SPEECH FIRST, INC. V. SANDS: SPEECH, ANTIDISCRIMINATION, AND THE OPEN QUESTION OF EQUITY IN EDUCATION

ABSTRACT

In nine separate lawsuits against public universities since 2018, a nonprofit advocacy group called Speech First, Inc. has mitigated the efforts of higher education administrators to balance speech and antidiscrimination interests in support of traditionally marginalized students who experience racist, misogynistic, or otherwise bigoted speech in the classroom or on campus. Under longstanding approaches to First Amendment rights to free expression that champion unrestricted exchange in the marketplace of ideas above all else, Speech First's challenges have been successful. This Note explores the now-vacated Fourth Circuit opinion in *Speech First v. Sands*, which joined a minority in an emerging circuit split to uphold bias response policies at Virginia Tech on the grounds that the policies are a form of government speech and do not offend the First Amendment. Connecting the opinion to literature from critical race theory and legal realism that advocates for balancing between free expression and antidiscrimination principles in higher education, this Note considers the potential benefits of a more nuanced approach to the marketplace of ideas on college campuses, as well as the state of play at public colleges and universities in the aftermath of the Supreme Court's decision to vacate *Sands.*

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INTRODUCTION

A tension has emerged in the realm of higher education. On university campuses across the country, two fundamental rights—the right to free speech and the right to not be discriminated against based on one's identity—have come into conflict in recent years.[1] Where such conflicts have unfolded, they have followed a similar pattern: an institution, seeking to foster greater diversity, equity, and inclusion of historically marginalized students by reducing incidents of discrimination, enacts policies that provide some recourse to those students when such incidents occur. In attempting to balance antidiscrimination principles with free speech interests, such policies expressly incorporate the First Amendment's dictates and do not punish or prohibit protected speech. In response, free speech advocates levy lawsuits against the institution, alleging that these policies infringed on student rights to free expression.[2] Lately, courts have often been persuaded by such arguments.[3] Even where they are not, external pressures have prevailed such that the challenged policies are curtailed or repealed entirely.[4] Consequently, where the First Amendment right to speech comes into conflict with antidiscrimination principles, present campus speech doctrine dictates that absent the exceptional circumstances

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1. *See generally, e.g.*, Speech First, Inc. v. Sands, 69 F.4th 184 (4th Cir. 2023), *vacated as moot* 144 S. Ct. 675 (2024); Speech First, Inc. v. Cartwright, 32 F.4th 1110 (11th Cir. 2022); Speech First, Inc. v. Killeen, 968 F.3d 628 (7th Cir. 2020); Speech First, Inc. v. Fenves, 979 F.3d 319 (5th Cir. 2020); Speech First, Inc. v. Schlissel, 939 F.3d 756 (6th Cir. 2019). *See also* Brian Soucek, Speech First*, Equality Last*, 55 ARIZ. ST. L.J. 681, 702–04 (2023).
2. *See generally* Soucek, *supra* note 1; DEAN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS (2017).
3. *See, e.g.*, *Cartwright*, 32 F.4th 1110.
4. *See* Soucek, *supra* note 1, at 707; *see also infra* notes 202–210 and accompanying text.

of a true threat or actionable harassment, the First Amendment must prevail. Scholars have described freedom of expression as "an indispensable condition of all other freedoms," such that it deserves "a preferred place in our system."[5] For it to be so preferred as to override any balancing with other rights and social values, including the values of antidiscrimination, necessarily comes at significant cost to equity in American education, and places institutions and educators in a precarious and untenable position.

This Note begins with a brief overview of *Speech First, Inc. v. Sands*,[6] a Fourth Circuit campus speech case that follows the pattern described above.[7] The Note next explores the features and objectives of campus-bias response policies generally, the motivations and legal obligations that drive universities to implement such policies, and the critiques levied against them by First Amendment scholars and free speech advocacy organizations, including Speech First, Inc. (Speech First). After recounting some common features across Speech First-led cases that preceded *Sands* in the Fifth, Sixth, Seventh, and Eleventh Circuits, as well as the *Sands* decision itself, this Note argues that the Fourth Circuit ruled correctly as a matter of both law and policy despite widening the existing circuit split on campus speech and bias response policies. The Note then proceeds to outline the missed opportunities in *Sands* to more explicitly endorse the legal and practical obligations of universities to balance speech rights with antidiscrimination rights. Finally, the Note concludes by considering the state of campus speech doctrine after the Supreme Court's decision to vacate the Fourth Circuit's decision in *Sands*, eliminating the modest gains it represented for reasonable balancing between speech and antidiscrimination principles in higher education.

I. BACKGROUND

In *Speech First v. Sands*, the Fourth Circuit became the latest federal court of appeals to rule on the constitutionality of a university bias response policy.[8] Speech First, a nationwide community of free speech supporters whose mission is to "fight back" against the "toxic censorship culture on college campuses,"[9] filed suit on behalf of unnamed student members at Virginia Tech, seeking an injunction against the university's Bias Policy on the grounds that it impermissibly chilled student expression in violation of the First Amendment.[10] The policy, explored at length below,[11] was enacted to address bias incidents—defined as "expressions against a person or group because of the person's or group's age, color, disability, gender, gender identity, gender expression, genetic information,

5. CHEMERINSKY & GILLMAN, *supra* note 2, at 23.
6. 69 F.4th 184.
7. *Id.*
8. *Id.* at 188.
9. *About Speech First*, SPEECH FIRST INC., https://speechfirst.org/about/ (last visited June 23, 2024).
10. *See Sands*, 69 F.4th at 188.
11. *See infra* notes 87–95 and accompanying text.

national origin, political affiliation, race, religion, sexual orientation, or any other basis protected by law"[12]—that Virginia Tech considered detrimental to the university community, and to provide recourse to students harmed by such expressions.[13] Affirming the district court's decision to deny Speech First's request for a preliminary injunction, the Fourth Circuit majority noted Speech First's lack of standing, as well as Virginia Tech's right to engage in speech as an institution in order to "promote a program" or "espouse a policy"[14] educating its student body on both "protected speech and the role of tolerance in the campus community."[15]

To engage fully with the *Sands* decision and its implications for the interplay between speech and antidiscrimination rights, it is important to consider the factors that led these principles to be in conflict. To that end, this section next explores: (1) the motivations and legal obligations that have driven the proliferation of bias response policies generally, as well as some common features of such policies; (2) two flavors of the prevailing critiques against university bias response from establishment civil libertarians and from free speech advocacy organizations like Speech First; and (3) First Amendment challenges in circuit courts brought by Speech First against universities around the country prior to *Sands* with attention to the procedural aspects that figure prominently in their outcomes.

A. Bias Response Policies Generally

Neither the controversy nor the university policy at issue in *Sands* are unique to Virginia Tech.[16] A 2016 survey concluded that 231 private and public university campuses had bias response teams.[17] These policies are principally motivated by a desire to decrease the number of "bias incidents"[18] that have become ubiquitous on college campuses.[19] According to a recent report, eighty-four percent of equal opportunity professionals at institutions of higher education surveyed reported behavior that violated university antidiscrimination policies. Eighty-two percent had encountered a hate crime on campus, and sixty-five percent reported occurrences of hate speech.[20] Of these categories, only hate crimes (conduct or speech

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12. *Sands*, 69 F.4th at 188.
13. *Id.*
14. *Id.* at 198.
15. *Id.* at 199.
16. *See generally* Barbara Lee, *General Counsel's Corner: Bias Response Teams – No Easy Answers,* JD SUPRA (Feb. 2, 2022), https://www.jdsupra.com/legalnews/general-counsel-s-corner-bias-response-9942704/.
17. *See* Molly O'Connor, Liz Brown, Hailey Badger & Liz Rothenberg, *Campus Bias Response: A Briefing for Senior Leadership,* EAB 4 (2017), https://attachment.eab.com/wp-content/uploads/2017/10/D9AC8B9F569D4AFCA226A4D4D61C2BB8.pdf.
18. Definitions of the incidents that these policies seek to address vary (*see, e.g.*, *infra* notes 87–95 and accompanying text)—but in general, they target acts of prejudice that are not accompanied by violence, the threat of violence, property damage, or illegal conduct. *See* U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, HATE CRIMES ON CAMPUS: THE PROBLEM AND EFFORTS TO CONFRONT IT 5 (Oct. 2001).
19. *See* Lee*, supra* note 16, at n.2.
20. Jeremy Bauer-Wolf, *Hate Incidents on Campus Still Rising*, INSIDE HIGHER ED. (Feb. 24, 2019), https://www.insidehighered.com/news/2019/02/25/hate-incidents-still-rise-college-campuses.

involving violence, threat of violence, property damage, or other illegal conduct) are understood on all sides to be unprotected by the First Amendment and thus grounds for university action against the speaker or actor.[21]

While bias response policies vary in their terms and operation, many share common features. The policies operate to support individuals who believe they have been subjected to prejudice that is protected by the First Amendment,[22] but which nevertheless harms the individual based on a protected characteristic and has lasting effects within a campus community.

