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Diversity Statements

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Universities increasingly require ‘diversity statements’ from faculty seeking jobs, tenure, or promotion. But statements describing faculty’s contributions to diversity, equity, and inclusion are also increasingly under attack. Criticisms first made in tweets and blog posts have expanded into prominent opinion pieces and, more recently, law review articles. And the attacks are having an effect. Within universities, faculty-wide resolutions for and against mandatory diversity statements have been called and academic freedom committees have been asked to intervene. Outside universities, lawyers are recruiting plaintiffs to challenge diversity statement requirements in court.

Behind all the rhetoric, the arguments made about diversity statements are, at heart, legal claims — and serious ones at that. Critics allege that universities are engaging in unconstitutional viewpoint discrimination, violating their faculty’s academic freedom, and imposing political litmus tests akin to the loyalty oaths struck down during the Cold War era. Yet

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evaluating these as legal claims requires grappling with complicated, often unsettled doctrine regarding the First Amendment and higher education — something that, unsurprisingly, hasn't been done on the comment threads, opinion pages, and faculty committees where this discussion has largely played out until now. This Article does that work, fleshing out the criticisms and developing a framework to address them and guide universities on how they can require and evaluate diversity statements — should they want to — without violating either the Constitution or the academic freedom on which their mission depends.

TABLE OF CONTENTS

INTRODUCTION	1991
I. REQUIRING DIVERSITY STATEMENTS	1998
A. <i>Different Requirements</i>	1999
B. <i>Different Rubrics</i>	2006
II. CRITIQUING DIVERSITY STATEMENTS	2011
A. <i>Viewpoint Discrimination</i>	2019
1. Are Mandated Diversity Statements Viewpoint Discriminatory?	2019
2. Is Viewpoint Discrimination Prohibited in Faculty Hiring and Promotion?	2021
B. <i>Academic Freedom</i>	2035
C. <i>Political Tests</i>	2041
III. A FRAMEWORK FOR DIVERSITY STATEMENTS	2048
A. <i>Source and Tailoring</i>	2050
B. <i>Content</i>	2054
C. <i>Intrusiveness</i>	2058
CONCLUSION	2061

INTRODUCTION

University faculty increasingly can't get hired, tenured, or promoted without submitting a statement describing their "contributions to diversity, equity, and inclusion."¹ As diversity statements have become more widely mandatory, they have also grown more controversial: derided as unconstitutional viewpoint discrimination, an invasion of academic freedom, or even — according to some — a reversion to the loyalty oaths used to drive out Communist faculty in the mid-twentieth century.

Consider the University of California system, where I teach. Each of our ten campuses now asks for diversity statements, whether referred to by that name, as DEI² or EDI³ statements (referring in differing order to "diversity," "equity," and "inclusion"), or as statements of "inclusive excellence."⁴ Some schools have recently experimented with a hiring process where search committees judge applicants' diversity statements before seeing their names, educational backgrounds, publication records, or the subject of their research. And UC faculty members going up for tenure or a salary raise are now encouraged, or in some cases required, to report on their contributions to diversity alongside their success in teaching, research, and service.⁵

¹ See JAMES D. PAUL & ROBERT MARANTO, AM. ENTER. INST., OTHER THAN MERIT: THE PREVALENCE OF DIVERSITY, EQUITY, AND INCLUSION STATEMENTS IN UNIVERSITY HIRING 8-10 (2021), <https://www.aei.org/research-products/report/other-than-merit-the-prevalence-of-diversity-equity-and-inclusion-statements-in-university-hiring/> [<https://perma.cc/UA7G-K7R6>] (finding that diversity statements were a required part of applications for thirty-four percent of the jobs advertised at "elite" universities and at nineteen percent of the faculty job listings overall in 2020).

² UNIV. COMM. ON AFFIRMATIVE ACTION, DIVERSITY & EQUITY & UC SYSTEMWIDE EQUAL OPPORTUNITY/AFFIRMATIVE ACTION ADM'RS GRP., THE USE OF CONTRIBUTIONS TO DIVERSITY, EQUITY, AND INCLUSION (DEI) STATEMENTS FOR ACADEMIC POSITIONS AT THE UNIVERSITY OF CALIFORNIA: JOINT RECOMMENDATIONS 1 (2019), https://senate.universityofcalifornia.edu/_files/reports/rm-mb-divchairs-use-of-dei-statements.pdf [<https://perma.cc/DR2Z-VKVG>] [hereinafter JOINT RECOMMENDATIONS].

³ Scott L. Waugh, *New EDI Statement Requirement for Regular Rank Faculty Searches*, UCLA EQUITY, DIVERSITY & INCLUSION (May 24, 2018), <https://equity.ucla.edu/news-and-events/new-edi-statement-requirement-for-regular-rank-faculty-searches/> [<https://perma.cc/YEJ9-7ZLT>] [hereinafter Waugh Memo].

⁴ *Guidance for Writing Inclusive Excellence Activities Statement*, UCI OFF. OF ACAD. PERS., <https://ap.uci.edu/faculty/guidance/ieactivities> (last visited Jan. 2, 2022) [<https://perma.cc/CU82-A7GF>].

⁵ JOINT RECOMMENDATIONS, *supra* note 2, at 3-4; UNIV. OF CAL. OFF. OF THE PRESIDENT ACAD. PERS. & PROGRAMS, EVALUATING CONTRIBUTIONS TO DIVERSITY FOR FACULTY APPOINTMENT AND PROMOTION UNDER APM-210, at 2 (2017), <https://www.ucop.edu/faculty-diversity/policies-guidelines/eval-contributions-diversity.pdf> [<https://perma.cc/V872-YHYE>] [hereinafter EVALUATING CONTRIBUTIONS]; Waugh Memo, *supra* note 3.

Meanwhile, resistance has grown, both inside and outside the University. The faculty at UC Davis recently put dueling referenda up for university-wide vote, one favoring and one decrying diversity statements.⁶ A department chair there took on her chancellor on the pages of the Wall Street Journal.⁷ Within legal academia, Professor Richard Epstein recently called UC's diversity efforts "a regrettable form of totalitarian behavior,"⁸ while Brian Leiter, the influential University of Chicago law professor,⁹ faculty ranker,¹⁰ and commentator on academia,¹¹ has not only characterized UC Berkeley's (and others') use of diversity statements an unconstitutional affront to academic freedom, but has also used his blog to advertise for a conservative legal organization that is publicly recruiting plaintiffs to sue the University

⁶ Letter from Kristin H. Lagattuta, Chair, and Richard P. Tucker, Vice Chair, Davis Div. of the Acad. Senate, to Gary S. May, C., Ralph J. Hexter, Provost & Exec. V.C., Phil Kass, Vice Provost, Acad. Affs., Renetta Garrison Tull, V.C., Diversity, Equity & Inclusion (May 9, 2020), https://asis.ucdavis.edu/sitefarm/file.cfm?view=rfc_response&id=16032 [<https://perma.cc/9E3D-35UB>] [hereinafter Lagattuta & Tucker Letter].

⁷ Abigail Thompson, Opinion, *The University's New Loyalty Oath*, WALL ST. J. (Dec. 19, 2019, 6:55 PM ET), <https://www.wsj.com/articles/the-universitys-new-loyalty-oath-11576799749> [<https://perma.cc/PAB5-P7DS>] [hereinafter *New Loyalty Oath*].

⁸ Richard A. Epstein, *The Civil Rights Juggernaut*, 2020 U. ILL. L. REV. 1541, 1567.

⁹ See Brian Leiter, UNIV. OF CHI. L. SCH., <https://www.law.uchicago.edu/faculty/leiter> (last visited Dec. 21, 2021) [<https://perma.cc/8BBF-ZEP6>].

¹⁰ See, e.g., Brian Leiter, *Faculty Quality*, BRIAN LEITER'S L. SCH. RANKINGS, <http://www.leiterrankings.com/faculty/index.shtml> (last visited Dec. 21, 2021) [<https://perma.cc/HP4J-6X6N>] (providing a list of various law faculty rankings from 1995 through 2013); Brian Leiter, *2019-20 Update to Philosophical Gourmet Report's 2017 Rankings for U.S. Departments*, LEITER REPS.: A PHIL. BLOG (Sept. 27, 2019, 9:15 AM), <https://leiterreports.typepad.com/blog/2019/09/2019-20-update-to-the-philosophical-gourmet-reports-2017-rankings-for-us-departments.html> [<https://perma.cc/ZN77-RTH6>] (ranking faculty across top PhD programs in philosophy).

¹¹ See BRIAN LEITER'S L. SCH. REPS., <https://leiterlawschool.typepad.com/> (last visited Dec. 21, 2021) [<https://perma.cc/9PJJ-EYUJ>]; LEITER REPS.: A PHIL. BLOG, <https://leiterreports.typepad.com/blog/> (last visited Dec. 21, 2021) [<https://perma.cc/HDZ7-KFLX>].

of California.¹² That organization, the Pacific Legal Foundation,¹³ is not alone. The Foundation for Individual Rights in Education (“FIRE”), a leading campus free speech advocacy group, has also advertised their willingness to help faculty pressure universities to abandon their reliance on diversity statements,¹⁴ as it has successfully done in the past.¹⁵ And in March 2021, faculty across the political spectrum, from Cornel West and Janet Halley to Michael McConnell and Robert George, launched a new group, the Academic Freedom Alliance, with Floyd Abrams and Paul Clement among its legal advisors; one of its core

¹² See Brian Leiter, *Berkeley “Diversity Statements” in Action in a Life Sciences Search*, LEITER REPS.: A PHIL. BLOG (Dec. 31, 2019, 3:15 PM), <https://leiterreports.typepad.com/blog/2019/12/berkeley-diversity-statements-in-action-in-a-life-sciences-search.html> [<https://perma.cc/CK7T-HDMH>] [hereinafter *Berkeley “Diversity Statements” in Action*]; Brian Leiter, *How Does Berkeley Evaluate “Diversity” Statements from Faculty Candidates?*, LEITER REPS.: A PHIL. BLOG (Dec. 1, 2019, 9:49 AM), <https://leiterreports.typepad.com/blog/2019/12/how-does-berkeley-evaluate-diversity-statements-from-faculty-candidates.html> [<https://perma.cc/SS85-Q94A>]; Brian Leiter, *Were You Rejected in One of the University of California Job Searches Utilizing the Unlawful “Diversity Statements”?*, LEITER REPS.: A PHIL. BLOG (Jan. 28, 2020, 5:22 PM), <https://leiterreports.typepad.com/blog/2020/01/were-you-rejected-in-one-of-the-university-of-california-job-searches-utilizing-the-unlawful-diversi.html> [<https://perma.cc/XTH5-YV3G>] [hereinafter *Were You Rejected?*]; Brian Leiter, *While “Diversity Statements” Are Being Used System-Wide in the University of California...*, LEITER REPS.: A PHIL. BLOG (Jan. 7, 2020, 1:07 PM), <https://leiterreports.typepad.com/blog/2020/01/while-diversity-statements-are-being-used-system-wide-in-the-university-of-california.html> [<https://perma.cc/R87P-J8Q5>].

¹³ See, e.g., Daniel Ortner, *Don’t Expect Diversity of Thought at University of California*, PAC. LEGAL FOUND. (Oct. 9, 2019), <https://pacificlegal.org/the-daily-caller-dont-expect-diversity-of-thought-at-university-of-california/> [<https://perma.cc/RSS8-D3J3>] (arguing that the use of diversity statements results in “every professor [seemingly] teaching from the same ideological textbook”); Daniel Ortner, *What is UC Davis Hiding About Its Use of Diversity Statements?*, PAC. LEGAL FOUND. (Feb. 3, 2020), <https://pacificlegal.org/the-hill-what-is-uc-davis-hiding-about-its-use-of-diversity-statements/> [<https://perma.cc/78NS-LFVN>] [hereinafter *What is UC Davis Hiding?*] (characterizing UC Davis’s use of diversity statements as the “wholesale exclusion of hundreds of potentially qualified applicants”).

¹⁴ E-mail from Peter Bonilla, Vice President of Programs, FIRE Fac. Network, to Fac., Univ. of California (Dec. 3, 2020, 4:34 PM) (on file with author); *FIRE Faculty Network Survey: Hiring, Promotion, and Diversity*, FIRE FAC. NETWORK, https://fire-dkzwf.formstack.com/forms/fire_faculty_network_dei_form (last visited Dec. 22, 2021) [<https://perma.cc/V4BX-PAVJ>].

¹⁵ Letter from Thor Halvorssen, Exec. Dir., Found. for Individual Rts. in Educ., to Dr. James J. Links, President, Bucks Cnty. Cmty. Coll. (Feb. 22, 2001), <https://www.thefire.org/letter-to-bucks-county-community-college/> [<https://perma.cc/2CKY-VA6A>] [hereinafter *Bucks College Letter*]; Letter from Adam Kissel, Dir., Individual Rts. Def. Program, to John R. Lawson, II, Rector, Bd. of Visitors, Virginia Polytechnic Inst. & State Univ. (Sept. 14, 2009), <https://www.thefire.org/fire-letter-to-virginia-polytechnic-institute-and-state-university-board-of-visitors/> [<https://perma.cc/52XP-9WJ9>] [hereinafter *Kissel Letter*].

stated purposes: defending academics' "right to be unburdened by ideological tests, affirmations, and oaths"¹⁶ — a barely veiled reference to diversity statements.¹⁷

The attacks on campus diversity statements are serious, but discourse on the issue, so far, largely is not. Objections to diversity statements have percolated up from blog posts and op-eds to campus petitions and complaints filed with academic freedom committees. Soon these objections may find their way to federal court. But the editorializing, institutional in-fighting, and legal threats haven't been matched by any serious legal scholarship actually analyzing the grave allegations that have been levied.¹⁸

This Article takes that step. It analyses — and answers — claims that universities' expanded and expanding uses of diversity statements constitute unconstitutional viewpoint discrimination, violate academic freedom, or recall the reviled loyalty oaths of the Cold War era.

In doing so, this Article takes seriously a consideration that critics of diversity statements often downplay or ignore: universities are themselves First Amendment actors (or government speakers), with statements of their own to make about diversity. Academic freedom — and at public schools, the First Amendment — preserves faculty's right to question their institution's values, not to insist that their institution remain value-neutral, were such a thing even possible. The challenge is to *balance* universities' institutional values with internal dissent and scholarly autonomy. And this remains a challenge when the institutional value at stake is academic freedom, no less than when the value is diversity or inclusion. There is no getting around the problem.

¹⁶ *Solidarity in Pursuit of Truth*, ACAD. FREEDOM ALL., <https://academicfreedom.org/> (last visited Jan. 2, 2022) [<https://perma.cc/49QE-RLLA>].

¹⁷ On the day the group was announced, the group's founder, Keith Whittington, acknowledged its concern about "a growing movement today to use a new set of required affirmations to filter out potential faculty . . . who might not share certain orthodoxies regarding social justice or inclusivity." *Academic Freedom Alliance: Q&A with Keith Whittington*, PRINCETONIANS FOR FREE SPEECH (Mar. 8, 2021) <https://princetoniansforfreespeech.com/academic-freedom-alliance-qa-keith-whittington> [<https://perma.cc/AS7X-L5VT>].

¹⁸ Legal scholarship on this subject has been surprisingly sparse. See Epstein, *supra* note 8, at 1567-69; Erica Goldberg, "Good Orthodoxy" and the Legacy of Barnette, 13 FIU L. REV. 639, 649-56 (2019) [hereinafter *Good Orthodoxy*]; Daniel Ortner, *In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia*, 70 CATH. U. L. REV. 515, 577-78 (2021) [hereinafter *In the Name of Diversity*]. Diversity statements are just one of several examples Epstein's and Goldberg's articles use to make larger points. Ortner's article, meanwhile, is a mix of advocacy and scholarship, written by a litigator looking for plaintiffs to sue the University of California over its diversity statement policies.

For that reason, this Article's defense of mandatory diversity statements is not unqualified. In fact, the defense proceeds by acknowledging that certain types or uses of diversity statements would be *indefensible* from a constitutional or academic freedom standpoint, then by mapping the distance between *those* points and the *actual* ways diversity statements have been employed. To do this, we need a nuanced vision of what counts as viewpoint discrimination in the context of academic employment. We need an understanding of how the requirements of academic freedom differ from First Amendment protections for speech. And we need a thick description of the ways and contexts in which diversity statements are actually being used in university settings. Both doctrinal and factual grounding is needed to move from talking points to scholarship.

