may not be affected by those things. We never get a two-sided presentation of what actually happens in a genuine speech controversy because these are at this preliminary stage where it's just all hypothetical.

And if a school could just take us there so that we could see what's actually happening on a campus, how are these teams actually working so that we could get an evidentiary record, then judges wouldn't be able just to rely on what they read in The Atlantic or The Times about how hostile colleges are to speech these days, yada, yada, yada.

Michelle Deutchman:

So that one was a special one for legal counsels to keep in mind and important.

Brian Soucek:

Yes, please.

Michelle Deutchman:

I was going to just also double down on the concern that these rulings are creating a very tremendous disincentive for universities, especially administrators who lack some of the protections that faculty have to address these kinds of bias incidents. And that is very dangerous not just on an individual level, but I think on a societal level, especially living in a moment when rhetoric is particularly ugly and polarizing. With that, I want to also give a shout out to the tremendous work of another fellow, and that's Ryan Miller, who spent his fellowship researching and writing actually about alternatives to bias response teams in response to these Speech First lawsuits and his work will be in the episode notes as

well. And we're just going to continue to charge ahead. So far in this episode, we've really talked about First Amendment challenges that are affecting the campus microcosm, but it's really hard to talk about the First Amendment in this moment without mentioning another one of the blockbuster Supreme Court rulings from the final days of the term. And that's the 303 Creative holding, which as far as I'm concerned drove a wrecking ball through public accommodation laws.

As listeners likely know, this case featured a web designer who argued that being required by state law to serve all clients was akin to compelled speech because creating a website for a same-sex couple meant she was expressing support for that type of union, which ran afoul of her religious beliefs. The court ruled in her favor, Justice Sotomayor in a scathing dissent that she read from the bench explained that this is the first time the court has granted a business opened to the public a constitutional right to refuse to serve a member of a protected class. So Brian, is this the license to discriminate against members of the LGBTQIA community that it seems to be? What will the impact be?

Brian Soucek:

Well, here I'm of two minds, and this is a problem that law professors always run into when we're asked to say what a opinion of the last term means. Where on the one hand I can see a really dark future in this area. There's language in the opinion, in the majority side of the opinion that treats all anti-discrimination law as a form of viewpoint discrimination, right? That after all the whole purpose of anti-discrimination is to stamp out a certain amount viewpoints that are racist, viewpoints that are sexist. And stamp out not in the sense of people can't still voice those things and write their racist and sexist op-eds, but at least in terms of that expression as it impacts their actions and certainly so in the market, right? This is a public accommodations law, so these are people that have chosen to open up a shop for all comers in the general marketplace. We're no longer in the field of public discourse or the so-called marketplace of ideas, we're in the actual marketplace where I would've thought we would want to have way more regulation in the real marketplace than we have in the marketplace of ideas.

And so to conflate those two things is an enormous danger, but that's a danger down the line. And so I'm of two minds because on the one hand, if you say, if this court stays with its current makeup for the next 10 years, where do you think we're going to be? I have some real concerns about what anti-discrimination law would look like 10 years from now with the current court should it continue with its current makeup. That said, where are we right now? I don't think we're that different than where we were before. And so my impulse has been to emphasize what this opinion actually holds because if I'm a lower court judge, that's what I'm bound by. That's what precedent is. In fact, it's explicitly not the Supreme Court tells us over and over again to predict where we're going in the future, it's to follow what we have said up until this point. So what is that? Well, here the entire opinion is structured around and based upon a set of stipulations, factual stipulations that were agreed to both by the plaintiff 303 Creative and its owner Lori Smith and the State of Colorado. And these stipulations might have been ill-advised, but they are the basis for this.

So what does that mean? As I read it, and certainly if I was litigating one of these cases what I would be arguing is that you get an exemption from anti-discrimination law if and only if, you're allowed to discriminate if, but also only if you have let's look at some of these stipulations. Your products are expressive. They are original, customized creations that contribute to the message that her business conveys through the website it creates. It's customized and tailored through close collaboration with the customer, and they will express Miss Smiths and 303 Creative's message celebrating and promoting her view of marriage. They're her original artwork. In other words, these are the rare kind of product that you go to say, I want to collaborate with you to produce something. A producer might do that on Broadway and say, Lynn Wells Miranda, let's collaborate on this. You want to write a musical, and then

he goes on and writes a musical where the founders are minority actors, et cetera, et cetera. Does that violate anti-discrimination law? Yeah. Yeah, it probably does.

We want to hire an African-American to play George Washington, is that a problem? No, it's an expressive work that is expressing his message, not the customer's. Lynn Wells Miranda is not just sitting there waiting for somebody to walk in and buy one of his cakes or commission one of his websites, it's a totally different type of product. So it's a rare kind of product in the marketplace where you go in and you say, oh look, it's a Hallmark store, I'll buy a card. Oh great, Hallmark is expressing happy birthday wishes to my mother. Nobody thinks that. Nobody thinks Hallmark cares about my mother. They know that I care about my mother and I have bought a Hallmark card in order to wish my mom well. That's how most products are, but for the stipulations here that's probably what we would've thought this website is like. Nobody is thinking that the maker of your wedding website is the one who is celebrating your marriage. You're celebrating your marriage, and they're just a conduit that tells people what time the reception is.