The fact that such speech does, generally, enjoy First Amendment protection[23] informs two other important features of bias response policies. First, bias response teams do not have the power to discipline an individual responsible for a bias event[24] (though some, like the Virginia Tech Bias Incident Response Team (BIRT) at issue in *Sands*, have authority to refer the individual to student conduct or discipline offices where the speech complained of exceeds the bounds of First Amendment protection).[25] Second, short of this referral mechanism, a BIRT can only invite a student to a voluntary meeting with a BIRT administrator to discuss and learn from the event.[26] No adverse effects or consequences befall a student for declining such a meeting, and the meeting is not itself disciplinary. As courts[27] and scholars have observed,[28] these meetings are rightly viewed as either (or both): (1) a procedural step to gather further facts and perspectives about an alleged bias incident, allowing both sides to be heard, or (2) a teaching moment, designed not to quell or chill expression, but to address the problem through more speech—an approach that the First Amendment has long embraced.

B. The Constitutional and Legal Landscape Underlying Universities' Competing Obligations

Universities do not enact these policies arbitrarily or without due consideration of the constitutional rights of their students. While public institutions of higher education are bound to uphold the First Amendment, they also have an affirmative obligation to prevent discrimination on campus.

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21. See, e.g., CHEMERINSKY & GILLMAN, *supra* note 2, at xxi ("But academic freedom—above all, the ability to express all ideas and viewpoints, no matter how offensive—is necessary at all colleges and universities.").
22. *See* Lee*, supra* note 16.
23. *See, e.g. Speech on Campus*, ACLU (Dec. 18, 2023), https://www.aclu.org/documents/speech-campus ("The First Amendment to the Constitution protects speech no matter how offensive its content. Restrictions on speech by public colleges and universities amount to government censorship, in violation of the Constitution.").
24. *See* Lee*, supra* note 16.
25. Speech First, Inc. v. Sands, 69 F.4th 184, 194 (4th Cir. 2023).
26. *See*, e.g., *id.*, at 189.
27. *See id.*, at 196–97 (citing Abbott v. Pastides, 900 F.3d 160, 179 (4th Cir. 2018)).
28. *See* Krause, *infra* note 43; *see also* notes 136–144 and accompanying text.

Federal law recognizes the inherent harms that discrimination in a school environment inflicts on students since *Brown v. Board of Education.*[29] The injuries identified in *Brown* derive from racist speech specifically, but federal antidiscrimination provisions now recognize injuries inflicted by biased speech based on characteristics such as gender, gender identity, gender expression, and sexual orientation.[30] In particular, *Brown* identified two types of injuries that reflect the harm caused by bias incidents on campus today: (1) psychic injury, which *Brown* characterized in terms of the symbolic message of segregation that affects the "hearts and minds" of Black children "[i]n a way unlikely ever to be undone"[31]; and (2) denial of equal educational opportunities, which were understood to prevent Black children from being able to learn and participate in a school's community because they were additionally burdened with the humiliation and psychic assault of segregation.[32] Since the 1990s, commentators have observed that students in higher education environments, where they are subject to denigrating verbal harassment, bear a similar burden with particular emphasis on the latter harm.[33]

The well-documented[34] harms of hostile and biased speech toward historically marginalized students have caused current students and legal scholars to call for greater university action to curtail such speech.[35] Free speech advocates have resisted such calls.[36] Both sides to this debate advance valid concerns and critiques. It is worthwhile to understand how both free speech and antidiscrimination doctrines have evolved over the last century.

1. Higher Education and the First Amendment

In *Tinker v. Des Moines Independent Community School District*,[37] the Supreme Court held that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[38] The Court stated the still-current test when determining whether a K-12 school or higher educational institution may prohibit a student's expression of a student opinion: the speech must (1) "materially and

29. 347 U.S. 483 (1954).
30. *See* Soucek, *supra* note 1, at 686 ("[C]laims under the various federal antidiscrimination statutes have often been treated in parallel.").
31. *Brown*, 347 U.S. at 494.
32. Charles R. Lawrence III, *If He Hollers, Let Him Go: Regulating Racist Speech On Campus*, 1990 DUKE L.J. 431, 464–65 (1990).
33. *Id.* at 465.
34 *See generally, e.g.*, Soucek, *supra* note 1; Lawrence, *supra* note 32; Richard Delgado, *Legal Realism and the Controversy over Campus Speech Codes*, 69 CASE W. RES. L. REV 275, 286 (2018); Alexander Tsesis, *Campus Speech and Harassment*, 101 MINN. L. REV. 1863 (2017); Stephen M. Feldman, *Searching for Truth That Speaks to Power: Free Speech and Equality on Campus*, 73 AM. U. L. REV. 807 (2024).
35. *See generally* Lawrence, *supra* note 32; Delgado, *supra* note 34.
36. *See infra* notes 61–64 and accompanying text.
37. 393 U.S. 503 (1969).
38. *Id.* at 506.

substantially interfere with the requirements of appropriate discipline in the operation of the school," or (2) the school can reasonably forecast that it would have that effect.[39] K-12 schools, which are required by the state and which states therefore have an interest in regulating, found further latitude in speech regulation following *Tinker*. For example, schools can regulate speech that is lewd or vulgar[40] or when the school has a legitimate pedagogical concern that justifies the regulation.[41]

Some commentators debate the degree to which colleges and universities are bound by a different set of rules.[42] Higher education, unlike elementary and secondary education, is not state-mandated, thus diminishing the state's ability to articulate a constitutionally "compelling" interest that would justify speech regulations. Moreover, college and university students are largely adults. Absent pressure from parents and expectations about state interventions into the controlled environment of a classroom, courts have seen fit to leave regulation of speech in such institutions to the communities themselves.[43] Articulating its disposition toward speech in higher education, the Supreme Court has stated that the campus is itself a "marketplace of ideas," and that "the Nation's future depends on leaders trained through . . . the robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"[44] Scholarly debate aside, courts have adhered to the *Tinker* standard in evaluating higher educational restrictions on speech—that "absent a 'material and substantial' disruption to the functioning of a school, or some other compelling interest, public schools [including universities] may not restrict students' speech."[45] To restrict speech based on its content (including speech that attempts to induce hatred against people based on race, gender, sexual orientation, or religion but still falls within First Amendment protection),[46] the prohibiting party must meet the strict

39. *Id.* at 509.
40. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
41. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
42. Feldman, *supra* note 34, at 823–27 (citing cases like Healy v. James, 408 U.S. 169 (1972); Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S. 667 (1973); *Bethel*, 478 U.S. 675; *Hazelwood*, 484 U.S 260; Morse v. Frederick, 551 U.S. 393 (2007); and Mahanoy Area Sch. Dist. v. B.L., 141. S. Ct. 2462 (2021), Feldman argues that "[c]ourt[s] generally defer[] to school officials regarding educational decisions, including those related to pedagogy and curriculum, even if those decisions restrict or punish speech"; that "school officials can reasonably promote certain values, including civility"; and that "[f]rom this perspective, a school or university could constitutionally prohibit and punish hate speech, group libel, and other offensive expression targeting . . . marginalized groups.").
43. Anna K. Krause, Note, *University Bias Response Teams: Balancing Student Freedom from Discrimination and First Amendment Rights Through Student Outreach*, 55 IND. L. REV. 809, 812 (2022).
44. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
45. Christina Bohannan, *On the 50th Anniversary of* Tinker v. Des Moines*: Toward a Positive View of Free Speech on College Campuses*, 105 IOWA L. REV. 2233, 2244 (2020) (quoting Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 511 (1969)).
46. While free speech advocates like Erwin Chemerinsky maintain that universities "cannot and should not punish speech because it is offensive," most do allow that "certain speech" including true threats, harassment, destruction of property, and disruptions of classes and campus activities are not protected by the First Amendment. *See* Chemerinsky & Gillman, *supra* note 2, at 20.

scrutiny standard applied in *Sands*. It must demonstrate a compelling government interest, and that the method used to meet the interest is narrowly drawn.[47]

2. Higher Education and Antidiscrimination

Critically, courts have held that maintaining an educational environment free from discrimination, including racism and gender bias,[48] is a sufficiently compelling interest. Appellate case law to this effect is supported by mandates from the United States Department of Education's Office for Civil Rights (OCR), which asserts that colleges and universities have the responsibility to respond to discrimination that is "sufficiently severe or pervasive that . . . it denies or limits a person's ability to participate in or benefit from the recipient's education programs and activities (i.e., creates a hostile environment)."[49] Indeed, the OCR mandates that when an institution is confronted with such a situation or even the possibility of one, it "must take immediate and appropriate steps to investigate or otherwise determine what occurred."[50] Such interventions, the OCR provides, do not offend the First Amendment.[51]

As with other aspects of the campus speech doctrine, however, university obligations under OCR guidelines and the conflicts those obligations create with the First Amendment are rife with debate and ambiguity.[52] Speech advocates are wary of the potential infringements that might stem from OCR guidelines, arguing that the OCR might be forcing campuses to violate free speech guarantees and urging updated guidelines to ensure that "no investigations by campuses or by OCR can be triggered merely by an allegation that someone was upset by the expression of ideas or views."[53] In recently promulgated Title IX guidelines, meanwhile, the Biden Board of Education acknowledged that universities may act to stop harmful speech *before* it crosses the above-stated threshold into actionable harassment—but nowhere did the regulations outline what those steps might be or how courts should handle ensuing charges of content or