This Article takes its factual grounding from the pioneering use of diversity statements within the University of California. Full disclosure: I have seen the debate at UC from both sides, as chair of the system-wide faculty committee on academic freedom and also a committee member for an experimental diversity initiative hiring search on my own campus. But the facts in this Article come from publicly posted information and months of public record requests. And the reasons for using the UC system as a case study go far beyond the fact that I happen to work there.

Collectively, and in several cases individually, the ten campuses that make up the University of California stand out, not just for their prominence within American higher education,¹⁹ but for the self-consciousness of their aim to be a leader on issues of diversity.²⁰ At the same time, its campuses vary so widely in their reputation, size, surroundings, and specialties, that dissent to centralized institutional aims is inevitable, and is bound to come from multiple directions.

¹⁹ U.S. News, for example, currently ranks six of UC's campuses among the top eleven public universities in the country, and it includes UCSF among the country's top medical, nursing, and dental schools. *Top Public Schools: National Universities*, U.S. NEWS & WORLD REP. (2022), <https://www.usnews.com/best-colleges/rankings/national-universities/top-public> [https://perma.cc/STL7-RYBX]; *2023 Best Medical Schools: Primary Care*, U.S. NEWS & WORLD REP. (2022), <https://www.usnews.com/best-graduate-schools/top-medical-schools/primary-care-rankings> [https://perma.cc/H7SU-DZS6]; *2023 Best Medical Schools: Research*, U.S. NEWS & WORLD REP. (2022), <https://www.usnews.com/best-graduate-schools/top-medical-schools/research-rankings> [https://perma.cc/78TT-6TTF]; *2023 Best Nursing Schools: Master's*, U.S. NEWS & WORLD REP. (2022), <https://www.usnews.com/best-graduate-schools/top-nursing-schools/nur-rankings> [https://perma.cc/37AV-5FYF].

²⁰ See Letter from Aimée Dorr, Exec. Vice President for Acad. Affs., Univ. of California (June 29, 2015), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-210-1-d-issuance/apm-210-1-d-issuance-ltr.pdf [https://perma.cc/B9SJ-4GD4] (describing UC's diversity policies as "a national model").

Unlike private universities, the University of California has to respect both the academic freedom *and* the First Amendment rights of those who dissent from within. And as the primary battleground of the loyalty oath controversy of the mid-twentieth century,²¹ UC is additionally vulnerable, or at least attractive, to those trying to cast its institutional values as imposed orthodoxies.

Admittedly, debates over diversity statements across the country play out differently at different schools, public or private, each with its own history and demographics. But to take as case study the sprawling set of public institutions that make up the University of California is to adopt an example that is among the hardest to defend. To defend UC is thus to provide a framework most other universities could adapt to defend or structure their own use of diversity statements as well.

Part I describes various ways diversity statements are currently being used in the context of faculty hiring, tenure, and promotion, taking as its case study recent policy changes and diversity initiatives at the University of California. It mines publicly available guidance materials and job postings as well as public records act disclosures that together describe exactly how UC's campuses are asking for and evaluating diversity statements from the 23,000 people on UC's faculty and the many more who apply for faculty positions each year.

Part II canvases the criticisms increasingly heard, both within and outside the University of California, about its expanding emphasis on diversity statements. Since much of this criticism has been made in contexts that don't demand, or even allow for, much scholarly or doctrinal rigor, Part II explains what it would actually mean for a diversity statement requirement to count as viewpoint discrimination, or violate academic freedom, or constitute a loyalty oath, as so often alleged.²² Underneath their rhetoric, each of these is a distinctively *legal* claim. In fact, each is a legal claim that arises in a complex and sometimes unsettled doctrinal or theoretical context, involving tough questions at the intersection of free speech and higher education. Part II takes the time needed to translate critics' slogans into the kind of actual doctrinal arguments that courts may soon be asked to evaluate.

Part III then develops a framework for applying the law to the facts. It draws out the variables that make mandated diversity statements more or less vulnerable to their critics. And in doing so, it offers lessons

²¹ See *infra* notes 246–264 and accompanying text.

²² See, e.g., John O. McGinnis, *The University of California's New Loyalty Oath*, LAW & LIBERTY (Oct. 30, 2018), <https://lawliberty.org/the-university-of-californias-new-loyalty-oath/> [<https://perma.cc/2LU8-L3QL>] (referring to required diversity statements as a “new loyalty oath”); Thompson, *New Loyalty Oath*, *supra* note 7 (same).

on how universities can require and evaluate diversity statements in ways that further their institutional goals without violating either the constitution or the academic autonomy of their faculty.

To clarify before going on: this Article is not another contribution to the important scholarly literatures on diversity as a compelling governmental interest;²³ on the effectiveness of diversity in producing a more equitable or inclusive student experience;²⁴ or on the bureaucratization of equality efforts more generally.²⁵ This Article,

²³ For such scholarly literature on diversity as a compelling governmental interest, see, for example, Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427 (1979); Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 UC DAVIS L. REV. 1117 (2019); Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003); Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60 (2004); Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573 (2000); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998); Rachel F. Moran, *Bakke's Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 UC DAVIS L. REV. 2569 (2019); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); see also *Grutter v. Bollinger*, 539 U.S. 306, 351-52 (2003) (Thomas, J., concurring in part); Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787, 805 (2005).

²⁴ For such scholarly literature on the effectiveness of diversity in producing a more inclusive student experience, see, for example, DEREK BOK, JAMES SHULMAN & WILLIAM G. BOWEN, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998); JOHN M. CAREY, KATHERINE CLAYTON & YUSAKU HORIUCHI, *CAMPUS DIVERSITY: THE HIDDEN CONSENSUS* (2019); Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003); Devon W. Carbado & Mitu Gulati, *What Exactly Is Racial Diversity?*, 91 CALIF. L. REV. 1149 (2003) (reviewing ANDREA GUERRERO, *SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION* (2002)); Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 FORDHAM L. REV. 3115 (2015); Brian T. Fitzpatrick, *The Diversity Lie*, 27 HARV. J.L. & PUB. POL'Y 385 (2003); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425 (2014); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928 (2001); Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

²⁵ For such scholarly literature on the bureaucratization of equality efforts generally, see, for example, FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009); LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* (2016); NANCY LEONG, *IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY* (2021); Soohan Kim, Alexandra Kalev & Frank Dobbin, *Progressive Corporations at Work: The Case of Diversity Programs*, 36 N.Y.U. REV. L. & SOC. CHANGE 171 (2012); Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley*, UT-

though not its author, remains agnostic on whether diversity statements are a useful means towards a noble end. The focus here is on what universities *can* choose to do, not what they should choose.

Ought implies can, as philosophers like to say.²⁶ But the existing literature on diversity statements, necessary as so much of it is, has focused on the former without asking — or defending — what is constitutionally possible. To debate the value and effectiveness of required diversity statements, we first need to know whether and when they can be required. This Article develops a framework for showing universities that *want* to use diversity statements — perhaps to make a statement of their own — how they *can* do so, without violating either the First Amendment or the academic freedom on which their mission depends.

I. REQUIRING DIVERSITY STATEMENTS

Every university has its own experience with diversity, its own struggles with equity and inclusion, and its own approach to advancing those values in the present day. This Part focuses on one such approach: that of the University of California. There are three main reasons for using the UC system as case study. First, UC's evolving efforts to incorporate contributions to diversity into its evaluation of faculty stretches back almost two decades,²⁷ and the University now explicitly perceives itself as a “national model for universities seeking to recognize and credit meritorious contributions that work to reconcile inequalities.”²⁸ Second, as Part II will make clear, the University of California has been the main target of the highest profile *criticism* of diversity statements in recent years. Finally, as a public university subject to the limits of the First Amendment, one with longstanding

Austin, and UW-Madison, 32 LAW & SOC. INQUIRY 985 (2007); Brent K. Nakamura & Lauren B. Edelman, *Bakke at 40: How Diversity Matters in the Employment Context*, 52 UC DAVIS L. REV. 2627 (2019); Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017 (2011).

²⁶ See generally (or maybe *but see*) ALEX KING, WHAT WE OUGHT AND WHAT WE CAN (2019) (providing a critical analysis of this widely held belief).

²⁷ Letter from Harry Green, Chair, Univ. Comm. on Acad. Pers., & Emily Roxworthy, Chair, Univ. Comm. on Affirmative Action & Diversity, Univ. of California, to Bill Jacob, Chair, Acad. Council, Univ. of California (Jan. 2, 2014), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-210-1-d-issuance/apm-210-1-d-iss-ltr-appdx.pdf [<https://perma.cc/5WZF-XJN4>] [hereinafter Green & Roxworthy Letter].

²⁸ Letter from Mary Gilly, Chair, Acad. Council, Univ. of California, to Susan Carlson, Vice Provost, Acad. Pers., Univ. of California, at 2 (Mar. 3, 2015), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-210-1-d-issuance/apm-210-1-d-iss-ltr-appdx.pdf [<https://perma.cc/5WZF-XJN4>] [hereinafter Gilly Letter].

policies protecting academic freedom but also a sordid history of loyalty oaths demanded from its faculty, the University of California is uniquely exposed to criticism. In developing a framework to guide and defend universities' diversity statement requirements, this Article isn't trying to make things easy on itself.

The following Sections detail how and why diversity statements came about at the University of California. They describe UC's recent experiments using diversity statements in new and expanded ways, and the variety of rubrics that have been developed to evaluate those statements.

A. Different Requirements

In 2018, UCLA's Provost announced that his school would join most of the other UC campuses and require applicants for faculty positions to submit an "EDI statement" that describes the candidate's past, present, and future (planned) contributions to equity, diversity, and inclusion.²⁹ Going further than most other UC campuses, UCLA would also, from 2019 on, require diversity statements from its current faculty when they go up for tenure or promotion.³⁰

UCLA's decision to mandate diversity statements within all faculty hiring and advancement was the culmination of work stretching back to 2002, when the President of the UC system convened a panel to examine how to include outreach to "disadvantaged and underrepresented populations" into the University's research and teaching mission.³¹ Over the following four years, faculty committees developed an addition to the system-wide Academic Personnel Manual ("APM") "that would instruct campus reviewers to evaluate contributions to diversity and equal opportunity in all three categories of the academic appointment, review, and promotion process (teaching, research, and service)."³² The policy, APM 210-1.d, took effect in 2006, the same year that the University of California adopted an official

²⁹ Waugh Memo, *supra* note 3.

³⁰ *Id.*; *see also* UCLA OFF. OF EQUITY, DIVERSITY & INCLUSION, EQUITY, DIVERSITY AND INCLUSION (EDI) STATEMENT FAQs 1 (2019), <https://ucla.app.box.com/v/edi-statement-faqs> [<https://perma.cc/5FRZ-L543>] [hereinafter UCLA FAQs].

³¹ Green & Roxworthy Letter, *supra* note 27.

³² *Id.*

diversity statement of its own,³³ enshrined in 2007 as Regents Policy 4400.³⁴

The UC Diversity Statement made two important moves. First, it defined “diversity” to refer “to the variety of personal experiences, values, and worldviews that arise from differences of culture and circumstance,” including “race, ethnicity, gender, age, religion, language, abilities/disabilities, sexual orientation, gender identity, socioeconomic status, and geographic region, and more.”³⁵ Second, the policy maintained that diversity should be “integral to the University’s achievement of excellence” and that seeking to “achieve diversity among its student bodies and among its employees” is part of the University’s “core mission.”³⁶

Meanwhile, APM 210-1.d required that contributions promoting equal opportunity and diversity “should be given due recognition in the academic personnel process,” but left it to individual campuses to decide how to recognize those contributions.³⁷ Four years of work revising APM 210-1.d, from 2011 to 2015, ultimately led to a clarification that contributions to diversity “should be evaluated and credited in the same way as other faculty achievements.”³⁸ Faculty committees at the time recommended that every UC campus provide a space within review files where faculty and applicants “can, if they wish, document their contributions to diversity.”³⁹

By 2017, UC’s Academic Personnel office was expressing worries that campus efforts to increase racial and gender diversity on the faculty were making “limited progress” and that faculty search and review committees needed “to be aware of APM - 210-1-d and *understand how*

³³ See Letter from Robert C. Dynes, President, Univ. of California, to Chancellors, Univ. of California (June 30, 2006), <https://policy.ucop.edu/doc/4000375/Diversity> [<https://perma.cc/FUN4-NVY4>] [hereinafter UC Diversity Statement].

³⁴ *Regents Policy 4400: Policy on University of California Diversity Statement*, UNIV. OF CAL. BD. OF REGENTS, <https://regents.universityofcalifornia.edu/governance/policies/4400.html> (last amended Sept. 16, 2010) [<https://perma.cc/5EH4-63ZC>] [hereinafter *Regents Policy 4400*].

³⁵ *Id.*

³⁶ *Id.*

³⁷ Green & Roxworthy Letter, *supra* note 27 (“Since 2005, each campus has approached APM 210-1.d autonomously, and its implementation has been uneven and inconsistent across the system.”).

³⁸ Documents from the consultation period can be found at *Chronology of the Consultation Process for APM-210-1-d Effective July 1, 2015*, UNIV. OF CAL. OFF. OF THE PRESIDENT, https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-210-1-d-issuance/apm-210-1-d-iss-ltr-appdx.pdf (last visited Jan. 2, 2022) [<https://perma.cc/PEY8-7R2R>].

³⁹ Green & Roxworthy Letter, *supra* note 27.

to ensure this policy is being followed.”⁴⁰ The office issued guidelines that set no new requirements but emphasized that “in view of the critical need for equity and excellence,” “it is imperative that peer review committees evaluate” faculty’s and applicants’ contributions in those regards.⁴¹ It went on to offer twenty-four examples of what shape those contributions could take, from “research that addresses . . . [r]ace, ethnicity, gender, multiculturalism, and inclusion” to a “record of success advising women and minority graduate students.”⁴² (Notably, given the arguments to come, all of the recommendations focus on actions taken, or invitations or honors received, by the person making the statement — not on their beliefs).

The next system-wide instruction on diversity statements came from the faculty rather than the administration. In 2019, the system-wide faculty committees on Affirmative Action, Diversity, and Equality, on Faculty Welfare, and on Academic Personnel collaborated to produce six recommendations for how DEI statements should be used across the University.⁴³ By that point, eight of UC’s ten campuses were said to require diversity statements from faculty candidates,⁴⁴ and the report recommended making this a system-wide requirement.⁴⁵ It also recommended that, within two years, all campuses use DEI statements in faculty advancement in ways “consistent with each campus’s use of research, teaching, and service statements.”⁴⁶ Further recommendations suggested providing guidance on how to write DEI statements and creating an assessment rubric for evaluating them — although the report did not specify *who* should provide guidance or create a rubric, whether individual departments, campuses, or the University as a whole.⁴⁷

Stepping back, a few general points emerge. First, at the University of California, potential or actual contributions to diversity, equity, and inclusion are generally treated as a plus factor in applications for faculty

⁴⁰ EVALUATING CONTRIBUTIONS, *supra* note 5, at 1 (emphasis in original).

⁴¹ *Id.* at 2.

⁴² *Id.* at 4.

⁴³ JOINT RECOMMENDATIONS, *supra* note 2, at 3-5.

⁴⁴ *Id.* at 2. The outliers were Berkeley and UC Santa Barbara, although nearly all searches at Berkeley request DEI statements, *id.* at 2 n.2, and UCSB now “ask[s] candidates to submit a Statement of Contributions to Diversity, Equity, and Inclusive Excellence.” *Statements of Inclusive Excellence*, UC SANTA BARBARA OFF. OF THE EXEC. VICE CHANCELLOR, <https://evc.ucsb.edu/diversity/inclusive-excellence> (last visited Jan. 2, 2022) [<https://perma.cc/PYT4-KM9B>].

⁴⁵ JOINT RECOMMENDATIONS, *supra* note 2, at 3.

⁴⁶ *Id.* at 5.