Now, that's not the stipulation and so I would hold any future business, in fact, I would hold 303 Creative to these factual stipulations. If she turns around after this and starts churning out not highly expressive, not highly customizable, not original websites, ones that are just plug and play, then I don't think she's protected by her own case.

Michelle Deutchman:

Okay, I'm feeling almost hopeful, but I do want to ask one more thing and likely the answer is not available yet because we'll see what happens in the lower courts, but what is the limiting principle of expressive conduct?

Brian Soucek:

Oh, well, that you have certain types of products that are inherently expressive. See, that wasn't really an issue here, right? She was dealing with words and images which are thought to be inherently expressive, so that already takes us out of the hotels and the rental chairs and possibly the cake. Probably the cake, I would say the flowers, the hairstylist, on and on and on. That's one limiting principle. But two, we talk about customizable. Lots of things are customizable. You getting extra cheese on your pizza is customizing. Getting my pants tailored is to customize them to my body. But here I take it, we are thinking more about originality. I am making you a new dress, something like that. I'm not just bringing up the ham or bringing in the waist. So we've got a highly original expressive product, which is the kind that both you think of and the public thinks of as expressing your message, business owner, not or not just mine.

And that's the really crucial analysis, that's always been the test when it comes to public accommodations, is who do we see as speaking here? And here I just don't think that most people think that the florist is speaking as opposed to the couple that has said, oh, we want lots of pink or our theme is blue.

Michelle Deutchman:

Okay, that's something to chew on. And I'm sad, but we're going to have to wrap up in a minute. And I'm left feeling that a lot of what we've talked about today is maybe how the First Amendment has been used as some might argue as a sword against diversity and bias response and some might argue public accommodation laws. And I fear that these types of decisions may get even harder to persuade people, especially younger people about the value of the First Amendment and achieving social progress and the

importance of the First Amendment in maintaining our democracy. And so I'm going to ask you what you might say to listeners about how one can either maintain or increase their faith in the First Amendment and it's enduring significance. I know this is a big question.

Brian Soucek:

Well, I don't want to give up the First Amendment values to the other side in each of the cases that we've discussed. So that's one point. I mean, let's just think about the Speech First cases. Sure, there's an allegation and your opinion on it may vary, but an allegation that bias response teams are shutting down chilling speech on campus. But of course, part of the point of Title IX and Title VI is to make sure that a hostile environment isn't arising on campus that would literally be chasing students away from this site of First Amendment opportunity. So there are First Amendment concerns on both sides. The student that's driven away because of the hostile racial environment is no less chilled in their opportunity both to receive information and to participate in the expressive life of the university than student A, B, and C in Speech First complaint. So let's not give that up, right?

Same with the diversity statements. Some people have felt that they are chilled from saying their true views on diversity because of these mandates, but of course the University of California has a very strong expressive interest in proclaiming to the world that it wants to be the most diverse and inclusive and excellent site of research and teaching in the world. And one of the ways in which it expresses that message is through practices like these. So let's realize that the First Amendment is there on both sides of these cases, but I get it when you see a case like 303 Creative, the First Amendment really seems as if it's just there to check people's equality rights. And so the question is well taken, and I think it's important to see that across the country some of the biggest threats to free speech and academic freedom, things like the Stop WOKE Act in Florida, which would limit the ability of professors to teach truthfully within general education courses at Florida's public universities.

The Don't Say Gay laws in K-12 type schools in Florida, the censorship laws that have affected libraries across the country. All of these, I hope, and I actually expect that all of these are going to be stopped through First Amendment lawsuits. And we're already seeing that in Pernell v Lam, which is now at the Eleventh circuit, but it's the case where they have currently an injunction against the Stop WOKE Act in Florida. An injunction is in place prohibiting Florida from applying those sections of the law to public universities. And briefing is ongoing at the Eleventh circuit to see what their final answer is going to be, but if that law gets struck down it's going to be thanks to the First Amendment.

Michelle Deutchman:

Yeah, I like it. We're going to end on a note of optimism, and that case is exceptionally important and you're giving me yet another opportunity to shout out some terrific work by two fellows who just completed their fellowship. And that's Jeff Snyder and Amna Khalid, their fellowship focused on the impact of laws like Florida's anti WOKE laws on teachers and academic freedom across the state of Florida. And they filed an amicus brief based on that research in the Eleventh circuit, which you'll also be able to find in the episode resources. So I think this is a really nice way to wrap our time together, which is that there is darkness, but with darkness there is always light. And so we will focus on the light that is there and look forward to continuing conversations with you, Brian, as you continue to expose and help people to think about the nuance of these challenges. And I know you are on the verge of departing for vacation, and so I am especially grateful that you gave your time and your expertise to SpeechMatters.

Brian Soucek:

Well, you're very welcome. It's my pleasure, Michelle.

Michelle Deutchman:

Thank you again to Professor Brian Soucek for joining us to talk about these important ongoing issues. Recently, the Center introduced its newest cohort of voice recipients. The Valuing Open and Inclusive Conversation and Engagement initiative provides funding for UC students, staff, and faculty who are interested in conducting research or coordinating programs on their campuses. This year's class focused on the theme of protecting our democratic freedoms. Visit our website at freespeechcenter.universityofcalifornia.edu to learn more. Additionally, get your applications in for the Center's advancing the mission of higher education in polarized times in-person institute for legal counsels, faculty and administrators hosted with the Luminate Foundation. Applications are due on July 21st. Talk to you next time.