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47. R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992).
48. IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386, 393 (4th Cir. 1993) ("[I]t is the University officials' responsibility, even their obligation, to achieve the goals they have set.").
49. *See* NOTICE OF PROPOSED RULEMAKING: TITLE IX OF THE EDUCATIONAL AMENDMENTS OF 1972, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106) [hereinafter PROPOSED TITLE IX RULEMAKING]. The 2022 regulations define sexual harassment to cover "unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment)." *Id.* at 41410.
50. *Id. See* OFF. FOR C.R., U.S. DEP'T OF EDUC., RACE AND NATIONAL ORIGIN DISCRIMINATION, FREQUENTLY ASKED QUESTIONS (May 11, 2023), https://www.ed.gov/laws-and-policy/civil-rights-laws/race-religion-and-national-origin/race-color-or-national-origin-discrimination.
51. *See* OFF. FOR C.R., U.S. DEP'T OF EDUC., RACE AND NATIONAL ORIGIN DISCRIMINATION, FREQUENTLY ASKED QUESTIONS, *supra* note 50 ("Schools can protect students from such harassment without running afoul of students' and staff First Amendment rights.").
52. *See* Soucek, *supra* note 1, at 698–700; Chemerinsky & Gillman, *supra* note 2, at 15–17, 122.
53. Chemerinsky & Gillman, *supra* note 2, at 122–23.

viewpoint discrimination.[54] The new standard thus attempted but ultimately failed to address what Brian Soucek described as the "double liability dilemma" that universities face under the current state of campus speech law: liability for failing to remedy harassment as soon as speech and conduct meet that threshold, and liability under the First Amendment if acted upon sooner.[55] Faced with competing demands and little clarity, it is unsurprising to see district and circuit courts vary in their approaches to the recent Speech First cases—or, as Soucek observes, to see them follow the lead of free speech absolutist organizations that acknowledge only one side of the balancing act.[56]

C. Criticism of Bias Response Policies

Bias incidents are a problematic reality on college campuses.[57] Commentators on both sides of the debate agree that institutions of higher learning must strive to meet their obligation to protect free speech while also creating a campus environment where everyone is free from discrimination.[58] Nevertheless, bias response policies have been met with vocal opposition from all sides of the sociopolitical and legal spectrum.

Civil libertarian organizations like the American Civil Liberties Union[59] and legal scholars such as Dean Chemerinsky and Howard Gillman[60] approach the issue with an understanding of the competing values that hang in the balance and a desire to achieve both ends. While acknowledging the problem of pervasive bias on campuses and commending the "admirable desire to protect" historically marginalized students, Chemerinsky and Gillman nevertheless contend that bias response policies are, as a rule, a step in the wrong direction.[61] Like other attempts throughout history to restrict low-value speech, they argue, the chilling effect of such policies inevitably infringes on free thought and expression that is not the intended target of the restrictions to the detriment of individual liberty and

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54. *See* Soucek, *supra* note 1, at 700.
55. *Id.* at 693.
56 . The Foundation for Individual Rights and Expression (FIRE) is an advocacy organization that, like Speech First, dedicates itself solely to free speech issues. A FIRE spokesperson recently explained that FIRE "does not feel the need to 'deal with tensions that may or may not exist with free speech and other values' and that 'there's no other values that we have to defend, which makes our work a little bit easier and more focused.'" *See* Soucek, *supra* note 1, at 701 (citing Matt Taibbi, *Move Over ACLU, FIRE Is the New Champion of Free Speech*, RACKET NEWS (June 6, 2022), https://taibbi.substack.corn/p/move-over-aclu-fue-is-the-new-champion (quoting Nico Perrino from FIRE). Soucek observes that, yes, simply ignoring the problem of a university's moral and legal nondiscrimination obligations while demanding stringent speech protections "surely is 'a little bit easier.'" *Id.*
57. Chemerinsky & Gillman, *supra* note 2, at 19.
58. *Id.* at 20 ("Colleges and universities cannot succeed at their mission unless they find a way to do both.").
59. *See* ACLU, *supra* note 23.
60. *See* Chemerinsky & Gillman, *supra* note 2, at 10.
61. *Id.* at 63 ("We believe there is no middle ground. History demonstrates that there is no way to define an acceptable, punishment-worthy idea without putting genuinely important new thinking and societal critique at risk.").

democratic function writ large[62] (and, indeed, to the same historically marginalized populations the policies are designed to protect).[63] Instead, civil libertarians advocate for the continued embrace of the preferred solution of free speech doctrine since the 1920s: "more speech," the idea that speech we may disagree with or even despise should be met and vanquished through discourse in the marketplace of ideas.[64]

This Note later explores critiques levied by critical race theorists in analyzing some practical flaws in the civil libertarian perspective.[65] But we should credit that perspective as thoughtful, nuanced, and historically grounded in its objection to campus speech restrictions, one that approaches the issue with an eye toward the overarching goal of achieving a balance between freedom of expression and antidiscrimination principles. There are, however, those who approach this controversy in a less nuanced way, and Chemerinsky and Gillman's perspective lends those voices considerable support and legitimacy. To this contingent, typified by organizations like Speech First, there is nothing laudable about bias response policies because the First Amendment should not be subject to balancing. To Speech First, bias response policies are nothing more and nothing less than an existential threat, and the interests said to be advanced in balancing speech and antidiscrimination principles merit little, if any, consideration.[66]

D. Speech First, Inc.'s Prior Campus Speech Litigation

Speech First is "a membership association of students, parents, faculty, alumni, and concerned citizens," which has, since 2018, initiated nine separate lawsuits against bias response policies enacted by public universities around the country.[67] The organization's stated motivation is the belief "that free and open discourse is an essential component of a comprehensive education," and to be committed to "exposing students to different and challenging ideas."[68]

In his recent article evaluating what he calls the "Speech First Trilogy" and its role in shaping the double liability dilemma described

62. *Id.*
63. *Id.* at 106 ("One ironic, even tragic, result of this discretion is that members of minority groups themselves—the very people whom the law is intended to protect—at likely targets of punishment."). *But see* Delgado, *supra* note 34, at 281–83.
64. *See* Chemerinsky & Gillman, *supra* note 2, at 38–40.
65. *See infra* notes 195–201 and accompanying text.
66. *See, e.g.*, SPEECH FIRST INC., *supra* note 9.
67. *See Lawsuits,* SPEECH FIRST INC., https://speechfirst.org/university-lawsuits/ (last visited June 24, 2024).
68. *See* SPEECH FIRST INC., *supra* note 9. In addition to its advocacy and litigation against public universities, Speech First has taken an active role in advancing model legislation that would, among other objectives, bar universities from incorporating principles of diversity, equity, inclusion, or Critical Race Theory (CRT) in courses required for graduation—a glaring exception to Speech First's otherwise absolutist stance on enforcing "free and open discourse" that "expos[es] students to new and challenging ideas[.]" *See Model Legislation*, SPEECH FIRST INC., https://speechfirst.org/model-legislation/ (last visited June 24, 2024).

above,[69] Soucek asserts that each of the Speech First cases advances the following legal theory: that a university policy violates the First Amendment if it limits speech that is not either (1) a threat of violence or (2) sufficiently "severe or pervasive" to cross the threshold into hostile environment harassment.[70] Arguing that "[i]t cannot be the law" that universities "are both legally required to act, and legally liable for acting, to prevent racially or sexually hostile educational environments on their campuses,"[71] Soucek queries "how courts or commentators could come to miss or ignore this problem[.]"[72] In formulating a partial answer, his article identifies five procedural features present in each of the Speech First cases, including *Sands*, that force courts into what critical race theorists call the "perpetrator perspective"[73]: one that focuses exclusively on the culpability of individual bad actors (here, allegedly, universities) instead of also evaluating the experience of groups that have long been discrimination's victims (here, historically underrepresented students who benefit from campus speech and bias policies).[74] Speech First, Soucek posits, forces courts into this perspective by (1) claiming associational standing on behalf of students, rather than naming the students allegedly harmed as parties to their case;[75] (2) bringing facial, rather than "as applied" challenges, absolving Speech First of the obligation to offer any examples of actual enforcement of the challenged policies[76] and (3) inducing a standing controversy that requires the court to adopt the view of the "reasonable student."[77] In that posture, the court must then (4) decide whether the schools, which changed their policies after the suits were initiated, can be trusted not to simply re-implement the prior version of the policies,[78] and finally (5) determine whether or not to grant the preliminary injunction denied by the lower court based not on the actual merits of the case, but on the likelihood of success on the merits of each case.[79] None of these procedural factors are unique to the Speech First cases or First Amendment cases generally, but they do help to explain the "unusually one-sided" approach circuit courts have taken in deciding these cases, "driv[ing] the outcomes . . . by determining whose stories get told."[80] These are essential components of a nationwide litigation strategy that has allowed Speech First to alter federal First Amendment jurisprudence without ever proceeding to trial.

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69. *See generally* Soucek, *supra* note 1.
70. *See* Soucek, *supra* note 1, at 688 (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 631 (1999)).
71. Soucek, *supra* note 1, at 731.
72. *Id.* at 694.
73. *Id.* at 684.
74. *Id.*
75. *Id.* at 708.
76. *Id.* at 709.
77. *Id.*
78. *Id.* at 710.
79. *Id.* at 711.
80. *Id.* at 708.