⁴⁷ *Id.* at 3.

positions or for tenure or promotion.⁴⁸ This point is a bit more complicated than it might first appear. Plus factors operate differently, after all, in the context of advancement than they do in the context of hiring. Salary bumps might admit of degrees, but you either get the job or you don't. In the latter case, one person's plus factor may be why someone else doesn't get hired. Incidentally, this shows how the choice between mandatory and optional diversity statements doesn't necessarily amount to much. It hardly matters if faculty or applicants choose not to provide a *voluntary* statement or if they write "No DEI contributions during the period under review" in their *mandatory* statement; they will not get the bump either way.

Second, UC has taken pains to emphasize that DEI contributions "should be evaluated and credited on the same basis as other contributions, but should not be understood as constituting a 'fourth leg' of evaluation, along with research and creative activity, teaching, and service."⁴⁹ This Article will repeatedly come back to the idea that DEI contributions should be evaluated analogously to required statements about faculty's research and teaching contributions. As a practical matter, diversity statements are sometimes made as standalone documents. But that doesn't mean that contributions to diversity are something other than a *component* of teaching and research excellence, as UC has repeatedly claimed.⁵⁰

Finally, the policies, guidance, and recommendations above all apply to faculty appointment and advancement *in general* at the University of California or one of its campuses. In the past few years, however, UC has experimented with more targeted diversity initiatives that use diversity statements in more particular ways. Beginning with its 2016 budget, the California legislature has appropriated at least \$2 million a year for "a program for best practices in equal employment opportunity" at the University of California.⁵¹ In deploying those funds, the University Provost asked campuses to compete for funds by developing "strategies that would help UC make progress in the hiring

⁴⁸ See Gilly Letter, *supra* note 28, at 2 ("[T]he original intention of APM 210.1.d was to ensure that faculty efforts in promoting equal opportunity and diversity receive their proper credit in the academic review process.").

⁴⁹ *Id.* at 1.

⁵⁰ See, e.g., UCLA FAQs, *supra* note 30 ("EDI contributions within the categories of research, teaching, and service are inseparable from how the University of California conceives of 'merit.'").

⁵¹ Budget Act of 2016, S.B. 826, 2015–16 Leg., Reg. Sess. (Cal. 2016).

of African-American, Latino(a)/Chicano(a)/Hispanic, and Native American faculty members.”⁵²

The resulting Advancing Faculty Diversity Recruitment Program, now in its sixth year, has provided grants of up to \$500,000 at every campus.⁵³ When applying, campuses have to offer innovative plans for hiring more women and minority faculty — defined again in terms of African-American, Latino, and Native American scholars⁵⁴ — and they have to do so against a state constitutional provision that prohibits “preferential treatment” based on race and sex in public hiring.⁵⁵ One such innovation in particular has garnered much of the attention, and criticism, that we will see below in Part II: the use of diversity statements as a threshold test in hiring.

During the 2018–19 academic year, three UC campuses — Berkeley, Davis, and Riverside — experimented with a new hiring procedure: committees would first get only anonymized versions of applicants’ DEI statements, not their complete files.⁵⁶ Berkeley tried this for five inter-departmental searches cutting across six life sciences departments,⁵⁷ which together have 233 faculty.⁵⁸ Davis ran eight college- or school-wide, open-discipline searches, meaning that hiring could be in any area of, say, the College of Engineering or the School of Education.⁵⁹ At both

⁵² UC OFF. OF THE PRESIDENT, FINAL REPORT ON THE 2016-17 USE OF ONE-TIME FUNDS TO SUPPORT BEST PRACTICES IN EQUAL EMPLOYMENT OPPORTUNITY IN FACULTY EMPLOYMENT 6 (2017), https://www.ucop.edu/faculty-diversity/_files/reports/adv-fac-div-2016-17-final-leg-report.pdf [<https://perma.cc/HB8X-X3ZJ>] [hereinafter 2016-17 REPORT].

⁵³ UC OFF. OF THE PRESIDENT, ADVANCING FACULTY DIVERSITY (AFD) RECRUITMENT: REQUEST FOR PROPOSALS (RFP) FOR 2020-21, at 5-8 (2020), https://www.ucop.edu/faculty-diversity/_files/afd-rfp-2020/afd-rfp-recruitment-2020-22.pdf [<https://perma.cc/Q4BN-L3WE>].

⁵⁴ *Id.* at 10.

⁵⁵ CAL. CONST. art. I, § 31.

⁵⁶ UC OFF. OF THE PRESIDENT, FINAL REPORT ON THE 2018-19 USE OF ONE-TIME FUNDS TO SUPPORT BEST PRACTICES IN EQUAL EMPLOYMENT OPPORTUNITY IN FACULTY EMPLOYMENT 14, 20, 31 (2019), https://www.ucop.edu/faculty-diversity/_files/reports/adv-fac-div-2018-19-final-leg-report.pdf [<https://perma.cc/N7DQ-6UAV>] [hereinafter 2018–19 REPORT].

⁵⁷ INITIATIVE TO ADVANCE FAC. DIVERSITY, EQUITY, & INCLUSION IN THE LIFE SCIS. AT UC BERKELEY, YEAR END SUMMARY REPORT 2018-19, at 2 (2019), https://ofew.berkeley.edu/sites/default/files/life_sciences_initiative_year_end_report_summary.pdf [<https://perma.cc/H9XJ-SUGC>] (“Limiting the first review to contributions in DE&I is itself a dramatic change of emphasis in the typical evaluation process which generally focuses on primarily on research accomplishments. Furthermore, we believe that the redaction of candidate names from these statements reduced unconscious bias.”) [hereinafter BERKELEY REPORT].

⁵⁸ 2018–19 REPORT, *supra* note 56, at 12.

⁵⁹ The eight units at Davis together have 1,021 faculty. *Id.* at 19.

Berkeley and Davis, diversity statements were evaluated as part of an “initial barrier step”;⁶⁰ only “[c]andidates that met a high standard in this area were advanced for further review.”⁶¹ (Exactly what that standard was varied from search to search, since each committee discussed and decided what its “cut-off score” would be.) Meanwhile, Riverside’s math department, with twenty-nine faculty, hired six new members using a procedure that began by considering only research and diversity statements, although faculty could later remove or add to the resulting list once applicants’ full files were revealed.⁶²

Changing the order in which hiring committees evaluate the parts of an application had a dramatic effect on the number of underrepresented minority and women applicants who became finalists and were ultimately hired. At Riverside, minority and women candidates comprised 8.3% and 23.9% of the applicants, respectively, whereas those numbers rose to 14.3% and 46.4% at the finalist stage and 16.7% and 50% at hiring.⁶³ At Berkeley those numbers were 14.3%/36.2%/40% for underrepresented minority candidates and 39.5%/50%/46.7% for women.⁶⁴ More dramatically still, at Davis, 32.7% of the applicants for Davis’s eight positions were underrepresented minority scholars, but 82.1% of the finalists and all of the hires were; women comprised 44.5% of the applicants, 57.1% of the finalists, and 87.5% of the hires.⁶⁵

Clearly, prioritizing diversity statements — and, at Berkeley and Davis, setting a minimum required “score” for DEI contributions — produced tangible effects in the hiring process. But it is worth reiterating that those procedural innovations were made within a relatively small number of searches that all shared a distinctive focus.

At Davis, for example, instead of advertising, say, for a bankruptcy scholar or an immigration clinician, the School of Law announced that it was looking to hire “faculty with a strong commitment to teaching, research and service that will promote the success of underrepresented minority students (African-American, Latino(a)/ Chicano(a)/ Hispanic, and Native American) and address the needs of our increasingly diverse

⁶⁰ *Id.* at 23.

⁶¹ *Id.* at 14.

⁶² *Id.* at 29-31. Riverside’s College of Engineering had experimented with a similar procedure in three searches in 2016–17, the first year of AFD funding. See 2016–17 REPORT, *supra* note 52, at 20.

⁶³ 2018–19 REPORT, *supra* note 56, at 32-33.

⁶⁴ *Id.* at 16-17.

⁶⁵ *Id.* at 22-23.

state.”⁶⁶ Not only is the conception of diversity more narrowly defined here than it is in standard faculty searches (or in the University’s Diversity Statement⁶⁷), but contributions to diversity, so defined, are the primary element of the job description. The specificity of what is sought here makes the job criterion more akin to “expertise in bankruptcy” than “demonstrated teaching skill” in the typical law faculty job description. Parts II and III will have much to say about why this distinction is important.

Complicating this last point, however, UC’s Advancing Faculty Diversity initiatives have sometimes been billed not just as self-contained efforts to diversify the faculty, but also as experiments for how diversity statements might be used in faculty hiring more broadly.⁶⁸ At Berkeley, for example, the life sciences departments that participated in the 2018 AFD initiative “agreed to incorporate [its] interventions in all future faculty recruitments,” a move that, it admits, “has been more difficult in some departments and has met resistance by a small number of senior faculty members.”⁶⁹ Riverside has said that evaluating diversity and research statements before the remainder of applications is “the most successful outcome” of its 2018 AFD experiment in the math department. Before the onset of COVID, it was planning to use that practice both for additional AFD searches *and* for regular faculty searches targeting specific research areas in two of its physical sciences departments.⁷⁰ Davis, meanwhile, launched a two-year study, involving three of its schools, which conducted some searches the ordinary way and, following Riverside’s lead, ran other searches in which anonymized diversity *and* research statements are scored, and some candidates are cut, before the rest of applicants’ files are distributed.⁷¹ More recently

⁶⁶ Memorandum, Univ. of California, Davis, Open Rank Faculty Position in Law (Jan. 18, 2019) (on file with author). This language is far stronger than the standard search ad’s talk of valuing or welcoming contributions to diversity. Cf. UNIV. OF CAL., DAVIS, ADVERTISING UC DAVIS’ COMMITMENT TO DIVERSITY AND INCLUSION IN LADDER RANK RECRUITMENTS (2016), <https://aadocs.ucdavis.edu/policies/recruitments-and-removals/how-to-advertise-commitment-to-diversity-inclusion.pdf> [<https://perma.cc/K8B7-6MFU>].

⁶⁷ See UC Diversity Statement, *supra* note 33.

⁶⁸ 2018–19 REPORT, *supra* note 56, at 8 (targeting AFD grants on units that “need to make progress in faculty diversity” but also “have the capacity to develop practices than can be adopted more broadly with sufficient future funding”).

⁶⁹ BERKELEY REPORT, *supra* note 57, at 1.

⁷⁰ UC RIVERSIDE, COLL. OF NAT. & AGRIC. SCIS., ADVANCING FACULTY DIVERSITY IN THE PHYSICAL SCIENCES 1-2 (2019) (public records disclosure on file with author).

⁷¹ 2019-2021: *Prioritizing Academic Excellence in Research/Teaching and Contributions to DEI*, UC DAVIS, <https://academicaffairs.ucdavis.edu/uc-davis-pilot-study-prioritize-academic-excellence-research-and-contributions-diversity-equity-and> (last visited Jan. 2, 2022) [<https://perma.cc/6BMD-M6EP>].

still, UC Santa Cruz has received funding to offer individual departments modest financial incentives to opt in to a hiring system where non-anonymized research and DEI statements are scored before the rest of candidates' applications, and finalists are asked to give short talks on their DEI contributions during their campus visits.⁷²

It remains to be seen, then, how broadly UC's recent experiments in hiring — particularly their early evaluation of DEI statements and their use of rubrics — will be adopted, both on other campuses and in hiring focused chiefly on research or curricular needs beyond diversity.

B. Different Rubrics

As or more important than universities' choices about requiring diversity statements are their means of evaluating them. At the University of California, the faculty senate's 2019 recommendations on the use of DEI statements includes the suggestion that someone — it is not specified who this should be — “[c]reate an assessment rubric” to evaluate candidates' ability to: (1) “[a]rticulate awareness” of DEI issues, “especially as they relate to underrepresented groups in higher education”; (2) document their efforts to advance DEI; and (3) offer “specific, concrete plans for future contributions.”⁷³ The 2019 Recommendations cite to and take their language from the three criteria of a UC Irvine rubric no longer offered among Irvine's own faculty recruitment resources online.⁷⁴ Irvine's rubric was the one used,

⁷² HERBIE LEE, UC SANTA CRUZ, ADVANCING FACULTY DIVERSITY-RECRUITMENT 2020-21 PROPOSAL: INSTITUTIONALIZATION OF INCLUSIVE HIRING BEST PRACTICES (2020) (public records disclosure on file with author). In their most recent hiring season, departments at UCSC have employed a mix of approaches, with some initially evaluating candidates' DEI statements alone, see *Job Posting, Biomolecular Engineering Department: Assistant Professors-Bioengineers*, UC SANTA CRUZ, <https://recruit.ucsc.edu/JPF01161> (last visited Mar. 24, 2022) [<https://perma.cc/JF7D-HCV4>], others initially evaluating DEI statements together with teaching statements, see *Job Posting, Art: Assistant Professor in Social Design*, UC SANTA CRUZ, <https://recruit.ucsc.edu/JPF01154> (last visited Mar. 24, 2022) [<https://perma.cc/36LT-U99S>], others initially evaluating DEI statements together with research statements, see *Job Posting, Philosophy: Assistant Professor (Initial Review 11/19/21)*, UC SANTA CRUZ, <https://recruit.ucsc.edu/JPF01123> (last visited Mar. 24, 2022) [<https://perma.cc/624N-WL8Q>]; and still other departments hiring the traditional way, with no initial screening round at all, see *Job Posting, Computer Science and Engineering Department: Adjunct Professor Pool (Ongoing)*, UC SANTA CRUZ (last visited Mar. 24, 2022) <https://recruit.ucsc.edu/JPF01083> [<https://perma.cc/R6S3-LKX4>].

⁷³ JOINT RECOMMENDATIONS, *supra* note 2, at 3.

⁷⁴ See *Recruitment Resources*, UCI OFF. OF INCLUSIVE EXCELLENCE, <https://inclusion.uci.edu/recruitment-resources> (last visited Jan. 2, 2022) [<https://perma.cc/MRK3-4HAC>] [hereinafter *UCI Recruitment Resources*].

though, by UC Davis's Law and Education Schools during their 2018 AFD initiative hiring searches.⁷⁵

To say that points should be awarded for awareness, actions, and future plans related to diversity, equity, and inclusion is to operate at a fairly high level of generality. At the opposite end of the spectrum is a rubric developed by administrators at UC Berkeley in 2018, reproduced in Figure 1. Interestingly, this is the rubric UC Irvine now provides on its Inclusive Excellence Office's recruitment resources page.⁷⁶

Berkeley has since tweaked this rubric,⁷⁷ eliminating the bullet points about low scores for candidates who seem uncomfortable discussing diversity-related issues and middle scores for membership in organizations supporting underrepresented individuals; the revised rubric also clarifies that a low score for "plans" should be given to a candidate who "[e]xplicitly states the intention to ignore the varying backgrounds of their students and 'treat everyone the same.'"⁷⁸

Berkeley's grid is meant to apply to any faculty search. The school makes clear that its examples can be modified "to fit the academic and disciplinary backgrounds of applicants in a particular search," although it also recommends that faculty committees consult with the administration before adding categories for evaluation "to ensure that the assessment follows best practices and falls within permissible legal parameters."⁷⁹

⁷⁵ UNIV. OF CAL., DAVIS, DIVERSITY STATEMENT EVALUATION GRID (2018) (on file with the author).


⁷⁶ *UCI Recruitment Resources*, *supra* note 74 (including Berkeley's rubric under the tab "IE Activities/Diversity Statements").

⁷⁷ *See Rubric for Assessing Candidate Contributions to Diversity, Equity, Inclusion, and Belonging*, UC BERKELEY OFF. FOR FAC. EQUITY & WELFARE, <https://ofew.berkeley.edu/recruitment/contributions-diversity/rubric-assessing-candidate-contributions-diversity-equity-and> (last visited Jan. 2, 2022) [<https://perma.cc/8GX4-7YLA>].