Outcomes in the various Speech First actions have been mixed: the Fifth, Sixth, and Eleventh Circuits all struck down university bias response protocols,[81] while the Seventh Circuit affirmed the denial of a preliminary injunction against the University of Illinois' policies,[82] which were ultimately repealed anyway.[83] The doctrinal debates, legal conflicts, and procedural factors precipitating this split, as well as its consequences for higher education nationwide, figured prominently in the Fourth Circuit's opinion in *Speech First, Inc. v. Sands*.

II. SPEECH FIRST, INC. V. SANDS

A. Opinion of the Court

Senior Circuit Judge Motz authored the opinion of the court, which Circuit Judge Diaz joined.[84] Circuit Judge Wilkinson wrote the dissenting opinion.[85] In addressing the issue of whether the district court correctly denied Speech First's request for a preliminary injunction against two Virginia Tech bias protocols, the Fourth Circuit affirmed the district court's ruling that: (1) Speech First lacked standing to challenge the Virginia Tech's bias policy; (2) the bias policy constituted permissible government speech; (3) that Speech First was not likely to succeed on the merits of its claim that the informational activities policy was an impermissible prior restraint on speech as required for issuance of a preliminary injunction; and (4) that the organization was also unlikely to succeed on the merits of its claim that the same policy was an unconstitutional, speaker-based regulation as required for a preliminary injunction.[86]

1. Facts

Speech First sued Timothy Sands, the President of the Virginia Polytechnic Institute and State University (Virginia Tech),[87] asserting that two Virginia Tech policies—the Bias Intervention and Response Policy (BIRT) and the Informational Activities Policy (IAP)—violated the First Amendment rights of its student members. The BIRT defined bias incidents as "expressions against a person or group because of the person's or group's age, color, disability, gender, gender identity, gender expression, genetic information, national origin, political affiliation, race, religion, sexual orientation, veteran status, or any other basis protected by law."[88] The policy enabled members of the community to report incidents of bias that occur on campus.[89] Reported incidents were reviewed by the BIRT, a panel of university administrators that the district court found "lack[ed]

81. Speech First, Inc. v. Sands, 69 F.4th 184, 197 (4th Cir. 2022).
82. Speech First, Inc. v. Killeen, 968 F.3d 628, 639, 647 (7th Cir. 2020).
83. Soucek, *supra* note 1, at 704.
84. Speech First, Inc. v. Sands, 69 F.4th 184, 187 (4th Cir. 2023), *vacated as moot* 144 S. Ct. 675 (2024).
85. *Id.*
86. *Id.* at 186.
87. *Id.* at 188.
88. *Id.*
89. *Id.*

any authority to discipline or otherwise punish students for anything."[90] The review panel first determined whether the subject of the complaint involved speech protected by the First Amendment.[91] If so, the complaints were dismissed outright.[92] For complaints that were not dismissed, the BIRT invited both the complaining student and the responding student to a voluntary conversation facilitated by an administrator.[93] The express goal of this conversation was to create a learning opportunity for both students.[94] If the responding student declined to attend, no further action was taken, and the student faced no consequences of any kind.[95]

2. Standards of Review

Noting that Speech First "ha[d] not and d[id] not challenge" the facts as stated, Judge Motz laid out the legal standards relevant to Speech First's charge that the district court abused its discretion in refusing to preliminarily enjoin these Virginia Tech policies:[96] (1) the district court's factual findings would be examined for clear error; (2) legal conclusions would be reviewed *de novo*; (3) that the party seeking a preliminary injunction invites the district court to act as the finder of fact on a limited record; (4) that said party bears the burden of demonstrating a likelihood of success on the merits.[97] The opinion noted that the court "took seriously its factfinding responsibility," considering an extensive collection of evidence, much of which "Speech First itself submitted."[98]

3. Standing Analysis

The court then turned to Speech First's initial contention that the district court erred in concluding that the organization lacked standing to challenge the bias policy on behalf of its members.[99] The lower court had concluded that the bias policy did not proscribe any constitutionally protected speech, thus precluding the injury in fact necessary to establish standing.[100] Speech First's challenge was predicated on the notion that individuals suffer a concrete injury even when the state has simply "chilled" the right to engage in free speech[101] through (1) implicit threats and (2) a burdensome administrative regime.[102]

Observing at the outset that such a claim is cognizable only when "a person of ordinary firmness" would likely be deterred from free expression, Judge Motz dispensed with both arguments in turn. Beginning with

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90. *Id.* at 188–89.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 190.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 192.
101. *Id.*
102. *Id.* at 192–93.

the implicit threats argument, she stated that a putative plaintiff suffers no cognizable injury if she "lacks an 'objectively good reason for refraining from speaking.'"[103] Rejecting Speech First's analogy to *Bantam Books, Inc. v. Sullivan*[104] and its concerns about BIRT's "special referral power,"[105] Judge Motz distinguished the cases by refencing its recent holding in *Abbott v. Pastides*[106] and BIRT's lack of authority to mandate involuntary compliance, abstention from coercive tactics, and deference to constitutionally protected speech.[107] As in *Abbott*, which held a plaintiff cannot prevail unless they demonstrate that a challenged policy conveys a "credible threat of enforcement,"[108] Judge Motz held that Speech First's student members had failed to allege an injury in fact. She invoked *Abbott* again in turning to Speech First's alternative argument about the burden on free exercise via "elaborate bureaucratic regime," noting that Speech First's argument was largely the same as the one that failed in that case: that while some administrative processes may be so onerous as to amount to a sanction and confer First Amendment standing, a "threatened administrative inquiry" is not such a process unless it imposes "some significant burden, independent of any ultimate sanction."[109] If a mandatory meeting such as the one in *Abbott* did not rise to that level, she reasoned, neither did an invitation to an optional one.[110] As such, the court concluded that Speech First had failed to demonstrate injury in fact necessary to establish standing.[111]

4. Overview of the Circuit Split and Prior Speech First Cases

The opinion then briefly compared similar challenges brought by Speech First in the Fifth, Sixth, Seventh, and Eleventh Circuits, where Judge Motz rebuked all but the Seventh Circuit's analysis for failing to properly defer to the factual findings of lower courts in granting Speech First standing to challenge.[112] Next, Judge Motz provided an overview of government speech doctrine, noting that "the First Amendment does not stand in the way of modest efforts to encourage civility on college campuses."[113] Quoting the Supreme Court, she observed that "governmental entities may engage in speech in order to 'promote a program' or 'espouse a policy,'" and that in so doing, the distinction between "government expression" and "government intimidation" turns on the distinction between "attempts to convince and attempts to coerce."[114] Here, the opinion briefly made a case for the merit of the policies in question, alluding to the need

103. *Id.* at 193 (quoting Abbott v. Pastides, 900 F.3d 160, 176 (4th Cir. 2018)).
104. 372 U.S. 58, 83 (1963).
105. *Sands*, 69 F.4th at 195.
106. 900 F.3d 160.
107. *Id.* at 194.
108. *Abbott*, 900 F.3d at 176.
109. *Sands*, 69 F.4th at 196 (quoting *Abbott*, 900 F.3d at 179).
110. *Id.* (quoting Speech First, Inc. v. Killeen, 968 F.3d 628, 640–41 (7th Cir. 2020)).
111. *Id.* at 195.
112. *Id.* at 197–98.
113. *Id.* at 198.
114. *Id.*

to balance the "vital" need for "teachers and students . . . to remain free to inquire . . . and to engage in robust debate" with the reality that "the Constitution . . . does not require us to ignore that universities have not always been places where such open dialogue is accepted from everyone."[115] Virginia Tech's policies, Judge Motz explained, "legitimately" (and non-coercively) "str[o]ve to promote civility" and "educate its student body about both 'protected speech and the role of tolerance in the campus community'"—precisely, she concluded, the type of government speech that the First Amendment permits.

5. The Informational Activities Policy

The opinion then proceeded to the plaintiff's challenge of the IAP, for which the lower court refused to enjoin not on standing grounds, but out of deference to an incomplete factual record which precluded a conclusion about Speech First's likelihood of prevailing on the merits of its claim.[116] Drawing primarily from *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*,[117] which the opinion recounted at length,[118] Speech First's challenge maintained that the IAP was unlawful both as a prior restraint and as an impermissible speaker-based regulation.[119] The prior restraint argument unfolded in two dimensions: first, that the IAP conferred "unbridled discretion" on the University that could be used to disallow speech, and second, that it represented an unconstitutional time, place, and manner restriction because the University had not adequately explained the need for such a policy. Judge Motz credited neither. Referring to the trial court record, the Campus Life Office at Virginia Tech did not have "unbridled discretion" because it "merely confirm[ed] the location was available and then approve[d] the request,"[120] and the University's rationale for the time, place, and manner restriction was to ensure "fair and equitable access" to its finite resources.[121] Speech First, the opinion noted, failed to produce any evidence that this rationale was unsupported, unreasonable, or subterfuge.[122]

The plaintiff's speaker-based regulation argument fared no better. Speech First asserted that the Registered Student Organization (RSO) policy (requiring students to secure sponsorship from an RSO before distributing leaflets on campus) was a "classic" and "constitutionally forbidden" speaker-based restriction.[123] Distinguishing Virginia Tech's rationale for its policy from a similar policy held unconstitutional in

115. *Id.*
116. *Id.* at 199.
117. 457 F.3d 376 (4th Cir. 2006).
118. *Sands*, 69 F.4th at 200.
119. *Id.* at 199.
120. *Id.* at 200.
121. *Id.* at 201.
122. *Id.*
123. *Id.*

Turning Point USA at Arkansas University v. Rhodes,[124] Judge Motz again deferred to the trial court record of Virginia Tech's rationale. While she noted that this holding was based on an inadequate record that "lacks information about the demands on reservable spaces by RSOs and the availability of alternatives for students who are not members of RSOs,"[125] she again underscored that the burden is on the moving party to demonstrate the likelihood of success on the merits, based on the record at the time of the motion for preliminary injunction.[126] As Speech First failed to carry its burden, the court affirmed the district court's refusal to enjoin the IAP.

6. Majority Conclusion

In closing, Judge Motz offered a rebuttal of the dissent grounded largely in procedural posture, proper burdens of proof, and the historically "uphill battle" for plaintiffs in reversing a denial of injunctive relief.[127] Using a quote from dissenting Judge Wilkinson to underscore the importance of appellate deference to district court findings, the majority asserted that the dissent "disregard[ed] the district court's findings of fact and replace[d] them with its own conjecture." Judge Motz called the dissent's narrative "a dramatic read" that "c[a]me[] nowhere close to offering a basis for upending the district court's careful exercise of its discretion."

B. Dissenting Opinion

The dissenting opinion, authored by Circuit Judge Wilkinson, centered on a lengthy hypothetical detailing the various harms visited on a college sophomore[128] at Virginia Tech under the "surveillance state" of Virginia Tech and the "incipient inquisition[]" of the BIRT and IAP,[129] which it argued objectively chills speech. Contending that the First Amendment "guarantees to everyone not just passive access to but active participation in the marketplace of ideas[,]" Judge Wilkinson argued that facial challenges are appropriate where "'a substantial number' of the applications of an 'impermissibly overbroad' policy are 'unconstitutional[] judged in relation to the state's plainly legitimate sweep.'"[130] His opinion included precedent to support the idea that when a challenged policy "risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements."[131] Stepping through a number of consequences that the majority neglected to consider, Judge Wilkinson aspired to "strip . . . fig-leaf assurances" away from the policies

124. 973 F.3d 868 (8th Cir. 2020).
125. *Sands*, 69 F.4th at 201 (quoting Speech First v. Sands, No. 7:21-cv-00203, 2021 WL 4315459, at *24 (W.D. Va. Sept. 22, 2021)).
126. *Id*. at 202.
127. *Id.* at 202–03.
128. *Id.* at 203–04 (Wilkinson, J., dissenting).
129. *Id.* at 204.
130. *Id.* at 205.
131. *Id.* at 206 (quoting Cooksey v. Futrell, 721 F.3d 226, 235 (4th Cir. 2013)).

to expose the regime's "oppressive nature,"[132] characterizing the various rationales put forth by Virginia Tech and the majority as mere "placations" that offer "cold comfort" in light of the language of policies.[133] The opinion concluded by claiming that the policies in question unfairly target students with conservative viewpoints, that the solution to distasteful speech is "tasteful discourse," and that "while everyone agrees that promoting civility and discouraging discrimination is a good thing, the majority's vague invocation of civility has no limiting principle," and was therefore unconstitutional.

III. ANALYSIS

In *Speech First v. Sands*, the Fourth Circuit joined the Seventh Circuit in a developing circuit split on campus speech doctrine, correctly finding in favor of two Virginia Tech policies that attempted an admittedly difficult, but increasingly necessary, balancing act between rights to free expression and antidiscrimination. While the holding was consistent with both First Amendment doctrine and case law and appropriately deferential to the procedural posture of the case, however, the majority's opinion was regrettably tentative in its embrace of the antidiscrimination aspect of that balancing act. The decision, since vacated by the Supreme Court,[134] joined the other Speech First cases in privileging an idealized view of the marketplace of ideas that fails to credit the important role that antidiscrimination protections have in leveling the playing field that such a marketplace requires—a role that is necessary in view of a university landscape that, as the majority acknowledged, has "not always been [one] where such open dialogue is accepted from everyone."[135] Focusing on Virginia Tech's Bias Response policy, this section first argues that the Fourth Circuit's holding about First Amendment and antidiscrimination obligations as applied to higher education institutions is correct in finding that the BIRT advances the latter obligation without compromising the former. Next, this section contends that while the majority opinion briefly gestured toward the important role that policies like Virginia Tech's play in balancing the rights of free speech and antidiscrimination, the surface treatment of those issues in this case minimizes the concerns of those who would benefit from such policies by failing to articulate either the real harms they strive to prevent or the inadequacies of the "more speech" solution as practiced on campuses in the absence of bias response policies. In closing, this section evaluates the implications for campus speech doctrine following the Supreme Court's decision to vacate *Sands*.

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132. *Id.*
133. *Id.* at 210.
134. Speech First Inc. v. Sands, 69 F.4th 184 (4th Cir. 2022), *vacated as moot* 144 S. Ct. 675, 675 (2024) ("The petition for a writ of certiorari is granted. The judgment with respect to the Bias Policy claims is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit with instructions to dismiss those claims as moot.").
135. *See supra* note 115 and accompanying text.

A. The Fourth Circuit Ruled Correctly in View of the University's Legal Obligation to Protect Students from Discrimination, Acknowledging that If Informal Inquiry Is Prohibited by the First Amendment, Institutions Cannot Fulfill that Obligation

In an article attempting to sort through the conflicting guidance and holdings of First Amendment doctrine, university antidiscrimination obligations, and recent bias response cases, Anna Krause reiterated an argument made in *Abbott v. Pastides* that figured prominently in Judge Motz's reasoning in *Sands*: that an invitation to a student accused of bias to meet with a university administrator to discuss the incident is not a violation of that student's First Amendment rights.[136] A voluntary meeting, "though likely uncomfortable for the plaintiffs," is not itself punitive,[137] but a reasonable attempt by the institution to fulfill its obligation under federal law to ascertain the facts of a given bias incident, hear from the parties involved, and decide whether further action—including an investigation, which the meeting expressly is not—is necessary. As articulated and applied in *Abbott*, such a procedure is as narrowly drawn a measure as a university could possibly enact while attempting to fulfill its antidiscrimination obligations. There, the plaintiffs argued that the University of South Carolina should have taken some intermediary or preliminary step to "weed out complaints without student involvement."[138] The Fourth Circuit correctly determined that a voluntary meeting was, in fact, that weeding out process.[139] It is difficult to devise an alternative measure by which a university could establish the facts with input from all parties to reach its determination and fulfill its obligation.

Krause proceeded to explore the "process-as-punishment" angle as applied in *Speech First v. Schlissel*[140] and *Speech First v. Killeen*,[141] noting that the latter was persuaded by the *Abbott* court's reasoning while the former was not.[142] Where the *Schlissel* court held that the mere appearance of an administrator's power to punish as the result of a meeting may be sufficient to objectively chill speech,[143] the *Killeen* court, like Krause, correctly prioritized the practical necessity of administrator meetings in satisfying a university's obligations under federal guidance. It noted that such measures, independent of any sanction, cannot be understood as such an "extraordinarily intrusive" process that self-censorship is an objectively reasonable response.[144] To find otherwise would, in practice, bar an

136. *See* Krause, *supra* note 43, at 824–25.
137. *Id.*
138. *Id.* at 825.
139. *Id.* (citing *Abbott*, 900 F.3d at 168).
140. 939 F.3d 756 (6th Cir. 2019).
141. 968 F.3d 628 (7th Cir. 2020).
142. Krause, *supra* note 43, at 826–27.
143. *Schlissel*, 939 F.3d at 765.
144. Krause, *supra* note 43, at 826.

institution from making any reasonable attempt to ascertain the facts of a given bias incident.

The question of whether a university's process for inquiring into an alleged bias incident can itself be understood to chill speech is at the heart of Soucek's double liability dilemma, where universities are liable under discrimination law for failing to act to remedy discriminatory speech, as well as under the First Amendment if it acts before the discriminatory conduct crosses the *Davis v. Monroe County Board of Education*[145] hostile environment threshold.[146] Soucek notes that the *Davis* standard for permissible university action is the one endorsed by Speech First[147] before turning to an evaluation of alternative approaches, drawn from the work of free speech scholars who similarly endorse the *Davis* standard.[148] Of these, the perspective outlined by conservative scholar Todd Pettys represents a path forward that preserves the *Davis* standard while allowing universities some latitude to satisfy antidiscrimination obligations through conduct and policies like the one at issue at Virginia Tech.[149] Pettys, like Speech First, argued that schools cannot discipline students for speech that falls below the *Davis* standard without infringing on the First Amendment—but he also asserted that schools "can condemn the statement as antithetical to campus values" or "advise the student about the harms that continued expressions of that sort might inflict."[150] As in *Abbott* and consistent with Krause's "process-not-punishment" argument, Pettys' approach draws a practical distinction between formal university discipline and university conduct.