⁷⁸ *Id.*

⁷⁹ *Id.*

Figure 1:

Rubric to Assess Candidate Contributions to Diversity, Equity, and Inclusion	
Knowledge about Diversity, Equity, and Inclusion	
1 - 2	<ul style="list-style-type: none"> • Little expressed knowledge of, or experience with, dimensions of diversity that result from different identities. Defines diversity only in terms of different areas of study or different nationalities, but doesn't discuss gender or ethnicity/race. Discusses diversity in vague terms, such as "diversity is important for science." May state having had little experience with these issues because of lack of exposure, but then not provide any evidence of having informed themselves. Or may discount the importance of diversity. • Little demonstrated understanding of demographic data related to diversity in higher education or in their discipline. May use vague statements such as "the field of History definitely needs more women." • Seems uncomfortable discussing diversity-related issues. May state that he or she "just hasn't had much of a chance to think about these issues yet." • Seems not to be aware of, or understand the personal challenges that underrepresented individuals face in academia, or feel any personal responsibility for helping to eliminate barriers. For example, may state that it's better not to have outreach or affinity groups aimed at underrepresented individuals because it keeps them separate from everyone else, or will make them feel less valued.
3	<ul style="list-style-type: none"> • Individuals receiving a rating of "3" in the "Knowledge" dimension will likely show aspects of both "1-2" and "4-5" ratings. For example, they may express little understanding of demographic data related to diversity, and have less experience and interest in dimensions of diversity, but show a strong understanding of challenges faced by individuals who are underrepresented and the need to eliminate barriers, and be comfortable discussing diversity-related issues.
4 - 5	<ul style="list-style-type: none"> • Clear knowledge of, experience with, and interest in dimensions of diversity that result from different identities, such as ethnic, socioeconomic, racial, gender, sexual orientation, disability, and cultural differences. This understanding can result from personal experiences as well as an investment in learning about the experiences of those with identities different from their own. • Is aware of demographic data related to diversity in higher education. Discusses the underrepresentation of many groups and the consequences for higher education or for the discipline. • Comfort discussing diversity-related issues (including distinctions and connections between diversity, equity, and inclusion), both in writing, and in a job talk session and one-on-one meetings with students, staff, and faculty. • Understands the challenges faced by underrepresented individuals, and the need for all students and faculty to work to identify and eliminate barriers to their full and equitable participation and advancement. • Discusses diversity, equity, and inclusion as core values that every faculty member should actively contribute to advancing.
Track Record in Advancing Diversity, Equity, and Inclusion	
1 - 2	<ul style="list-style-type: none"> • Participated in no specific activities, or only one or two limited activities (limited in terms of time, investment, or role). • Only mentions activities that are already the expectation of faculty as evidence of commitment and involvement (for example, "I always invite and welcome students from all backgrounds to participate in my research lab, and in fact have mentored several women." Mentoring women scientists may be an important part of an established track record but it would be less significant if it were one of the only activities undertaken and it wasn't clear that the candidate actively conducted outreach to encourage women to join the lab. • Descriptions of activities are brief, vague, or describe being involved only peripherally. Or the only activities were oriented toward informing oneself (for example, attended a workshop at a conference).
 Office for Faculty Equity & Welfare - August 2018	

3	<ul style="list-style-type: none"> • May have participated extensively in a single activity. Less clear that there is an established track record. • Limited participation at the periphery in numerous activities, or participation in only one area, such as their research to the exclusion of teaching and service. • In describing mentoring of underrepresented students, mentions specific strategies used for effective mentoring, or awareness of the barriers underrepresented students face and how to incorporate the ideas into their mentoring • Membership in a student or professional organization that supports underrepresented individuals
4 - 5	<ul style="list-style-type: none"> • Describes multiple activities in depth, with detailed information about both their role in the activities and the outcomes. Activities may span research, teaching and service, and could include applying their research skills or expertise to investigating diversity, equity and inclusion. • Consistent track record that spans multiple years (for example, applicants for assistant professor positions can describe activities undertaken or participated in as an undergraduate, graduate student and postdoctoral scholar) • Roles taken were significant and appropriate for career stage (e.g., a candidate who is already an assistant professor may have developed and tested pedagogy for an inclusive classroom and learning environment, while a current graduate student may have volunteered for an extended period of time for an organization or group that seeks to increase the representation of underrepresented groups in science). • Organized or spoken at workshops or other events (depending on career stage) aimed at increasing others' understanding of diversity, equity, and inclusion as one aspect of their track record. • Served as a leader in a student or professional organization that supports underrepresented individuals
Plans for Advancing Diversity, Equity, and Inclusion	
1 - 2	<ul style="list-style-type: none"> • Vague or no statements about what they would do at Berkeley if hired. May even feel doing so would be the responsibility of someone else. • Describes only activities that are already the expectation of Berkeley faculty (mentoring, treating all students the same regardless of background, etc). • States that would be happy to "help out" but seems to expect the University or department to invite or assign them to activities.
3	<ul style="list-style-type: none"> • Mentions plans or ideas but more is expected for their career stage. Plans or ideas lacking in detail or clear purpose (for example, if "outreach" is proposed, who is the specific target, what is the type of engagement, and what are the expected outcomes? What are the specific roles and responsibilities of the faculty member?)
4 - 5	<ul style="list-style-type: none"> • Clear and detailed ideas for what existing programs they would get involved with and what new ideas they have for advancing equity and inclusion at Berkeley and within their field, through their research, teaching, and/or service. Level of proposed involvement commensurate with career level (for example, a new assistant professor may plan to undertake one major activity within the department over the first couple of years, conduct outreach to hire a diverse group of students to work in their lab, seek to mentor several underrepresented students, and co-chair a subcommittee or lead a workshop for a national conference. A new tenured faculty member would be expected to have more department, campus-wide, and national impact, including leadership). • Intends to be a strong advocate for diversity, equity and inclusion within the department/school/college and also their field. • References activities already taking place at Berkeley and in the field, and how additional or new activities would advance equity and inclusion. • Addresses multiple areas of need (for example, classroom climate, the laboratory, conferences)
 Office for Faculty Equity & Welfare - August 2018	

During the 2018 AFD searches, several schools at UC Davis adapted the Berkeley rubric, specifying (in accordance with the AFD initiative's goals) that, for those searches, "different identities" should be taken to refer especially to "African-Americans, Latin(x)/Hispanics, and Native

Americans.”⁸⁰ Participants in the AFD grant also added a bullet point suggesting that low scores should be given in the first category, “Awareness,” to candidates who “provide reasons for not considering diversity in hiring, or see[] it as antithetical to academic freedom or the university’s research mission.”⁸¹

Less clear, particularly given hiring disruptions during the pandemic, is whether faculty hiring committees at Davis are applying this or similar rubrics — or any explicit rubrics at all in their *ordinary* searches. A 2019 letter from Davis’s Provost instructed deans to score diversity statements “with rubrics provided by Academic Affairs,”⁸² but that office now only provides public guidance to *candidates* on how to write diversity statements, not to departments on how specifically to score them.⁸³ Other campuses provide sample rubrics that “departments can modify as necessary for their own uses.”⁸⁴

As we will see in the Parts that follow, how specific these rubrics get, how broadly they get applied, and who makes those decisions all end up mattering when evaluating the critiques of diversity statements that are increasingly voiced.

⁸⁰ Public records requests show that Davis’s College of Agricultural and Environmental Sciences, College of Biological Sciences, and Veterinary School all used the modified Berkeley rubric. See UNIV. OF CAL., DAVIS, *supra* note 75.

⁸¹ *Id.*

⁸² Letter from Ralph J. Hexter, Provost & Exec. V.C., Univ. of California, Davis, to Deans, Univ. of California, Davis 2 (June 13, 2019), https://asis.ucdavis.edu/sitefarm/file.cfm?view=rfc_request&id=1416 [<https://perma.cc/GX3Q-URHR>] [hereinafter Hexter Letter].

⁸³ See *Guidelines for Writing a Statement of Contributions to Diversity, Equity, and Inclusion*, UC DAVIS, <https://academicaffairs.ucdavis.edu/guidelines-writing-diversity-statement> (last visited Jan. 2, 2022) [<https://perma.cc/5H86-ASQG>] [hereinafter *Diversity Statement Guidelines*]. A June 29, 2019, email from Davis’s Vice Provost for Academic Affairs, disclosed through public records requests and file with the author, points search committees to the rubrics used in the AFD searches. E-mail from Philip H. Kass, Vice Provost – Acad. Affs., U.C. Davis (on file with the author).

⁸⁴ *Sample Candidate Evaluation Tool*, UCLA, <https://ucla.app.box.com/s/xmchcoo68ak0gtx852nzzjrts41x2twp> (last visited Jan. 2, 2022) [<https://perma.cc/SR5V-9BRH>]; see also ACAD. PERS. OFF., UNIV. OF CAL., MERCED, RECRUITMENT TOOLKIT §§ 12-14 (2017) https://academicpersonnel.ucmerced.edu/sites/academicpersonnel.ucmerced.edu/files/page/documents/00.complete_toolkit_0.pdf [<https://perma.cc/PN4C-VNHG>] (adapting Irvine’s statement). For an example of a medical campus tailoring evaluation criteria to its faculty’s distinctive work, see *Contributions to Diversity Statement*, UCSF OFF. OF DIVERSITY & OUTREACH, <https://diversity.ucsf.edu/contributions-to-diversity-statement> (last visited Jan. 2, 2022) [<https://perma.cc/JP54-543E>].

II. CRITIQUING DIVERSITY STATEMENTS

When UCLA's Provost announced in 2018 that the university would be making diversity statements mandatory, conservative commentator Heather Mac Donald was one of the first to notice, asking in the *Los Angeles Times* whether Albert Einstein would now be able to get a job at UCLA.⁸⁵ Hers was a policy argument: that universities are generally too focused on the "trivialities of identity."⁸⁶ But claims of illegality soon followed. Northwestern law professor John McGinnis was soon blogging about what he called UC's "new loyalty oath," comparing it to the religious tests Oxford and Cambridge imposed in the nineteenth century, and worrying about the academic freedom problems and "serious First Amendment issues" the mandates raised.⁸⁷ A month later, the former dean of Harvard Medical School, Jeffrey Flier, entered the fray, tweeting that UCLA's policy "is an affront to academic freedom."⁸⁸

Flier's tweet linked to an analysis by the Executive Director of FIRE — the Foundation for Individual Rights in Education, a leading campus free speech advocacy group — which claimed that UCLA's new requirements threatened academic freedom and public trust in academia.⁸⁹ Professors' credibility and influence, FIRE argued, depends on popular perceptions that their work is driven by "scientific

⁸⁵ Heather Mac Donald, Opinion, *UCLA's Infatuation with Diversity Is a Costly Diversion from Its True Mission*, L.A. TIMES (Sept. 2, 2018, 4:05 AM PT), <https://www.latimes.com/opinion/op-ed/la-oe-mac-donald-diversity-ucla-20180902-story.html> [<https://perma.cc/LLE4-YH7X>].

⁸⁶ *Id.* ("UCLA and the rest of the University of California have been engulfed by the diversity obsession. The campuses are infatuated with group identity and difference."). See generally HEATHER MAC DONALD, *THE DIVERSITY DELUSION: HOW RACE AND GENDER PANDERING CORRUPT THE UNIVERSITY AND UNDERMINE OUR CULTURE* (2018) (discussing how the broadening of diversity in education has divided society instead of building bridges).

⁸⁷ McGinnis, *supra* note 22.

⁸⁸ Jeffrey Flier (@jflier), TWITTER (Nov. 10, 2018, 3:28 PM), <https://twitter.com/jflier/status/1061400170515054593> [<https://perma.cc/2BYL-F6PK>] [hereinafter Flier Tweet]; see also Colleen Flaherty, *Making a Statement on Diversity Statements*, INSIDE HIGHER ED (Nov. 12, 2018), <https://www.insidehighered.com/news/2018/11/12/former-harvard-deans-tweet-against-required-faculty-diversity-statements-sets-debate> [<https://perma.cc/SV2G-SE7Z>] ("Flier's comment — given Harvard's perennial cachet and the fact that it's currently embroiled in its own legal battle over how it factors in diversity in admissions — attracted widespread attention.").

⁸⁹ Robert Shibley, *UCLA Diversity Requirement Threatens Academic Freedom, Trust in Academia*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. ("FIRE") (Nov. 9, 2018), <https://www.thefire.org/ucla-diversity-requirement-threatens-academic-freedom-trust-in-academia/> [<https://perma.cc/6TB4-C5MT>].

conscience”⁹⁰ rather than ideology.⁹¹ But on FIRE’s telling, UCLA’s requirements are a demand of managers, not “the faculty at large.”⁹² Worse, said FIRE, they are “politically loaded”:

If you doubt this is likely to be used a[s] an ideological screening tool, imagine UCLA replacing “equity, diversity, and inclusion” with “capitalism, freedom, and patriotism,” and providing examples that happen not to include any activities or opinions that would make mainstream Republicans uncomfortable, and see if your opinion changes.⁹³

“Such an idea is hardly far-fetched,” says FIRE, linking to information about UC’s loyalty oath controversy in the mid-twentieth century,⁹⁴ when faculty were made to swear that they were not members of the Communist Party.⁹⁵

This was not FIRE’s first time making these arguments, and the University of California was not its first target. As far back as 2001, FIRE succeeded in convincing a public community college in Pennsylvania to stop asking job applicants to describe how their “commitment to diversity” is demonstrated in their work.⁹⁶ Already in 2001, FIRE was arguing that requiring faculty to show their commitment to diversity was “as inimical to academic and intellectual freedom as any [oath] that

⁹⁰ This phrase comes from AM. ASS’N OF UNIV. PROFESSORS, AAUP’S 1915 DECLARATION OF PRINCIPLES 4 (1915), https://www.aaup-ui.org/Documents/Principles/Gen_Dec_Princ.pdf [<https://perma.cc/RJE9-KPVJ>] [hereinafter 1915 AAUP PRINCIPLES] (canonical statement of academic freedom principles). See generally MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 29-52 (2009) (describing the 1915 Statement as the “first systematic articulation of the logic and structure of academic freedom in America, and arguable the greatest”).

⁹¹ Shibley, *supra* note 89.

⁹² *Id.*

⁹³ *Id.*; accord McGinnis, *supra* note 22 (“Let’s substitute a statement that would require all applicants to tell the university how they had and how they would promote patriotism.”).

⁹⁴ Shibley, *supra* note 89 (citing *The Loyalty Oath Controversy*, UC HIST. DIGIT. ARCHIVES, https://www.lib.berkeley.edu/uchistory/archives_exhibits/loyaltyoath/index.html (last updated Sept. 29, 2006) [<https://perma.cc/MZ6F-S6FB>]).

⁹⁵ See *infra* notes 246–264 and accompanying text.

⁹⁶ *Loyalty Oath Overturned at a Pennsylvania College*, FIRE (Mar. 12, 2001), <https://www.thefire.org/loyalty-oath-overturned-at-a-pennsylvania-college-3/> [<https://perma.cc/6N92-9HGX>]; see also Robin Wilson, *Diversity Question on College’s Job Application Amounts to ‘Loyalty Oath,’ Group Contends*, CHRON. HIGHER EDUC. (Feb. 21, 2001), https://www.chronicle.com/article/diversity-question-on-colleges-job-application-amounts-to-loyalty-oath-group-contends/?cid2=gen_login_refresh&cid=gen_sign_in [<https://perma.cc/5FLW-3RNM>]; Bucks College Letter, *supra* note 15.

arose during the sad days of McCarthyism.”⁹⁷ For a public school to do so, it added, would violate its “constitutional obligation to content neutrality” and the First Amendment’s prohibition against compelled speech.⁹⁸

In 2009, FIRE turned its sights on Virginia Tech and its requirement that professors seeking promotion or tenure describe their “engagement in diversity-related initiatives.”⁹⁹ FIRE was joined by the National Associations of Scholars (“NAS”), a conservative higher education reform organization, which referred to diversity statements as “litmus tests for tenure.”¹⁰⁰ FIRE and NAS never declared victory there, as they had in Pennsylvania. But they did succeed in setting the terms of the debate moving forward.

By 2019, talk of litmus tests and loyalty oaths began bubbling up from tweets and blog posts to opinion essays, legal scholarship, and litigation planning. In early 2019, Dean Flier turned his retweet of FIRE’s statement into an op-ed in the *Chronicle of Higher Education*, where he worried both that mandatory DEI statements are a “political litmus test” and that “diversity,” “equity,” and “inclusion” are problematically vague.¹⁰¹ Criticism came from within UC as well. Abigail Thompson, chair of UC Davis’s math department and vice-president of the American Mathematical Society, published essays in late 2019, first in the Society’s professional journal¹⁰² and then in the *Wall Street Journal*, where the headline read: “The University’s New Loyalty Oath: Required ‘diversity and inclusion’ statements amount to a political litmus test for hiring.”¹⁰³

⁹⁷ Bucks College Letter, *supra* note 15.