Theoretical approaches aside, the *Sands* court noted that where the court in *Killeen* was merely persuaded by *Abbott*, the Fourth Circuit is bound by it.[151] Thus, the "process-not-punishment" argument was the grounds upon which it affirmed the district court's holding that Speech First had not established the injury-in-fact necessary to maintain standing with regard to the BIRT policy.[152] Significantly, with the legal groundwork laid for its holding on that challenge, the majority decision proceeded through two apparent detours before engaging with Speech First's challenge to the IAP.[153] The first provided an overview of the Speech First

145. 526 U.S. 629, 631 (1999).
146. *See supra* note 70 and accompanying text.
147. *See* Soucek, *supra* note 1, at 692 (quoting Cherise Trump, Executive Director of Speech First).
148. *Id.* at 693–97.
149. *Id.* at 697 (citing Todd E. Pettys, *Hostile Learning Environments, the First Amendment, and Public Higher Education*, 54 CONN. L. REV. 1, 54–55 (2022)).
150. *Id.* (quoting Pettys, *supra* note 149, at 40).
151. Speech First Inc. v. Sands, 69 F.4th 184, 196 (4th Cir. 2022).
152. *Id.*
153. The Informational Activities Policy is beyond the scope of this Note, as it involves the disparate expectations about speech protections that speakers might be afforded depending on their location on campus. Scholars have noted that different parts of a university campus are understood to merit different levels of free speech protections. A bulletin board, like a campus quad, might be understood to be a "public forum" where speech protections are at their highest; a dorm or residence hall, where students rightly expect respite from hostile discourse that might unfold elsewhere, might

actions in the Fifth, Sixth, Seventh, and Eleventh Circuits, largely reprimanding all but the Seventh for dispensing with proper considerations of procedural posture.[154] The second, and more pertinent here, was its discussion of government speech and the doctrine's policy benefits as applied to the issue of bias response. The *Sands* court stopped short of expressly adopting Krause and Soucek's view that universities should affirmatively balance speech interests and antidiscrimination interests, and that these policies are essential to that balancing. But the proximity of these two arguments—that process is not punishment, and that government entities like Virginia Tech may "engage in speech in order to 'promote a program' or 'espouse a policy'" so long as it toes the proper line between "attempts to convince and attempts to coerce"[155]—suggests an awareness of that necessity.

In any event, the invocation of government speech doctrine was critical to the result that the Fourth Circuit reached in *Sands*. It also served as a backdrop to the court's departure from the Fifth, Sixth, and Eleventh Circuits, offering a glimmer of hope for doctrinal resolution of Soucek's double liability dilemma that reflects and incorporates the "more speech" solution preferred by civil libertarians. Where Speech First appears to contend that any institutional action to temper or discourage hostile expression short of the *Davis* threshold is necessarily unconstitutional, the Fourth Circuit's approach rightly positions such action as expression—an interpretation that brings speech interests and antidiscrimination interests into alignment, rather than conflict.

Applying the district court's finding on government speech doctrine (that Virginia Tech's policies were indeed pursued without intimidation or threat),[156] the court again proceeded to elaborate beyond its legal conclusion. Judge Motz acknowledged the "special place in our society" that colleges and universities occupy—not only as marketplaces of ideas, but as places where students are "exposed . . . to persons whose backgrounds and life experiences are far distant from their own."[157] The court observed that it is in that spirit—and with an eye toward the reality that "universities have not always been places where such open dialogue is accepted from everyone"—that universities like Virginia Tech "find it equally vital" to ensure that "teachers and students . . . remain free to . . . engage in robust debate" *and* "communicate that their campuses are places welcoming to

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be a zone where speech is more heavily regulated. Classrooms fall somewhere in between—academic freedom dictates that students should be able to explore just about any line of reasoning that is germane to classroom discussions, while professional codes of conduct provide cover to faculty and administrators who see fit to intervene when expression crosses a line between productive exploration and contributing to an environment that detracts from learning. *See* Soucek, *supra* note 1, at 689.

154. *Sands*, 69 F.4th at 197.
155. *Id.* at 198.
156. *Id.*
157. *Id.*

all students[.]"[158] Efforts to educate a student body "about both 'protected speech and the role of tolerance in the campus community,'" the court concluded, is exactly the kind of non-coercive speech the government speech doctrine was intended to encompass.[159]

Thus, though its argument on this subject is not dispositive, the *Sands* court suggests that universities must be allowed some latitude in balancing speech rights on campuses with rights to be free from discrimination. Unfortunately, the court's argument for this allowance was more implied than expressed. It was predicated not only on the idea that a process of inquiry in response to a complaint was not itself punishment,[160] but also on the idea that the meet-and-discuss process under a BIRT regime provided opportunities for learning on both sides and that these lessons could eventually yield the result that BIRT envisioned: the end of discrimination on campuses via elimination of "expressions against a person or group because of the person's or group's age, color, disability, gender (including pregnancy), gender identity, gender expression, genetic information, national origin, political affiliation, race, religion, sexual orientation, veteran status, or any other basis protected by law."[161]

But in failing to address a university's antidiscrimination obligations directly, the majority neglected an important reality that underlies the need for the interest balancing these policies provide for: that often, the kinds of bias incidents that compel universities like Virginia Tech to enact policies like BIRT and IAP are not enabled by ignorance of the harm they cause and are not likely to be rectified either by a pithy response in the moment or by an earnest one after the fact under administrative supervision.[162] Often, the kinds of discriminatory remarks that make these policies necessary are, to some degree, *motivated* by the harm they cause.[163] As some observers have remarked, there appears to be a block of the American college student populations[164] for whom cruelty is the point: an exercise in purposeful exclusion that reasserts outdated notions of who belongs and who does not.[165] First Amendment doctrine holds that even cruelty-as-objective should not be a bar to free expression, short of hostile

158. *Id.*
159. *Id.* at 199.
160. *See supra* notes 136–38 and accompanying text.
161. *Sands*, 69 F.4th at 207.
162. *See* Delgado, *supra* note 34, at 286 ("Racist speech is rarely a mistake that could be cleared up by discussion. After all, what would be the answer to a remark like, '[. . .] go back to Africa. You don't belong here'? Try to imagine a victim who draws himself up with dignity and says, 'Sir, you misconceive the situation. Prevailing ethics and constitutional interpretation hold that I, an African American, am an individual of equal dignity and entitled to attend this university in the same manner as others. Now that I have made you aware of this, I am sure you will modify your conduct in the future.' The notion that talking back is safe for the victim or informative for the racist simply flies in the face of reality. It ignores the power dimension that lurks behind such speech.").
163. *Id.* at 285–86.
164. *Sands*, 69 F.4th at 220 (Wilkinson, J., dissenting).
165. *See generally* Adam Serwer, *The Cruelty Is the Point*, THE ATLANTIC (Oct. 3, 2018), https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/.

environment harassment or targeted threats.[166] But where, as here, a university's bias response policies are calculated to advance antidiscrimination principles while paying due attention to a students' rights to protected speech, why should a majority finding in favor of those policies be so tepid in its acknowledgment and endorsement of the other, equally fundamental rights these policies protect?

A partial answer may lie in the procedural strategies that Speech First has used across all its cases[167] to induce what critical race theorists describe as "perpetrator perspective," a concept long used to diagnose the failures of American antidiscrimination law in circumstances where courts focus exclusively on the culpability of individual bad actors, rather than further considering the experience of groups that have historically been victims of discrimination.[168] Forced to evaluate this case's likelihood of success on the merits through the lens of a facial challenge to Virginia Tech's policies, with no record of actual enforcement and no trial record to draw from, the Fourth Circuit's focus on the hypothetical harms to student speech and general exclusion of those who might benefit from the challenged policies, may at least be due, in part, to the procedural posture that dictated "whose stories g[o]t told."[169]

B. The Sands Court Missed an Opportunity to Advocate for a More Equitable Balance Between Speech Rights and Rights to Freedom from Discrimination

The Fourth Circuit's relative silence on antidiscrimination principles might be due, in part, to the procedural aspects noted above. It might also be informed, as some theorists have suggested,[170] by a misapprehension of the harms that all forms of discrimination inflict upon historically marginalized students and communities on college campuses—as well as by deference to a vision of the marketplace of ideas that does not account for important realities of campus discourse. Closer consideration of those harms,[171] as well as First Amendment doctrine distilled in the Chicago Principles,[172] reveals that policies like Virginia Tech's are, in many ways, both the very least and the very most that a university properly seeking to balance speech rights and antidiscrimination principles can do for their students. Opinions like the majority's in *Sands*, which ultimately fail to adequately account for those harms and the need for balancing of interests, are symptomatic of the very vestiges of discrimination in higher education that the *Sands* court itself recognized.[173] The majority in *Sands*, despite the

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166. *Sands*, 69 F.4th at 222 (Wilkinson, J., dissenting) (quoting Mahanoy Area Sch. Dist. v. B.L., 594 U.S. 180, 190 (2021)).
167. *See supra* notes 73–80 and accompanying text.
168. *See supra* notes 73–74 and accompanying text.
169. *Id.*
170. *See generally* Delgado, *supra* note 34; Lawrence, *supra* note 32.
171. *See* Lawrence, *supra* note 32.
172. *See* David F. Levi & Geoffrey R. Stone, *Free Speech on Campus: Examining the Campus Speech Debate Through a First Amendment Lens*, 107 JUDICATURE 54, 56 (2024).
173. *See supra* note 115 and accompanying text.

outcome, conformed with criticisms levied by critical theorists against the "conspicuous . . . absence" of "[t]raditional civil libertarians" from the collective condemnation of discrimination advanced by the minorities harmed by that discrimination.[174]

This Note does not suggest that overbroad policies seeking to regulate all speech in either category is a tenable or desirable solution. This Note does argue, however, that we should be skeptical of an approach to the First Amendment that strikes down all reasonable attempts to balance speech rights and antidiscrimination obligations such as Virginia Tech's BIRT. This is not only because such measures do not offend the First Amendment, because numerous well-established exceptions to free speech absolutism exist,[175] or because the lack of any such latitude places universities in an impossible position from a liability perspective.[176] Non-punitive bias response policies which operate through the lens of the First Amendment should stand—or at the very least not be struck down as per se unconstitutional—because they represent the most narrowly tailored measure yet conceived to advance the compelling interest of establishing equity in higher education. Without them, we risk further entrenching a flawed vision of the marketplace of ideas that will never be a level playing field without intervention.[177]

This is a critical point, as the marketplace of ideas lies at the heart of both the development of First Amendment doctrine throughout the twentieth century and present-day justifications for campus speech doctrine as it currently stands.[178] To understand the importance and the flaws of this vision of the marketplace of ideas, the following section explores how this concept came to be enshrined in the heart of First Amendment doctrine.

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174. *See* Lawrence, *supra* note 32, at 466–67 ("There is much about the way many civil libertarians have participated in the debate over regulation of racist speech that causes the victims of that speech to wonder which side they are on . . . when racial minorities or other victims of hate speech hold counter-demonstrations or engage in picketing, leafletting, heckling, or booing of racist speakers, civil libertarians often accuse them of . . . seeking to silence opposing points of view.").

175. Delgado, *supra* note 34, at 284 ("Speech may have served as a powerful tool for reformers, but our system of free speech did not. Anyone doubtful of this proposition is invited to consider a brief review of the many First Amendment exceptions to freedom of speech, including words of conspiracy, libel, copyright, plagiarism, official secrets, misleading advertising, words of threat, disrespectful words uttered to a judge, teacher, or authority figure, and many more. These exceptions, each responding to some interest of a powerful group—publishers, advertisers, cops, the president—seem logical and necessary, as indeed perhaps they are. But the mere suggestion of a new exception protecting young black undergraduates from castigation while walking home from the library late at night immediately produces consternation.").

176. *See* Soucek, *supra* note 55 and accompanying text.

177. *See* Lawrence, *supra* note 32, at 467–69 ("[P]eople of color are equally skeptical about the absolutist argument that even the most injurious speech must remain unregulated because in an unregulated marketplace of ideas the best ideas will rise to the top and gain acceptance. Our experience tells us the opposite. . . . The American marketplace of ideas was founded with the idea of the racial inferiority of non-whites as one of its chief commodities, and ever since the market opened, racism has remained its most active item in trade. . . . [T]he idea of the racial inferiority of non-whites infects, skews, and disables the operation of the market. . . . [It] is an epidemic infecting the marketplace of ideas and rendering it dysfunctional.").

178. *See* Chemerinsky & Gillman, *supra* note 2, at 39.

C. The Civil Libertarian Perspective: "More Speech" and the Marketplace of Ideas

This Note devotes considerable space to questioning the consequences of an approach to the First Amendment that exempts speech rights from balancing against all other interests in nearly all circumstances—but it does not do so without careful consideration of the many weighty and compelling points advanced by free speech proponents. In their 2018 book *Free Speech on Campus*,[179] Chemerinsky and Gillman established the thorough and wide-ranging historical, philosophical, pedagogical, and legal foundations for the evolution of First Amendment doctrine as it exists today. The authors traced the right's origins throughout the development of the earliest Western universities,[180] across Enlightenment-era philosophical underpinnings,[181] and pre-20th century treatment of speech rights in America.[182] From there, they described the turning point toward modern doctrine in the 1920s, when Justices Louis Brandeis and Oliver Wendell Holmes began to champion resolution of harmful speech through "more speech" in the "marketplace of ideas."[183] The goal of this impressive chronology is to underscore for members of what the authors call "this generation"[184] —who the authors observed are less receptive to long-held notions of the First Amendment's "preferred place" in our legal system[185] —both (1) the practical benefits of unfettered speech and (2) the danger that any effort to curb harmful speech will eventually be deployed to the detriment of free thinkers, democratic self-governance, and the historically marginalized students that bias policies are designed to serve.[186]

To make a detailed and compelling argument extremely brief, Chemerinsky and Gillman's case for the broad protection of even low-value expressive activity boils down to this: (1) freedom of speech is essential to freedom of thought, without which no person can develop an independent point of view; (2) freedom of both speech and thought are essential components of a democratic society, and without them, the "pressure of conformity' will inevitably preclude diversity of experience, perspective, and identity; and (3) that "the alternative—government censorship and control of ideas—has always led to disaster."[187] The problem

179. *See generally id.*
180. *Id.* at 49–82.
181. *Id.* at 29.
182. *Id.* at 28–34.
183. *Id.* at 39.
184. *Id.* at 10, 12 (explaining that their book grew out of the authors' experience teaching an undergraduate seminar, where as professors, they presented students with hypotheticals throughout the semester about scenarios where the community would face a choice between punishing speech and refuting speech. Throughout the semester, the authors observe, the students would acknowledge that one "could adopt a 'more speech solution . . . but [] doubted that this would protect their peers from psychological distress.'").
185. *Id.* at 23.
186. *Id.* at 106 ("One ironic, even tragic, result of this discretion is that members of minority groups themselves—the very people whom the law is intended to protect—at likely targets of punishment."). *But see* Delgado, *supra* note 34, at 281–83.
187. Chemerinsky & Gillman, *supra* note 2, at 23.

of hateful, hostile speech on campuses, the authors acknowledged, is a real and pervasive one.[188] But because "[h]istory demonstrates that there is no way to define an unacceptable, punishment worthy idea without putting genuinely important new thinking and societal critique at risk,"[189] our collective hands are tied. Because "decades and decades of effort . . . have never succeeded in solving the definitional problems by which campus speech codes are brought to bear against individuals and speech that were not its intended targets[,]"[190] Chemerinsky and Gillman posit that higher education should confine itself to an approach that depends on "more speech" by campus community members, but not administrators, to defeat bigotry and harassment in the marketplace of ideas.

D. The Critical Race Theory Perspective: The Marketplace Distorted

Both in their history of the doctrine's evolution and throughout their address of modern-day concerns about campus speech, Chemerinsky and Gillman hearkened back to the dissent of Justices Brandeis and Holmes in *Abrams v. United States*[191] as the beginning of the "revolution in the thinking and practice of free speech rights"[192] from which the present state of affairs flows.

Holmes and Brandeis argued that any concerns over the harmful effects of speech should be addressed by the "marketplace of ideas"—that is, by people exercising their speech rights to expose the harmful idea's dangers—rather than by government censorship or punishment. The major exception to this rule involved speech that created an "imminent threat" of lawlessness or real danger, such that there was no time for "more speech" to solve the problem (as with, for example, shouting fire in a crowded theater in order to start a panic).[193]

Justice Brandeis himself wrote in *Whitney v. California* that "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[194]

The marketplace of ideas and the "more speech" remedy are compelling and hopeful concepts. But the "evil[s]" of bigotry and discrimination have not yet been vanquished from the marketplace of ideas in the century that has elapsed since *Abrams*. In a marketplace where ideas are said to persist solely through the force of their truth, how do we reconcile the continued endurance of racial, gender, religious, and other animus we find repulsive?

188. *Id.* at 10.
189. *Id.* at 62.
190. *Id.* at 103.
191. Abrams v. United States, 250 U.S. 616, 625–31 (1919) (Holmes, J., dissenting).
192. Chemerinsky & Gillman, *supra* note 2, at 37.
193. *Id.* at 38.
194. Whitney v. California, 274 U.S. 357, 377 (1927).