⁹⁸ *Id.* (“Your inquisition into private views of ‘diversity’ would force potential hires to confess both by word and by act their faith in the opinion that ‘diversity’ was essential to their teaching and academic life.”).

⁹⁹ Kissel Letter, *supra* note 15, at 7.

¹⁰⁰ Ashley Thorne, “Diversity” and “Inclusion” Litmus Tests for Tenure, NAT’L ASS’N OF SCHOLARS (July 8, 2015), https://www.nas.org/blogs/article/diversity_and_inclusion_litmus_tests_for_tenure [https://perma.cc/9R2Q-W2ED]; see also OR. ASS’N OF SCHOLARS, THE IMPOSITION OF DIVERSITY STATEMENTS ON FACULTY HIRING AND PROMOTION AT OREGON UNIVERSITIES 1 (2017), www.oregonscholars.org/wp-content/uploads/2017/01/DiversityStatements_Rev16Mar17.pdf [https://perma.cc/TD4M-859H].

¹⁰¹ Jeffrey Flier, Opinion, *Against Diversity Statements*, CHRON. HIGHER EDUC. (Jan. 3, 2019), <https://www.chronicle.com/article/against-diversity-statements/> [https://perma.cc/C7PY-7SFK] [hereinafter *Against Diversity Statements*].

¹⁰² Abigail Thompson, *A Word from . . .*, 66 NOTICES AM. MATHEMATICAL SOC’Y 1778, 1778-79 (2019) [hereinafter *A Word from . . .*].

¹⁰³ Thompson, *New Loyalty Oath*, *supra* note 7.

Thompson's op-ed garnered public pushback from her campus's administration,¹⁰⁴ but also support from prominent academic bloggers,¹⁰⁵ George Will's column in the *Washington Post*,¹⁰⁶ litigators investigating UC's policies,¹⁰⁷ and, most recently, Richard Epstein, writing in the *University of Illinois Law Review*.¹⁰⁸ Similar claims about loyalty oaths and litmus tests are repeated in each. But four of these commentators have expanded on these claims in ways worth noting.

First is Epstein, who sees diversity statements as part of a "civil rights juggernaut" that acts as though "every purported social consensus deserves unanimous support, thereby leaving no room for dissenters."¹⁰⁹ Describing the recent diversity hiring initiatives at Berkeley and Davis in some detail, Epstein doesn't just analogize them to loyalty oaths; he argues that mandated diversity statements are actually worse, since the anti-Communist fervor was at least motivated

¹⁰⁴ *May and Tull Defend Diversity-contribution Statements*, UC DAVIS (Dec. 26, 2019), <https://leadership.ucdavis.edu/news/may-and-tull-defend-diversity-contribution-statements> [<https://perma.cc/M7DN-JF4H>] ("[N]ot asking questions about a candidate's readiness and potential for serving the diverse population of students in California, the most diverse state in the nation, would be negligent."); see also Gary S. May & Renetta Garrison Tull, *UC Davis Defends Its 'Diversity Statements'*, WALL ST. J. (Dec. 26, 2019, 3:33 PM ET), <https://www.wsj.com/articles/uc-davis-defends-its-diversity-statements-11577392382> [<https://perma.cc/C5JJ-9JRM>].

¹⁰⁵ E.g., John Cochrane, *Wokeademia*, GRUMPY ECONOMIST (Jan. 30, 2020, 11:25 AM), <https://johnhcochrane.blogspot.com/2020/01/wokeademia.html> [<https://perma.cc/M44U-FA6R>]; Jerry Coyne, *UC Davis Math Professor Demonized for Criticizing Required "Diversity" Statements for Academic Jobs*, WHY EVOLUTION IS TRUE (Nov. 24, 2019, 11:00 AM), <https://whyevolutionistrue.com/2019/11/24/uc-davis-math-professor-demonized-for-criticizing-required-diversity-statements-for-academic-jobs/> [<https://perma.cc/NMH7-2FUV>]; Brian Leiter, *Mathematician Abigail Thompson Now Being Pilloried for Opposing Mandatory "Diversity Statements" in the UC System*, LEITER REPS.: A PHIL. BLOG (Nov. 26, 2019, 9:32 AM), <https://leiterreports.typepad.com/blog/2019/11/mathematician-abigail-thompson-now-being-pilloried-for-opposing-mandatory-diversity-statements-int-h.html> [<https://perma.cc/E8LD-NVS9>]; Brian Leiter, *Mathematician Abigail Thompson (UC Davis) on the "Diversity" Loyalty Oaths*, LEITER REPS.: A PHIL. BLOG (Dec. 20, 2019, 1:26 PM), <https://leiterreports.typepad.com/blog/2019/12/mathematician-abigail-thompson-uc-davis-on-the-diversity-loyalty-oaths.html> [<https://perma.cc/T7D5-FY32>].

¹⁰⁶ George F. Will, *Higher Education's Mandatory Political Participation*, WASH. POST (Mar. 11, 2020), https://www.washingtonpost.com/opinions/higher-educations-mandatory-political-participation/2020/03/10/7a119cf8-62fe-11ea-845d-e35b0234b136_story.html [<https://perma.cc/65SA-Y8WU>].

¹⁰⁷ E.g., Ortner, *What is UC Davis Hiding?*, *supra* note 13.

¹⁰⁸ Epstein, *supra* note 8, at 1568-69.

¹⁰⁹ *Id.* at 1545.

by concerns about national security — a governmental interest Epstein sees as more compelling than the educational benefits of diversity.¹¹⁰

Epstein's law review article cites the blog of Chicago law professor Brian Leiter, whose posts have referred to UC's policies as "a lawsuit for unconstitutional viewpoint discrimination (and maybe also race discrimination) waiting to happen";¹¹¹ have recommended that job applicants to UC use their diversity statement to make a constitutional objection to the requirement;¹¹² and have repeatedly referred potential plaintiffs to Daniel Ortner at the Pacific Legal Foundation for free legal representation.¹¹³

Leiter clarified and expanded on his constitutional claims in a subsequent *Chronicle of Higher Education* essay entitled "The Legal Problem with Diversity Statements."¹¹⁴ "The problem," Leiter wrote, "is that the new diversity statements . . . requir[e] candidates to profess allegiance to a controversial set of moral and political views that have little or no relationship to a faculty member's pedagogical and scholarly duties."¹¹⁵ After gestures toward case law on compelled speech, freedom of association, and vagueness,¹¹⁶ Leiter says the real problem with UC's mandated diversity statements is that they "constitute 'viewpoint discrimination.'" He claims that Berkeley is "conditioning employment on professing belief that racial and gender diversity are more important, for example, than diversity of intellectual methodology or political viewpoint" and "in effect, on believing that *Bakke*," the Supreme Court's

¹¹⁰ *Id.* at 1568; *cf.* *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) ("Where the Court has accepted only national security . . . as a justification for racial discrimination, I conclude that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity.'").

¹¹¹ Leiter, *Berkeley "Diversity Statements" in Action*, *supra* note 12.

¹¹² *Id.*

¹¹³ Brian Leiter, *Have You Been Rejected in a Search Requiring a Mandatory "Diversity Statement"?*, LEITER REPS.: A PHIL. BLOG (Jan. 1, 2020, 1:13 PM), <https://leiterreports.typepad.com/blog/2020/01/have-you-been-rejected-in-a-search-requiring-a-mandatory-diversity-statement.html> [<https://perma.cc/6BRQ-LZ87>]; Leiter, *Were You Rejected?*, *supra* note 12.

¹¹⁴ Brian Leiter, *The Legal Problem with Diversity Statements*, CHRON. HIGHER EDUC. (Mar. 13, 2020), <https://www.chronicle.com/article/the-legal-problem-with-diversity-statements/> [<https://perma.cc/F2CM-C3XJ>] [hereinafter *Diversity Statements Legal Problem*].

¹¹⁵ *Id.*

¹¹⁶ *See infra* note 267 (describing the sequence of claims).

defense of affirmative action on diversity grounds,¹¹⁷ “was correctly decided.”¹¹⁸

The third commentator to go beyond blog-length criticism of diversity statements is Daniel Ortner, the public interest lawyer Leiter recommended to those looking to sue the University of California. Helpfully, for those wanting to know what shape such a lawsuit would take, Ortner has significantly expanded on his op-eds¹¹⁹ and public talks¹²⁰ to write what I believe is the only previous full-length law review article on this topic.¹²¹

Ortner’s article is notable for its detailed factual description of UC’s various uses of diversity statements.¹²² Ortner portrays these as part of a larger trend within universities of increased administrative decision-making, less emphasis on faculty governance, and a general undermining of the discipline-based, holistic consideration of faculty that drives the tenure system.¹²³ As a legal problem, as opposed to one of educational policy, Ortner focuses on the First Amendment.¹²⁴ And though he expresses worries about how diversity requirements privilege some research agendas over others,¹²⁵ Ortner’s real claim is about unconstitutional viewpoint discrimination — a position that requires him both to argue that professors at public universities should receive broader free speech protections than other government employees,¹²⁶

¹¹⁷ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 265-67 (1978). As the swing vote in a 4–1–4 decision, Justice Powell’s reliance on the diversity rationale, *see id.* at 311-15, became that of the Court twenty-five years later in *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

¹¹⁸ Leiter, *Diversity Statements Legal Problem*, *supra* note 114.

¹¹⁹ E.g., Ortner, *What is UC Davis Hiding?*, *supra* note 13.

¹²⁰ E.g., *In the Name of Diversity: Civil Rights Practice Group Teleforum*, FEDERALIST SOC’Y (Mar. 11, 2020, 1:00 PM EST), <https://ledsoc.org/events/in-the-name-of-diversity> [<https://perma.cc/L2CQ-XWX7>].

¹²¹ Ortner, *In the Name of Diversity*, *supra* note 18.

¹²² *See id.* at 543-52.

¹²³ *See id.* at 562-72.

¹²⁴ Ortner also considers race discrimination, though passingly. *Id.* at 552 (“This issue is largely outside of the scope of this article . . .”).

¹²⁵ *See id.* at 556-62. Ortner concedes, however, that universities can privilege some types of research over others. *Id.* at 575 (“Universities should be able to develop specialized initiatives or areas of study such as the University of Chicago’s focus on law and economics, BYU’s focus on law and corpus linguistics, or UCLA Law’s specialization in critical race studies. These kinds of content distinctions are compatible with the academic freedom and with the First Amendment.”).

¹²⁶ *Id.* at 572-74.

and that faculty positions are a kind of “non-public forum” where viewpoint discrimination is prohibited.¹²⁷

The fourth critic of note, Erica Goldberg, offers the only other law review treatment of mandated diversity statements to date, and she shares Ortner’s conviction that “at public universities, viewpoint discrimination in hiring violates the First Amendment.”¹²⁸ Whether particular diversity statement mandates do so, however, is to her a harder question. Goldberg argues that while “[t]here are ways of implementing these sorts of statements that may not be constitutionally problematic,” some “cross a line” and impose what she calls “good orthodoxy”: a hegemony of views about how to advance equality.¹²⁹ Like Epstein’s and Ortner’s, Goldberg’s legal scholarship on diversity statements cites, quotes, and often reflects arguments first aired in the less rigorous contexts of op-eds, blogs, and social media.¹³⁰

Whatever their sources, these arguments have gained traction. In 2020, a faculty-wide vote was called at UC Davis for the first time in eight years, on a resolution stating that “Diversity, Equity, and Inclusion statements shall not be mandatory for the appointment or for the advancement of faculty.”¹³¹ It narrowly failed (426–441) and was soon followed by a second faculty-wide vote, this time on the resolution that “Statements describing Contributions to Diversity, Equity and Inclusion are a useful part of a holistic review in the appointment of new faculty,” which passed 486 to 317.¹³² The dueling resolutions produced 265 comments from faculty members arguing not just the

¹²⁷ *Id.* at 574-75.

¹²⁸ Goldberg, *Good Orthodoxy*, *supra* note 18, at 653. Like Epstein, Goldberg discusses diversity statements as an illustration of a broader point, not the sole focus of her article. *See id.* 649-56.

¹²⁹ *Id.* at 651.

¹³⁰ *See id.* at 651 nn.58–60; Flaherty, *supra* note 88; George Leef, *Professors Shouldn't Be Forced to Pledge Allegiance to "Diversity,"* FORBES (May 10, 2017, 3:00 PM EDT), <https://www.forbes.com/sites/georgeleef/2017/05/10/professors-shouldnt-be-forced-to-pledge-allegiance-to-diversity/?sh=23b38de611cc> [<https://perma.cc/Y3N8-4DL3>]; *see also* Epstein, *supra* note 8, at 1566-68 nn.89, 91, 96 & 101 (quoting Stephen Bainbridge, *infra* note 279; Jerry Coyne, *Life Science Jobs at Berkeley Give Precedence to Candidates' Diversity and Inclusion Statements*, WHY EVOLUTION IS TRUE (Dec. 31, 2019, 11:30 AM), <https://whyevolutionistrue.wordpress.com/2019/12/31/life-science-jobs-at-berkeley-with-hiring-giving-precedence-to-diversity-and-inclusion-statements/> [<https://perma.cc/44JN-ATDE>]; Leiter, *Were You Rejected?*, *supra* note 12; Thompson, *A Word from . . .*, *supra* note 102); Ortner, *In the Name of Diversity*, *supra* note 18, at 518-19 n.12–13, 583 n.402 (citing Flier, *Against Diversity Statements*, *supra* note 101; Thompson, *A Word from . . .*, *supra* note 102; Mac Donald, *supra* note 85; Ortner, *What is UC Davis Hiding?*, *supra* note 13).

¹³¹ Lagattuta & Tucker Letter, *supra* note 6.

¹³² *Id.*

wisdom and efficacy but also the legality of diversity statements.¹³³ Nine different faculty committees at UC Davis weighed in with official statements of their own.¹³⁴ And if the Pacific Legal Foundation or some other advocacy group files suit as they have threatened,¹³⁵ UC's lawyers may soon need to weigh in as well.

The criticisms above tend to fall into three broad categories: claims about viewpoint discrimination, violations of academic freedom, and allegations about political tests and loyalty oaths. Some of these claims may have started as just good rhetoric, like Heather Mac Donald's claim that Albert Einstein probably could not get a job at UC these days.¹³⁶ But underneath the rhetoric, these are actual legal claims — and serious ones at that. In fact the rhetorical force of these claims derives in part from the legal language in which they are often couched: viewpoint discrimination is, or can be, a violation of the First Amendment, at least at public schools.¹³⁷ So too can certain infringements of professors' academic freedom, which is an important professional norm and often a contractual guarantee even aside from the constitution.¹³⁸ Political tests are barred in California by the state constitution and UC's governing by-laws, while loyalty oaths have been struck down in decisively many ways, both in federal court and the court of public opinion.¹³⁹

It matters, then, whether these legal claims have legal merit. The following Sections take them one by one and ask whether, or to what extent, they do. Given how informally many of these claims have been levied, reconstruction, expansion, or clarification is sometimes needed. The point, after all, isn't to note the shortcomings of a tweet, but to ask whether the serious legal allegations suggested there might, if fleshed out, have force. In what follows, then, I draw from the many critics just

¹³³ *Id.*

¹³⁴ See *Consultation Listing*, UC DAVIS ACAD. SENATE, <https://academicsenate.ucdavis.edu/requests-consultation-year?year=2019-2020> (last visited Mar. 2, 2022) [<https://perma.cc/L3SC-KULY>] (under the tab "Statements on Contributions to Diversity, Equity, and Inclusion (DEI)").

¹³⁵ See sources cited *supra* note 113.

¹³⁶ Mac Donald, *supra* note 85.

¹³⁷ See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (holding that the University engaged in unconstitutional viewpoint discrimination when it declined to fund a student publication due to its religious nature).

¹³⁸ See DONNA R. EUBEN, AM. ASS'N OF UNIV. PROFESSORS, ACADEMIC FREEDOM OF INDIVIDUAL PROFESSORS AND HIGHER EDUCATION INSTITUTIONS: THE CURRENT LEGAL LANDSCAPE 241-43 (2002), <https://www.aaup.org/issues/academic-freedom/professors-and-institutions> [<https://perma.cc/ZA8G-Y35G>].

¹³⁹ See *infra* Part II.C.

canvased. And yet I also work to provide the doctrinal and theoretical contexts that so few of them have offered. These are needed if we are going to apply the sometimes complex legal tests governing viewpoint discrimination, academic freedom, and loyalty oaths to the policies universities increasingly employ.

A. Viewpoint Discrimination

“The government may not discriminate against speech based on the ideas or opinions it conveys.”¹⁴⁰ This “core postulate of free speech law”¹⁴¹ might seem clearly to stop state-run universities from doling out raises, even jobs, based on people’s expressed support for the school’s diversity, equity, and inclusion efforts.

But is it actually true that “at public universities, viewpoint discrimination in hiring violates the First Amendment”?¹⁴² And do mandated diversity statements even constitute discrimination based on faculty’s (and aspiring faculty’s) viewpoints? These questions prove more complicated than they first appear, and the following Sections take them in reverse order.

1. Are Mandated Diversity Statements Viewpoint Discriminatory?

Mandated diversity statements do not *have* to discriminate on the basis of viewpoint. Consider a question which asked faculty to explain how their teaching, service, or research improved the educational experience and achievement of underrepresented minorities on campus. To be sure, a prompt like this discriminates on the basis of content. People who change the subject and answer a different question — perhaps one they would prefer to have been asked — will score poorly. But content discrimination is unavoidable, and unquestionably permissible, when it comes to job applications and promotion or tenure reports. If you’re asked about your teaching, you can’t reply with your grocery list. That is content discrimination.

The question is whether the prompt above exposes faculty to judgment based on what *viewpoints* they hold. And it is not clear that it does. After all, faculty are being asked to share their accomplishments, not their own view of whether those accomplishments were worthwhile, a good use of their time, or something they would do if it weren’t financially rewarded by their employer. This seems hardly

¹⁴⁰ *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019).

¹⁴¹ *Id.*

¹⁴² Goldberg, *Good Orthodoxy*, *supra* note 18, at 653.

different than teaching statements, where faculty have little trouble reciting their accomplishments in the classroom even if, personally, they think that teaching is just a distraction from research. It seems that the prompt above could be successfully answered even by faculty who were of the view that promoting the educational experience and achievement of underrepresented minorities is a waste of time.

To put the point another way, and to flag a point to come, it is notable here that faculty could write an op-ed like Brian Leiter's, or an article like Richard Epstein's, decrying the modern-day emphasis on diversity without contradicting anything they might write in a successful response to the prompt above. Their diversity statements would explain how minority students have thrived under their tutelage; meanwhile, their public writing would argue why requiring diversity statements, or even why pursuing diversity itself, is a bad idea. The fact that both statements could be made without contradiction strongly suggests that state actors would not be enforcing an orthodoxy of views through questions like the one above.

But questions like the one above are not the only ones being asked. Berkeley's rubric for evaluating diversity statements — a rubric that other campuses have also adopted or adapted¹⁴³ — gives lower marks to those who “discount the importance of diversity”; who “seem[] uncomfortable discussing diversity-related issues”; who don't “feel any personal responsibility for helping to eliminate barriers” to underrepresented individuals; who “state that it's better not to have outreach or affinity groups aimed at underrepresented individuals because it keeps them separate from everyone else, or will make them feel less valued”; and who don't “intend[] to be a strong advocate for diversity, equity and inclusion within the department/school/college and also their field.”¹⁴⁴

All of these are viewpoints.¹⁴⁵ That is not to say that asking about them is unconstitutional, or even ill-advised. But it is to say that we cannot avoid asking to what extent viewpoints can be taken into account when public universities hire, tenure, and promote their faculty.

¹⁴³ See *supra* notes 76 and 80.

¹⁴⁴ See *supra* fig.1.

¹⁴⁵ For an example of the opposing viewpoint, see recent legislation proposed in Arkansas, H.B. 1218, 93d Gen. Assemb., Reg. Sess. (Ark. 2021). This bill would allow the State Board of Education to cut up to ten percent of a public university's funding if it allows a class or event that “[p]romotes . . . social justice for a” race or “[a]dvocates the isolation of a group of students based on a particular characteristic instead of the treatment of students as individuals.” *Id.* § 1(b).

2. Is Viewpoint Discrimination Prohibited in Faculty Hiring and Promotion?

The Supreme Court has warned that “[f]or the University . . . to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”¹⁴⁶ If choices about funding student activities carry such risks, we might think a university’s choices about what faculty it employs, tenures, promotes, and rewards with raises must be even more consequential to “the Nation’s intellectual life.”¹⁴⁷ It may seem beyond question, then, that, as Professor Goldberg wrote, “at public universities, viewpoint discrimination in hiring violates the First Amendment.”¹⁴⁸

But it’s not true. Or at least not categorically so. To grasp this, we might do better, at least initially, to look to our intuitions before getting lost in the weeds of First Amendment doctrine.

No one thinks that universities need to be agnostic about whether the Earth is round or less than 10,000 years old. Yet these are viewpoints that potential faculty members might hold. Only marginally more controversially: a law school surely does not have to interview an immigration restrictionist for a position in its asylum clinic, and a business school, launching a program on entrepreneurialism, can surely prefer candidates who believe in capitalism.

Beyond hiring, schools give honorary degrees and invite commencement speakers not just because they are prominent or

¹⁴⁶ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995).

¹⁴⁷ *But see* Vikram D. Amar & Alan E. Brownstein, *A Close-up, Modern Look at First Amendment Academic Freedom Rights of Public College Students and Faculty*, 101 MINN. L. REV. 1943, 1971 (2017) [hereinafter *First Amendment Academic Freedom Rights*] (“Indeed, the First Amendment in many respects protects public university students significantly more than faculty, because students are regulated individuals (as students and/or residents of a campus community), whereas faculty are government employees.”).

¹⁴⁸ Goldberg, *supra* note 18, at 653. Professor Goldberg doesn’t offer direct support for this claim, citing only an article by Richard Epstein that mentions neither viewpoint discrimination nor universities. *See id.* at 653 n.69. Professor Goldberg presents a more nuanced view of the law surrounding faculty hiring in Erica Goldberg & Kelly Saraby, *Measuring a “Degree of Deference”: Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 257 (2011) (“Courts should therefore ensure the widest latitude is given to faculty-driven decisions assessing academic quality, like the hiring and firing of professors and the grade evaluation of students. Unless an individual complainant clearly demonstrates that a faculty assessment was not based on truly academic grounds, decisions about academic quality made by faculty should be presumptively valid.”).

effective figures, but because the recipients have been prominently effective in advancing causes the school respects.¹⁴⁹ Universities exercise judgment when they invite official speakers, and they make expressive statements with the honors they bestow.

As teachers, all faculty engage in viewpoint discrimination when marking exams. As Judge Easterbrook once wrote, “The government’ as an abstraction could not penalize any citizen for misunderstanding the views of Karl Marx or misrepresenting the political philosophy of James Madison, but a Department of Political Science can and should show such a person the door.”¹⁵⁰ That principle applies even more strongly when the Department is evaluating one of its members for tenure.

Notably, though, students and faculty with misguided views about Madison should not be shown the door in the chemistry department, just as the veterinary school has no business asking applicants their view on Marx. Clearly, a more nuanced account about the permissibility of viewpoint discrimination in university settings is needed.

Robert Post explains our intuitions here with the important suggestion that viewpoint discrimination is not exactly what bothers us in the problematic cases. Imagine, he writes,

a case in which a chemistry department awards research grants only to students who oppose abortion rights. Although we might be tempted to say about this case that the department’s criteria for awarding grants are outrageously viewpoint discriminatory, what we would actually mean is that the criteria are completely irrelevant to any legitimate educational objective of the department.¹⁵¹

Post’s insight applies equally in the context of faculty hiring and advancement. The upshot: allegations that public universities, by requiring diversity statements, are engaging in unconstitutional viewpoint discrimination really amount to the claim that universities are hiring and promoting faculty based on criteria that aren’t relevant to their legitimate educational or academic objectives. Reframing the question in this way has big consequences.

The following trudge through the doctrinal weeds of First Amendment law brings us, I think, to this same conclusion. Readers wanting to avoid these weeds can skip ahead ten pages. But for those

¹⁴⁹ See *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998).

¹⁵⁰ *Feldman v. Bahn*, 12 F.3d 730, 732-33 (7th Cir. 1993); see also PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 128-29 (2013).

¹⁵¹ Robert C. Post, *Subsidized Speech*, 106 *YALE L.J.* 151, 167 (1996).

interested, the doctrinal discussion shows the complicated ways that allegations of viewpoint discrimination would need to be reframed were they ever to move from blogs, op-eds and faculty resolutions to actual court complaints and legal briefs.

* * *

Those trying to brand mandatory diversity statements as unconstitutionally viewpoint discriminatory need a doctrinal story to tell about how statements made during faculty hiring, or in applications for tenure or promotion, are covered by the First Amendment.

In regard to faculty already employed at public universities, and perhaps for applicants as well,¹⁵² the first roadblock is the Supreme Court's case law on speech by public employees. The current test, from *Garcetti v. Ceballos* in 2006,¹⁵³ says that when government workers "make statements pursuant to their official duties, [they] are not speaking as citizens" and the First Amendment does not apply to their speech.¹⁵⁴ Were the *Garcetti* test to apply to academics, it would mean that diversity statements required as part of professors' official tenure or promotion reports would not be protected at all.¹⁵⁵

There is a circuit split, though, about whether *Garcetti's* holding *does* apply to teachers, especially university professors.¹⁵⁶ After all, the *Garcetti* Court's reasoning — that government managers should have the power to control and evaluate work product they have commissioned¹⁵⁷ — applies awkwardly to academia: faculty teaching and research just isn't "commissioned" in anything like the way an ordinary office manager might tell a subordinate to write a report or prepare a spreadsheet. As the foundational 1915 *Declaration of Principles on Academic Freedom and Tenure* put it, faculty "are the appointees, but not in any proper sense the employees" of a university.¹⁵⁸ *Garcetti* is premised on the idea that a manager should be

¹⁵² See *infra* note 179.

¹⁵³ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

¹⁵⁴ *Id.*

¹⁵⁵ See *id.* at 421-22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.").

¹⁵⁶ Compare *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) (declining to apply *Garcetti* to a professor's speech), and *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014) (same), and *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011) (same), with *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008) (applying *Garcetti* to a professor's classroom speech).

¹⁵⁷ *Garcetti*, 547 U.S. at 422.

¹⁵⁸ 1915 AAUP PRINCIPLES, *supra* note 90.

able to direct an employee's work without triggering a free speech lawsuit.¹⁵⁹ Since no managers direct faculty members' teaching and research in that way, at least at any university that respects academic freedom, the premise does not apply.

Even if *Garcetti* were to apply, not all would be lost for critics. Even then, professors still could sue if they were penalized for speaking out against diversity statements *outside* of work. *Garcetti*, after all, is the culmination of a whole line of cases aimed at preserving space beyond one's government job — space where a public employee can still speak as a citizen, with a usual citizen's protections.¹⁶⁰ This can be especially tricky for professors, whose work boundaries can be hard to define.¹⁶¹ But *Garcetti* emphasizes that “a citizen who works for the government is nonetheless a citizen,” and the government cannot “leverage the employment relationship” to control all that its employees do and say on their own time.¹⁶² We will return to this point in the discussion of unconstitutional conditions below.

Of course, those alleging viewpoint discrimination would much prefer that the *Garcetti* test *not* apply, so that the diversity statements professors file as part of their jobs might have some chance of protection under the First Amendment. The Fourth, Sixth, and Ninth Circuits have gone this route, taking advantage of the Supreme Court's punt on the issue¹⁶³ to hold that *Garcetti* does not apply to “teaching and academic

¹⁵⁹ See Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 646 (2012) (“I take *Garcetti* to stand for a relatively narrow principle: employees may be evaluated and rewarded or punished based on their job performance, even if that job performance takes the form of speech.”).

¹⁶⁰ See *Garcetti*, 547 U.S. at 417-20 (citing, for example, *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983)). The cases define this space of protected speech in different ways, but all aim to vindicate the principle that public employees don't give up all their speech rights simply because they accept a government job. Note also that although I follow the case law in referring to speech of employees as citizens, the First Amendment's protections are not actually limited to U.S. citizens.

¹⁶¹ See Amar & Brownstein, *First Amendment Academic Freedom Rights*, *supra* note 147, at 1974 (“[H]ow do we determine the job parameters of university professors who are often expected — as part of the scholarship and service components of their job — to speak to government, the press, professional associations, and other audiences, and to publish articles and books for diverse dissemination?”).

¹⁶² *Garcetti*, 547 U.S. at 419.

¹⁶³ *Id.* at 425 (“We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”).

writing.”¹⁶⁴ The question is whether the test these courts use instead of *Garcetti* proves any more helpful.

With *Garcetti* cast aside for academics, the Fourth, Sixth, and Ninth Circuits rely on the pre-*Garcetti* *Pickering-Connick* two-step test, which first asks whether the employee’s speech “addressed ‘matters of public concern,’” then, if so, balances the employee’s expressive interests against the government employer’s interest in efficiently carrying out its business.¹⁶⁵ The Fourth Circuit says that “[t]his analysis permits a nuanced consideration of the range of issues that arise in the unique genre of academia.”¹⁶⁶ But according to the Ninth Circuit in *Demers v. Austin*, the “unique genre of academia” means that both steps of the *Pickering-Connick* test “will often be difficult to assess” in the context of academic speech.¹⁶⁷ At step one, it may be hard to assess whether “academic disagreements over what may appear to be esoteric topics”¹⁶⁸

¹⁶⁴ *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014); see also *Meriwether v. Hartop*, 992 F.3d 492, 504 (6th Cir. 2021); *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) (holding *Garcetti* inapplicable to professors at public universities, at least as to their “scholarship and teaching”). It is worth noting that the Fourth Circuit allows that *Garcetti* might apply to a faculty member’s “assigned . . . role in declaring or administering university policy,” as opposed to their scholarship and teaching. See *id.* Mandated diversity statements could be seen as reports on how well faculty are administering university policy, but given that they actually report on how well faculty’s teaching and scholarship benefits a diverse student body and public, I give critics the benefit of the doubt and assume in what follows that *Garcetti* wouldn’t bar their claims in the Fourth Circuit.

¹⁶⁵ *Demers*, 746 F.3d at 412 (quoting *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 146 (1983)); see also *Meriwether*, 992 F.3d at 507; *Adams*, 640 F.3d at 564.

¹⁶⁶ *Adams*, 640 F.3d at 564. *Adams* itself only gets through the first step of the test, however, finding it satisfied and sending the case back to the district court for consideration of the rest. *Adams* thus doesn’t delve much into the nuanced “range of issues” that arise in academia.

¹⁶⁷ *Demers*, 746 F.3d at 413 (“The nature and strength of the public interest in academic speech will often be difficult to assess. . . . The nature and strength of the interest of an employing academic institution will also be difficult to assess.”).

¹⁶⁸ *Id.*; see also, e.g., Amar & Brownstein, *First Amendment Academic Freedom Rights*, *supra* note 147, at 1975 (“*Pickering*’s focus on whether speech involves a matter of public concern seems to protect some teachers more than others. Math professors may seldom write on matters of public concern.”). Robert Post goes further and argues that the *Connick-Pickering* test just misses the point: it serves a different value — roughly, protecting contributions to public opinion (democratic legitimacy) — than does academic freedom for scholarship and teaching, which Post sees as promoting expertise or democratic competency. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 85 (2012). According to Post, “regulation of faculty research and publication should trigger First Amendment coverage whether or not faculty speech involves matters of public concern.” *Id.*

count as matters of public concern. At step two, “the nature and strength of [a school’s] legitimate interests”¹⁶⁹ may also be difficult for courts to judge. In the *Demers* court’s words:

[T]he evaluation of a professor’s writing for purposes of tenure or promotion involves a judgment by the employing university about the quality of what he or she has written. Ordinarily, such a content-based judgment is anathema to the First Amendment. But in the academic world, such a judgment is both necessary and appropriate.¹⁷⁰

Even if the First Amendment applies to mandated diversity statements, then, faculty may still struggle with *Pickering-Connick* balancing, where the university’s interest in efficiently carrying out its mission might necessitate the very viewpoint discrimination that challengers are complaining about. *Demers* fails to clarify exactly when, in this regard, universities have “adequate justification for treating” their faculty “differently from other members of the general public.”¹⁷¹ Perhaps when the government is acting as educator, different rules should apply than when it is acting as a regular employer, much less when it is simply governing the public at large.