Some posit that the endurance of racism, sexism, and xenophobia is both a cause and symptom of a marketplace of ideas that is, at present, hopelessly skewed by the power dynamics of American society.[195] In interrogating the marketplace of ideas and "more speech" solutions, Steven Feldman applied the German philosopher Jürgen Habermas' concept of the "ideal speech situation," underscoring the fallacies of notions that university campuses are places where the best ideas win, and the solution to low-value speech is simply reasoned argument.[196] He begins by defining the ideal speech situation:

> Habermas conceptualized the ideal speech situation as an encounter cleansed of domination, coercion, and other distortions arising from material forces and strategic rationality. A consensus that emerges from the ideal speech situation reflects the force of the best arguments only and thus allows us to identify truth and normative legitimacy. Because pure reason and evidence govern in the ideal speech situation, we can reach "enforced universal agreement."[197]

This definition, plainly, does not align with the reality of American university campuses. Feldman observed that wealth and economic power shape all aspects of campus discourse, from who is allowed to participate to the subjects for discussion.[198] Cultural prejudices and structures of power embedded throughout American society—including racism, sexism, antisemitism, and homophobia—"influence the ideas that are injected into disputes about truth on campus."[199] The effect of this distortion, Feldman concluded, is that a member of a marginalized group enters the campus marketplace of ideas from a position of disadvantage.[200] Without corrective action by the university to level the playing field, the marketplace does not just fail to challenge "the normal, the mainstream, and the powerful" in its search for truth—it reinforces the status quo.[201]

The Fourth Circuit's decision in *Sands* is commendable in its it allowance for the reality that universities must have some ability to intervene in hostile or discriminatory speech before it crosses the threshold into harassment. However, its more tacit embrace of the need for balancing between speech and antidiscrimination protections leaves unfulfilled an opportunity to explicitly recognize root causes that make modest interventions in the marketplace of ideas necessary. Measures like Virginia Tech's BIRT that do not punish protected speech and seek to address instances of bias with more speech between administrators and community members are reasonable, narrowly drawn measures that serve a legitimate, even

195. *See* Feldman, *supra* note 34, at 846.
196. *Id.* at 845 (summarizing Jürgen Habermas*, The Hermeneutic Claim to Universality*, *in JOS£F BL£ICHER, CONTEMPORARY HERMANEUTICS: HERMENEUTICS AS METHOD, PHILOSOPHY AND CRITIQUE*, 181, 206 (1980)).
197. *Id.*
198. *See id.* at 846.
199. *Id.* at 847.
200. *Id.*
201. *Id.* at 848.

critical, purpose: to ensure that campus iterations of the marketplace function in the way that is commensurate with the level of protection free speech receives in our legal system.

E. Whatever Modest Progress Sands *Might Have Represented in Balancing Speech and Antidiscrimination Rights Is Invalidated by its Aftermath*

The reality is that such critiques of the *Sands* decision are academic. Despite the Fourth Circuit's decision upholding Virginia Tech's policies, the University discontinued its bias protocol effective "during the summer [of 2023],"[202] shortly after the appellate decision was announced in May of that year and after Speech First had appealed to the Supreme Court.[203] In his response brief to Speech First's certiorari petition, which he argues should be denied in significant part because suspending the BIRT policies had rendered the claim moot,[204] Sands claimed the policy's discontinuation was "a move not prompted by the litigation[,]"[205] but because complaints under the protocol "rarely called for any communication to the student who was the subject of the complaint (or any other action) . . . especially given BIRT's use of the First Amendment to evaluate any complaint."[206] In other words, Sands used an argument that Virginia Tech had used earlier in court to justify the policy's existence—that no speech which is protected under the First Amendment results in any action whatsoever against the student who is the subject of the complaint[207]—as its justification for discontinuing the policy altogether.

Sands' brief in response to Speech First's certiorari petition contained additional revelations that those concerned with the future of campus antidiscrimination policies such as the BIRT might find troubling. The first was Sands' set of "strong assurances" as to the future of bias protocols at Virginia Tech: that the University has not and will not going forward "(a) reinstate the now-discontinued bias-incident response protocol . . . or (b) adopt or implement any protocol or policy that encourages anyone to report to University authorities any instances of student speech based on the content or viewpoint of that speech."[208] The second was that Sands urged the Court to deny certiorari and, instead, vacate the Fourth Circuit's decision.[209] The Court did just that in March 2024.[210]

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202. Brief in Response to Petition and Suggestion of Mootness at 9, Speech First, Inc. v. Sands, 144 S. Ct. 675 (2024) (No. 23-156).
203. Petition for Writ of Certiorari, *Sands*, 144 S. Ct. (No. 23-156).
204. Brief in Response to Petition and Suggestion of Mootness, *supra* note 202, at 16–22.
205. *Id.* at 9.
206. *Id.*
207. *Sands*, 69 F.4th at 189.
208. Brief in Response to Petition and Suggestion of Mootness, *supra* note 202, at 10.
209. *Id.* at 16.
210. *Sands*, 69 F.4th 184, vacated as moot 144 S. Ct. 675, 675 (2024) (No. 23–156, 2024 Term) ("The petition for a writ of certiorari is granted. The judgment with respect to the Bias Policy claims is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit with instructions to dismiss those claims as moot.").

This outcome is, perhaps, preferable to the alternative. Had the Court rejected those theories and heard a case where the appellee had signaled that it no longer stood by the arguments it made in the courts below, the consequences would have likely been even more far-reaching: *Speech First v. Sands* would have, in effect, created the vehicle by which public universities would be barred from enacting policies that seek to provide even the most informal recourse for university communities against biased speech.[211]

Whatever victory *Sands* may have represented for the necessary balance between speech and antidiscrimination interests on college campuses has largely been erased. The prevailing appellate view is now embodied by the other Speech First cases: that university bias response policies, as a rule, impermissibly chill speech.[212]

F. Future Campus Speech Controversies Will Be Telling of Whether Current Campus Speech Doctrine Lives Up to the Characterization of Its Proponents

In the wake of *Sands* and the various Speech First cases across the country, we are left with the campus speech doctrine observed in all but the Seventh Circuit.[213] Public universities may not enact even non-punitive, more-speech policies to address discriminatory speech, even when such policies (1) do not run afoul of the First Amendment[214] (and, indeed, incorporate the First Amendment into the application of the policy)[215] and (2) would have a tangible benefit to the experience of historically marginalized students at the minimal cost, applied only in exceptional cases,[216] of a voluntary conversation between the students and administrators.

One of the foremost arguments in favor of the prevailing doctrine is the "risk of reverse enforcement" theory:[217] the idea that speech limitations in any form would someday be used not to temper the speech of majorities (as the policies at issue in *Sands* attempted to do), but to silence minority viewpoints.[218] In *Sands* and the other Speech First cases, this understanding of the First Amendment has been deployed to the benefit of conservative students and groups who, since the 1980s, have co-opted the rhetoric of "silencing" first used by feminists and other outsider groups[219]

211. Such a decision would be consistent with this Court's stated disposition toward diversity, equity, and inclusion on college campuses as articulated in Students for Fair Admissions, Inc. v. Harvard, 143 S.Ct. 52 (2022), where it held that fostering a diverse and inclusive campus community was not a sufficiently compelling government interest to justify considering race as a factor in admissions policies.

212. In this event, the Seventh Circuit's decision in Speech First, Inc. v. Killeen, 939 F.3d 756 (6th Cir. 2019), would be the sole precedent for upholding university bias policies.

213. *See supra* text accompanying note 212.

214. *See supra* notes 50–51 and accompanying text.

215. *See supra* note 91 and accompanying text.

216. *See supra* notes 92–93 and accompanying text.

217. *See* Delgado, *supra* note 34, at 281–82.

218. *Id.* ("[A]dvocates posit that hate-speech rules are sure to set back the cause of minorities because the rules will be turned against minorities themselves.").

219. *See* Lawrence, *supra* note 32, at 477 n.160.

despite statistics that indicate they are significantly less likely to experience discrimination than minorities.[220] It is reasonable, in light of this, to expect that the present doctrine—that restrictions of any kind on student speech are, as a rule, impermissible—should also be applied to the opposite scenario, i.e. to vindicate speech expressing minority viewpoints where that speech is infringed upon by normative majorities. In an increasingly polarized sociopolitical landscape, any number of campus conflicts could give rise to a case that puts this notion to the test.

CONCLUSION

Speech First v. Sands is a case study in the challenges facing the project of equity in higher education. The case itself, decided correctly by the Fourth Circuit, vindicated university policies that represented modest and reasonable attempts to balance student rights to free expression with student rights to an educational environment free from discrimination, even though the decision fails to meaningfully grapple with the campus dynamics that makes these policies necessary.[221] The aftermath of *Sands* removed an important precedent supporting university efforts to engage in such balancing, dealing a significant blow to the ideals of diversity, equity, and inclusion in higher education and perpetuating the precarious legal footing that public universities find themselves in when navigating conflicts between speech and antidiscrimination principles.[222] Under this approach, where universities will be effectively barred from enacting bias response policies (it being difficult to conceive of any measures that impose less of a burden on free expression than those at issue in *Sands*), the most one can hope for is to see the First Amendment deployed equitably in future campus speech disputes. If it is used to deny minority populations modest protections from the harmful speech of majority populations, it must also be used to temper overzealous majoritarian responses to politically unpopular speech. Any other result would further distort the marketplace of ideas that present campus speech doctrine is said to protect, allowing majorities on university campuses to employ the First Amendment as "an instrument of domination, rather than a vehicle of liberation."[223]

*Sean LaLiberte**

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220. *See* Delgado, *supra* note 32, at 282 ("FBI reports show that hate crimes are committed much more frequently by whites against blacks than the other way around, and the same appears to be true for hate speech. Whites commit it, blacks and Latinos, as a rule, do not.").
221. *See supra* notes 170–74 and accompanying text.
222. *See supra* notes 207–10 and accompanying text.
223. Lawrence, *supra* note 32, at 459.

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