Judith Areen has made this argument in an important article about *Garcetti*’s application to public universities.¹⁷² Compared to ordinary employers, including government employers, universities can tolerate a higher level of internal dissent; achieving their institutional purpose

¹⁶⁹ *Demers*, 746 F.3d at 413.

¹⁷⁰ *Id.* Though the court refers to evaluations of scholarship as “content-based,” such evaluations surely extend to viewpoints as well. See Amar & Brownstein, *First Amendment Academic Freedom Rights*, *supra* note 147, at 1977 (“Public university employers invariably must make decisions about the hiring, promotion, and retention of professors based on the content (*even the viewpoint*) of what these professors say and write. The questions asked at hiring and promotion stages — are the professor’s expressed views scientifically plausible, adequately supported, rigorously reasoned, appropriately attentive to counterargument, etc. — are, at their core, content-based inquiries.” (emphases added)).

¹⁷¹ See *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009) (stating the Ninth Circuit’s version of the *Pickering-Connick* test); see also *Oyama v. Univ. of Haw.*, 813 F.3d 850, 864 & n.11 (9th Cir. 2015) (quoting *Eng*, 552 F.3d at 1070, and noting that *Demers* leaves open the details of how it applies to speech related to scholarship or teaching).

¹⁷² See Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 948-49 (2009).

may even require it, Areen writes.¹⁷³ The important tradition of shared governance between administrators and faculty has few parallels in other managerial domains,¹⁷⁴ and that affects the interests universities can properly assert. Efficiency plays a different role in a public university than it does at the DMV.

At the same time, unlike government regulation of the general public, the government, when serving as educator, “cannot be ‘viewpoint neutral’ if [state-run universities] are to fulfill their missions of teaching and research.”¹⁷⁵ So for conflicts between faculty and universities that involve “research, teaching, or academic governance matters,” Areen argues that a different First Amendment test should apply. Her proposal: if the burden placed on a professor’s expression was approved by the faculty, “a court should presume that the decision was made on academic grounds and defer to it” unless the professor “is able to show that the decision ‘was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise its professional judgment.’”¹⁷⁶ By contrast, the university would have the burden of showing that its decision was made on academic grounds were it made without consulting the faculty through established channels.¹⁷⁷

The specific contours of this proposal are Areen’s, not (yet) those of any court. But she draws her substantive standard — the quoted focus on “accepted academic norms” and faculty’s “professional judgment” — from the Supreme Court’s decision in *Regents of the University of Michigan v. Ewing*.¹⁷⁸ *Ewing* is about the rights of a university, not a faculty member. But its focus on courts’ deference to faculty’s academic judgment makes it relevant here. In fact, by abstracting the question from the employment context, cases like *Ewing* might prove even more relevant than the *Pickering-Connick-Garcetti* line, especially when it

¹⁷³ *Id.* at 990 (“Debate that might be viewed as disruptive in other public agencies is an accepted, and even necessary, part of the production of new knowledge and its dissemination in classrooms.”); see also J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 *YALE L.J.* 251, 254 (1989) (“All too often, courts fail to recognize that universities are fundamentally different from business corporations, government agencies, or churches.”).

¹⁷⁴ See generally LARRY G. GERBER, *THE RISE AND DECLINE OF FACULTY GOVERNANCE* (2014) (tracing the emergence of “shared governance” between faculty and management of academic institutions).

¹⁷⁵ Areen, *supra* note 172, at 993.

¹⁷⁶ *Id.* at 995 (quoting *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985)).

¹⁷⁷ *Id.* at 995-96.

¹⁷⁸ *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

comes to diversity statements filed by faculty *applicants*, who are not yet public employees.¹⁷⁹ Fleshing out a test that works for diversity statements from faculty *and* faculty applicants thus might benefit from a look at other areas of First Amendment law beyond employment.

Emily Gold Waldman — and, following her, the Ninth Circuit — has described cases like *Ewing* as “certification cases”: ones where universities have refused to allow students to complete their program of study because of the students’ expression.¹⁸⁰ Certification cases are about university faculties deciding not to give their stamp of approval to someone based on something they have said. As such, analogies to viewpoint-based refusals to appoint someone to the faculty, tenure them, or promote them are clear, if imperfect. Though courts have drawn on different lines of precedent in these cases, Waldman reports that “in none of these lines of cases has the Supreme Court prohibited governmental actors from making viewpoint-based decisions.”¹⁸¹ Instead, she says, courts have said that “university decisions must be pedagogically legitimate”;¹⁸² that evidence of careful faculty deliberation heightens courts’ deference;¹⁸³ and that universities must leave room for “off-duty” speech beyond the state’s control.¹⁸⁴

In a certification case of its own, citing Waldman, the Ninth Circuit in *Oyama v. University of Hawaii* approved a university’s decision because it was based on “established professional standards,” reflected “reasonable professional judgment,” and was “narrowly tailored to serve the University’s foundational mission” since it focused only on

¹⁷⁹ Faculty applicants too might be subject to the *Pickering-Connick* test, however. As the Ninth Circuit has noted, “[o]ther circuits have applied public employee speech doctrine in the job applicant setting.” *Oyama v. Univ. of Haw.*, 813 F.3d 850, 866 n.12 (9th Cir. 2015) (citing *Worrell v. Henry*, 219 F.3d 1197, 1207 (10th Cir. 2000); *Bonds v. Milwaukee Cnty.*, 207 F.3d 969, 979 (7th Cir. 2000); *Hubbard v. EPA*, 949 F.2d 453, 460 (D.C. Cir. 1992)).

¹⁸⁰ Emily Gold Waldman, *University Imprimaturs on Student Speech: The Certification Cases*, 11 *FIRST AMEND. L. REV.* 382, 388 (2013); see also *Oyama*, 813 F.3d at 866.

¹⁸¹ Waldman, *supra* note 180, at 419.

¹⁸² *Id.* (citing *Ewing*, 474 U.S. at 225; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

¹⁸³ *Id.* at 419-20; see also HORWITZ, *supra* note 150, at 116 (“[A]cademic judgments must observe the norms, practices, and traditions that govern academic thinking and decision-making. . . . Decisions must be made on the basis of academic merits, not extrinsic factors.”).

¹⁸⁴ See Waldman, *supra* note 180, at 419.

speech that was made within the student's program and directly related to the student's profession.¹⁸⁵

A second relevant area of First Amendment law involves cases outside the realm of education: cases where the government is choosing winners in a competitive process or acting as curator. As a federal court in California wrote in an opinion about the University of California's admissions policies: "where the government is providing a public service that by its nature requires evaluations of . . . the content of speech," viewpoint discrimination is allowed so long as it is "reasonably related to the government's goal of providing the public service."¹⁸⁶ In support of this, the California court looked to precedents on a public television station choosing who could participate in a debate and the selection criteria the National Endowment for the Arts ("NEA") uses to award its grants.¹⁸⁷

As the Supreme Court wrote in *Arkansas Educational Television Commission v. Forbes*: "Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others."¹⁸⁸ These curatorial choices are themselves expressive — universities and others are saying something with their choices, even if they aren't necessarily speaking through the people chosen.

In *National Endowment for the Arts v. Finley*, a case alleging viewpoint discrimination in the award of federal arts funding, the Court again held that, given the nature of highly competitive grant programs, "absolute neutrality is simply inconceivable."¹⁸⁹ In holding that "the Free Speech

¹⁸⁵ *Oyama*, 813 F.3d at 868, 871-72; see also Vikram D. Amar & Alan E. Brownstein, *Academic Freedom*, 9 GREEN BAG 2D 17, 20 (2005) (discussing courts' approval of school decisions that reflect "legitimate pedagogical concerns").

¹⁸⁶ *Ass'n of Christian Schs. Int'l v. Stearns*, 679 F. Supp. 2d 1083, 1095 (C.D. Cal. 2008); see also *Buxton v. Kurtinitis*, 862 F.3d 423, 429-30 (4th Cir. 2017).

¹⁸⁷ See *Stearns*, 679 F. Supp. 2d at 1095-97 (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73 (1998); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587-88 (1998)).

¹⁸⁸ *Forbes*, 523 U.S. at 674.

¹⁸⁹ *Finley*, 524 U.S. at 585 (quotation marks and citation omitted); see also *id.* at 586 ("In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately 'encourage a diversity of views from private speakers' The NEA's mandate is to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support sets it apart from the subsidy at issue in *Rosenberger* — which was available to all student organizations that were 'related to the educational purpose of the University'" (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 824, 834 (1995))).

Clause has no application in the context of speech expressed in a competitive interview” for admission to a public university, the Fourth Circuit relied on this passage, along with the one above from *Forbes*.¹⁹⁰

Three quick observations about *Finley*’s relevance to diversity statements. First, one of the plaintiffs’ arguments in that case was that the NEA’s “decency” standard for arts grants was so vague that it would allow administrators to engage in viewpoint discrimination.¹⁹¹ The Supreme Court was unmoved by that argument,¹⁹² but as we will see, similar claims continue to get made in the context of diversity statements.¹⁹³ Second, the NEA’s criteria for awarding grants “expressly take[] diversity into account,” and neither the Court nor the plaintiffs were bothered by that fact.¹⁹⁴ Finally — and more helpfully for those who want to challenge mandated diversity statements — the *Finley* Court and the NEA both acknowledged that “a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive certain ideas or viewpoints from the marketplace” — that is if the NEA “were to leverage its power to award subsidies . . . into a penalty on disfavored viewpoints.”¹⁹⁵

The Fourth Circuit noted *Finley*’s worry about leveraging in its decision about competitive college admissions, *Buxton v. Kurtinitis*, but it found that the speech that had doomed the applicant’s chances was “related directly to the purpose of the program in question,” and thus, fair game.¹⁹⁶

Cases like *Forbes*, *Finley*, and *Buxton* bode poorly for claims of viewpoint discrimination in competitive selection processes, which surely includes faculty hiring, promotion, and tenure. If those cases apply, complaints about viewpoint discrimination would really turn on one thing: leveraging. And that forces us to consider a third area of First Amendment law, wherein government funding is alleged to come with unconstitutional conditions — where selective subsidies are used as leverage to silence viewpoints the government would not otherwise be able to restrict.

¹⁹⁰ *Buxton*, 862 F.3d at 428-30.

¹⁹¹ *Finley*, 524 U.S. at 583.

¹⁹² *Id.* at 584 (“[I]t seems unlikely that this provision will introduce any greater element of selectivity than the determination of ‘artistic excellence’ itself.”).

¹⁹³ See *infra* notes 272–277 and accompanying text.

¹⁹⁴ *Finley*, 524 U.S. at 585.

¹⁹⁵ *Id.* at 587 (quotation marks and citation omitted).

¹⁹⁶ *Buxton v. Kurtinitis*, 862 F.3d 423, 430-31, 431 n.5 (4th Cir. 2017).

The Supreme Court's most recent analysis of leveraging, at least in a majority opinion,¹⁹⁷ comes from *Agency for International Development v. Alliance for Open Society International* ("AOSI") in 2013.¹⁹⁸ There, the federal government offered funds to nongovernmental organizations to help combat HIV/AIDS worldwide, but only if the organizations would explicitly oppose prostitution.¹⁹⁹ "[T]he relevant distinction that has emerged from our cases," the Court explained, "is between conditions that define the limits of the government spending program — those that specify the activities Congress wants to subsidize — and conditions that seek to leverage funding to regulate speech outside the contours of the program itself."²⁰⁰ The problem with the funding requirement in *AOSI* was that it didn't just require recipients to pledge not to use program funds in support of prostitution; recipients themselves had "to pledge allegiance to the Government's policy of eradicating prostitution."²⁰¹ The requirement went "beyond defining the limits of the federally funded program to defining the recipient."²⁰²

The issue in *AOSI* is one we have already encountered: those speaking with the government's money had no space outside the bounds of the program where they could express their own views without hypocrisy.²⁰³ The government was leveraging its funding to force expressions of support that it could never otherwise require.

Having explored four different strands of First Amendment law that might prove relevant to claims about diversity statements, there is one more objection or alternative to consider. Brian Leiter flatly claims that "[g]overnment cannot, excluding a few exceptions such as political appointments, base a hiring decision on the speaker's political viewpoint."²⁰⁴ In support, he cites *Wagner v. Jones*, an Eighth Circuit case about Iowa Law's decision not to hire a legal writing instructor, allegedly because she was a Republican who had previously worked with socially conservative organizations like the National Right to Life Committee and the Family Research Committee.²⁰⁵

¹⁹⁷ *But see* *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082, 2092-94 (2020) (Breyer, J., dissenting); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2487 (2018) (Kagan, J., dissenting).

¹⁹⁸ *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 205 (2013).

¹⁹⁹ *Id.* at 210.

²⁰⁰ *Id.* at 214-15.

²⁰¹ *Id.* at 220.

²⁰² *Id.* at 218.

²⁰³ *See supra* Part II.A.1 and text accompanying notes 161-162, 184.

²⁰⁴ Leiter, *Diversity Statements Legal Problem*, *supra* note 114.

²⁰⁵ *Id.*; *see also* *Wagner v. Jones*, 664 F.3d 259, 264 (8th Cir. 2011).

The *Wagner* opinion presents a sweeping test: the rejected applicant wins if her “political beliefs and associations” were a motivating factor, unless the school shows that it would have rejected her regardless of those beliefs and associations.²⁰⁶ *Wagner* thus might suggest that viewpoint discrimination in regard to beliefs that can be characterized as “political” are prohibited across the board. Two responses.

First, since we know that some viewpoints — like a chemist’s views on phlogiston — can undoubtedly be taken into account, at least in a chemistry department, the test above puts a lot of weight on deciding what counts as a specifically political belief. And in a political science department, public policy program, or law school, it is easy to imagine cases where even many political beliefs are fair game.²⁰⁷ To be clear, the legal writing program at Iowa Law was not such a case, so the *Wagner* court did not have to grapple with the issue. But again, it’s *irrelevant* political viewpoints that should be off the table, not political views in general.

Second, the issue of political *party* affiliation, as opposed to mere political views, triggers a whole other, yet-undiscussed line of cases and, in some places, legal provisions.²⁰⁸ We will return soon to allegations that mandated diversity statements amount to political litmus tests.²⁰⁹ But here it is worth noting, as Leiter himself does, that political patronage prohibitions do not apply to all types of positions.²¹⁰ According to the Supreme Court, “if an employee’s private political beliefs would interfere with the discharge of his public duties,” then “political affiliation is a legitimate factor to be considered.”²¹¹ Beyond that, political tests are an unconstitutional condition, just like that in *AOSI*.²¹² The point is this: even in regard to actual party affiliation, there are no categorical lines; job-relevance is the key to what the constitution permits.

²⁰⁶ *Wagner*, 664 F.3d at 270-71.

²⁰⁷ See Roosevelt, *supra* note 159, at 658 (“[I]n many fields, disentangling political elements from assessments of merit is quite hard.”).

²⁰⁸ E.g., CAL. CONST. art. XX, § 3; *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79 (1990); see also BD. OF REGENTS, UNIV. OF CAL., BYLAW 40.3(a) (2018), <https://regents.universityofcalifornia.edu/governance/bylaws/bl40.html#bl40.3> [<https://perma.cc/MR3K-FCKB>] [hereinafter UC REGENTS BYLAW 40.3(a)].

²⁰⁹ See *infra* Part II.C.

²¹⁰ Leiter, *Diversity Statements Legal Problem*, *supra* note 114 (noting “exceptions such as political appointments”).

²¹¹ *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980).

²¹² See *Rutan*, 497 U.S. at 78 (“[C]onditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so.”).

* * *

Before our doctrinal dive, we were working with the intuition that viewpoint discrimination claims, in the context of choosing and rewarding professors at public universities, really amount to concerns about criteria that are irrelevant to the job. Some viewpoint discrimination is unavoidable, after all, when judging whether a professor deserves to be hired, tenured, or promoted. But the views being judged should be relevant to the professor's discipline and job description.

The varied doctrinal approaches courts have taken to these cases supports that intuition. Whether we look to public employee speech cases, to certification cases, editorial control, competitive funding, or unconstitutional conditions cases, common themes emerge. The requirements of viewpoint neutrality that are so central in other areas of the university — public forums like the quad or limited public forums such as student groups and bulletin boards²¹³ — no longer apply. Instead courts give deference to decisions that reflect the “faculty’s professional judgment,” made according to “professional academic norms,”²¹⁴ on matters directly relevant to the program in question.²¹⁵ Running throughout these opinions as well, from selective funding cases like *Finley* to even the most speech-restrictive public employee cases like *Garcetti*, is the notion, developed further in the unconstitutional conditions cases, that viewpoint discrimination within a program cannot be leveraged into restrictions on speech outside the program. Space for employees, students, and grantees to speak as citizens cannot be eliminated as the price of government benefits.

Reframing viewpoint discrimination claims in terms of academic judgments about *relevance* fundamentally refocuses this entire debate. No longer is it enough for those opposed to mandatory diversity statements simply to allege viewpoint discrimination. Instead, they need to show that faculty are being judged for views that are unconnected to their jobs or disciplines. Until now, however, this has largely been an unargued assumption, not a focus of the arguments made against diversity statements.

Examples abound. Brian Leiter claims that UC’s policies on diversity statements require “candidates to profess allegiance to a controversial set of moral and political views that have *little or no relationship* to a

²¹³ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

²¹⁴ See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

²¹⁵ See *Oyama v. Univ. of Haw.*, 813 F.3d 850, 868 (9th Cir. 2015) (discussing narrow tailoring).

faculty member's pedagogical and scholarly duties."²¹⁶ Commentators offer thought experiments about mandatory patriotism statements without ever asking whether contributions to patriotism have the same relevance to academic jobs as contributions to diversity.²¹⁷ Columnist George Will writes that when UC considers faculty applicants' diversity statements before the rest of their materials, the university is weeding them out "*before* considering the applicants' academic qualifications."²¹⁸ Daniel Ortner says that to reject candidates at that stage is to do so "without even considering their teaching skills, their publication history, their potential for academic excellence or their ability to contribute to their field."²¹⁹ And a recent report by the American Enterprise Institute on the prevalence of DEI statements in faculty hiring is literally entitled "Other Than Merit."²²⁰

But if the determinative legal question is: "How relevant are contributions to diversity to various academic positions?," then it clearly begs the question to assume that demonstrated contributions to diversity do not count as "academic qualifications" or components of a scholar's "academic excellence." To date, most critics have taken for granted what counts among the qualifications for a given job, what constitutes academic excellence in a given field, and what exactly are faculty's pedagogical and scholarly duties. Yet claims of "viewpoint discrimination" hinge on how these questions are answered. Two important points follow from this realization.

First, what is relevant to a particular job, or what counts as excellence in a particular discipline, is going to prove different across different jobs and disciplines. Basic as this point may be, it means that the constitutionality of considering candidates' and faculty members' views on diversity will actually vary across jobs and, potentially, disciplines. In certain positions like those created through UC's Advancing Faculty Diversity initiative,²²¹ greater consideration of diversity-related

²¹⁶ Leiter, *Diversity Statements Legal Problem*, *supra* note 114 (emphasis added).

²¹⁷ See McGinnis, *supra* note 22; Shibley, *supra* note 89.

²¹⁸ Will, *supra* note 106 (emphasis added); *see also id.* ("Only 214 candidates who scored well in the diversity enthusiasm sweepstakes were then *evaluated as scholars.*" (emphasis added)).

²¹⁹ Ortner, *In the Name of Diversity*, *supra* note 18, at 549.

²²⁰ JAMES D. PAUL & ROBERT MARANTO, AM. ENTER. INST., OTHER THAN MERIT: THE PREVALENCE OF DIVERSITY, EQUITY, AND INCLUSION STATEMENTS IN UNIVERSITY HIRING I (2021), <https://www.aei.org/research-products/report/other-than-merit-the-prevalence-of-diversity-equity-and-inclusion-statements-in-university-hiring/> [https://perma.cc/X9EZ-22KJ].

²²¹ *See supra* Part I.A.

experience and interests, even beliefs, may be allowed than would be appropriate in other positions.

Second, defining academic excellence or pedagogical and scholarly duties within a particular discipline is something that is best done by experts within that discipline. Reframing the questions thus leads directly to the issue of academic freedom — the freedom of academics to have their work judged by disciplinary peers rather than administrators, donors, politicians, or the general public. Not only is it question-begging to assume the extent to which contributions to diversity are or are not part of scholarly excellence, as the next Section will discuss, to *impose* such assumptions on a scholarly discipline is to threaten the academic freedom that makes universities the distinctive institutions they are.

B. Academic Freedom

“Academic freedom” is sometimes just used to refer to the free speech rights of academics. Insofar as that is the case, the last Section has covered the topic. But academic freedom is also a distinctive and even defining feature of modern American universities.²²² The freedom of scholars, “after prolonged and specialized technical training,” “to impart the results of their own and of their fellow-specialists’ investigations and reflection . . . without fear or favor,” subject only to “their own scientific conscience and a desire for the respect of their fellow experts”²²³ — this is the constrained liberty on which the modern university is built. As the American Association of University Professor’s (“AAUP”) 1915 *Principles on Academic Freedom* put it: academic freedom is “not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion, and of teaching, of the academic profession.”²²⁴ The crucial idea is that the constraints on academic freedom come from professional norms and disciplinary standards, not from administrators, trustees, or public opinion.

The claim that “[r]equiring [diversity] statements in applications for appointments and promotions is an affront to academic freedom”²²⁵ is

²²² See *Introduction* to WHO’S AFRAID OF ACADEMIC FREEDOM?, at ix (Akeel Bilgrami & Jonathan R. Cole eds., 2015) (“[I]t is arguable that freedom of inquiry is unique and may be given a lexicographical priority over other values because it is an *enabling* value. It enables the pursuit of *other* values”). For the history of academic freedom in American universities, see generally FINKIN & POST, *supra* note 90; GERBER, *supra* note 174.

²²³ 1915 AAUP PRINCIPLES, *supra* note 90.

²²⁴ *Id.*

²²⁵ Flier Tweet, *supra* note 88.

best understood, then, not as a worry that academics' views are being judged but rather as an objection about *who* is doing the judging, or setting the standards, when it comes to faculty appointments and promotions. The principles of academic freedom require that these decisions be made by the disciplinary experts who are uniquely positioned to review their peers. Critics are right to worry if standards are instead being imposed from above by administrators, whether based on their own independent judgment, popular opinion, or the preferences of the donors or legislators providing their funds.

Clarifying the charge in this way has one benefit for critics of mandatory diversity statements: it shows why academic freedom concerns might apply to faculty hiring and not just tenure or promotion. Graduate students applying for faculty positions may have certain academic freedom rights at their home institution,²²⁶ but they have no academic freedom claims against any institution to which they don't (yet) belong. The academic freedom rights of *current* faculty are implicated, though, when the criteria for selecting their future colleagues are imposed from above or outside their disciplines.

Framing the claim in terms of general academic freedom principles also has the advantage of detaching the claim from the morass of First Amendment case law that mentions academic freedom.²²⁷ This includes some of the viewpoint-discrimination-in-academia cases that the previous Section already handled. But mixed with those cases (brought by professors against their universities) are also claims *by* universities seeking autonomy from interference from other government actors, and claims by individual professors against those other actors as well. This mix of cases has led to considerable confusion about whether constitutional protections for academic freedom applies to professors or to universities — or, as Robert Post compellingly argues, to both, but

²²⁶ At the University of California, for example, graduate students would enjoy the “student freedom of scholarly inquiry.” UNIV. OF CAL., OFF. OF THE PRESIDENT, ACADEMIC PERSONNEL MANUAL, APM – 010: ACADEMIC FREEDOM app. B (2009), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-010.pdf [<https://perma.cc/TQY4-CR33>] [hereinafter UC APM–010].

²²⁷ For discussions of this morass of First Amendment case law, see generally Areen, *supra* note 172; Byrne, *supra* note 173; David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990); Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987).

only insofar as they are protecting or advancing disciplinary practices and competence.²²⁸

To disentangle well-established professional norms of academic freedom from the protections that may be mandated under the First Amendment is not to turn critics' claims into something other than legal ones. The AAUP says that its 1940 *Statement of Principles of Academic Freedom and Tenure* has been "endorsed by more than 250 national scholarly and educational associations."²²⁹ The AAUP has developed recommended institutional regulations that derive from the 1940 *Statement*, and over the decades, decisions about particular cases made by the AAUP's "Committee A" on Academic Freedom and Tenure has become "a rich and useful common law of academic freedom."²³⁰ Institutions like the University of California have developed their own statements of academic freedom principles and have codified them in their academic personnel manuals.²³¹ By adopting statements like these, universities often make binding commitments to their faculty. Contract law and, at public universities, due process claims thus often provide better routes than the First Amendment for those who feel their academic freedom has been infringed.²³²

The University of California's policy on academic freedom makes clear that teaching and scholarship must "be assessed by reference to the professional standards that sustain the University's pursuit and achievement of knowledge. The substance and nature of these standards properly lie within the expertise and authority of the faculty as a

²²⁸ Robert Post, *Academic Freedom and the Constitution*, in WHO'S AFRAID OF ACADEMIC FREEDOM, *supra* note 222, at 123, 132-33.

²²⁹ *Advancing Academic Freedom*, AM. ASS'N OF UNIV. PROFESSORS, <https://www.aaup.org/our-work/protecting-academic-freedom> (last visited Dec. 19, 2021) [<https://perma.cc/MXS4-5HCE>].

²³⁰ FINKIN & POST, *supra* note 90, at 6.

²³¹ E.g., UC APM – 010, *supra* note 226; UNIV. OF CAL., OFF. OF THE PRESIDENT, ACADEMIC PERSONNEL MANUAL, APM – 011: ACADEMIC FREEDOM, PROTECTION OF PROFESSIONAL STANDARDS, AND RESPONSIBILITIES OF NON-FACULTY ACADEMIC APPOINTEES (2020), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-011.pdf [<https://perma.cc/W2ME-EC9E>] [hereinafter UC APM – 011]; UNIV. OF CAL., OFFICE OF THE PRESIDENT, ACADEMIC PERSONNEL MANUAL, APM – 015: THE FACULTY CODE OF CONDUCT 3 (2020), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-015.pdf [<https://perma.cc/6PMY-FPNN>] [hereinafter UC APM – 015].

²³² Amar & Brownstein, *First Amendment Academic Freedom Rights*, *supra* note 147, at 1985. Tethering the discussion that follows to contractual or other explicit statements regarding the protection of academic freedom also allows us to sidestep broader theoretical debates about how academic freedom might or should be conceived. For an expert overview of recent literature on that subject, see Henry Reichman, *Academic Freedom and the Common Good: A Review Essay*, 7 AAUP J. ACAD. FREEDOM 1, 15 (2016).

body.”²³³ As Robert Post, the main author of the current policy, has explained its basic idea: “[T]he quality of faculty work is to be judged only by reference to professional standards of academic judgment. It is not to be determined by reference to the political decisions of the electorate, the priorities of financial donors, or the managerial priorities of the administration.”²³⁴ A corollary is the idea that “faculty have the responsibility both to assess the work of their peers and also to submit to the assessment of their peers.”²³⁵ Disciplinary expertise and judgment is what keeps the whole system afloat and autonomous.

Daniel Ortner of the Pacific Legal Foundation and Robert Shibley of FIRE, two of UC’s main critics, have offered the most detailed descriptions of how this conception of academic freedom might be threatened by the University’s use of diversity statements.

Both point to the source of UC’s diversity statement mandates and claim, with varying degrees of accuracy, that they come from the administration rather than the faculty.²³⁶ Ortner alleges that an increased emphasis on cluster-hiring — establishing faculty lines that cross multiple disciplines²³⁷ or running searches that are college or school-wide²³⁸ — tends to lessen the importance of disciplinary norms and expertise during candidate review.²³⁹ He alleges that “ideological

²³³ UC APM – 010, *supra* note 226.

²³⁴ Richard C. Atkinson, *Academic Freedom and the Research University*, 148 *PROC. AM. PHIL. SOC’Y* 195, 202 (2004) (quoting Robert Post).

²³⁵ *Id.*

²³⁶ See Ortner, *In the Name of Diversity*, *supra* note 18, at 563-67 (alleging inaccurately that “diversity bureaucrats in the UC system have bypassed the need to dialogue with the Faculty Senate at all through the use of special diversity pilot programs” in hiring); Shibley, *supra* note 89 (“[T]ake a look at who is demanding that faculty members, both current and prospective, dedicate a substantial part of their efforts to activities that look good on an EDI statement. It’s . . . the UCLA administration and the Office of Equity, Diversity, and Inclusion.”).

²³⁷ See, e.g., Elizabeth S. Chilton, *The Certain Benefits of Cluster Hiring*, *INSIDE HIGHER ED* (Feb. 6, 2020), <https://www.insidehighered.com/views/2020/02/06/how-cluster-hires-can-promote-faculty-diversity-and-inclusion-opinion> [<https://perma.cc/3S75-ELG2>] (“By asking departments to think through how their hiring needs intersect with such a cluster, it has allowed them to consider the relative diversity of their disciplines and subfields . . .”).

²³⁸ *Advancing Faculty Diversity Recruitment Grant, 2018-2019*, UC DAVIS, <https://academicaffairs.ucdavis.edu/advancing-faculty-diversity-pilot-project> (last visited Jan. 3, 2022) [<https://perma.cc/9JMT-CWLD>] [hereinafter *Advancing Faculty Diversity*] (cited in Ortner, *In the Name of Diversity*, *supra* note 18, at 549 n.233).

²³⁹ *In the Name of Diversity*, *supra* note 18, at 567-569; see also Colleen Flaherty, *Cluster-Hiring Cluster &-%*#?*, *INSIDE HIGHER ED* (Feb. 1, 2016), <https://www.insidehighered.com/news/2016/02/01/uc-riverside-faculty-survey-suggests-outrage-cluster-hiring-initiative> [<https://perma.cc/2SNE-PC64>].

screening” at the hiring stage, particularly when diversity statements are judged before the rest of the application, may serve to lock in certain viewpoints, making them “self-perpetuating” rather than subject to continuing reexamination or debate.²⁴⁰ And he raises the danger of professors being punished for extramural speech that is critical of diversity or diversity statements, though he candidly admits to having no evidence that this is happening at the University of California.²⁴¹ Shibley, meanwhile, adds an additional argument based on the perception of outside influence corrupting faculty judgment. Drawing from the AAUP’s 1915 *Declaration of Principles*, Shibley worries that professors’ public influence will diminish “if people could merely dismiss their purportedly academic conclusions by pointing out that ideology, or the fear of losing jobs or opportunities because of political disagreement, was what was driving their academic endeavors.”²⁴²

Whether or not any of these objections are sound, they are valid. That is to say, the factual claims may or may not correspond to anything actually happening at the University of California, but if they did, genuine academic freedom concerns would arise. Ortner’s and Shibley’s objections do not just use academic freedom as an acontextual slogan, as critics have done with viewpoint discrimination. They take seriously the values of disciplinary expertise, peer review, and faculty governance that UC has enshrined in official policy.

In fact, within the University of California, faculty and their academic freedom committees have raised worries not unlike Ortner’s and Shibley’s. In February 2020, “in response to growing faculty concerns about *administration-led directives* on how DEI statements should be evaluated and prioritized in the faculty search process,” the Academic Senate at UC Davis spoke out about an administration memo which had instructed deans to score DEI statements with “rubrics provided by Academic Affairs, and require applicants to achieve a scoring cutoff to be considered.”²⁴³ Around the same time, the system-wide University Committee on Academic Freedom wrote that establishing “fixed rubrics

²⁴⁰ Ortner, *In the Name of Diversity*, *supra* note 18, at 570-72.

²⁴¹ *Id.* at 572 (“At the moment, there is not yet evidence that UC is looking beyond the four corners of the diversity statement when evaluating contributions for diversity.”).

²⁴² Shibley, *supra* note 89.

²⁴³ Lagattuta & Tucker, *supra* note 6 (emphasis added).

and numerical grading systems to which all search committees must adhere[] violates academic freedom.”²⁴⁴

Real as these concerns are, it is important not to treat them as unique to diversity statements. Academic freedom, and the system of peer review that it is built upon, is a fragile business, always susceptible not just to outside interference, but also to corruption from within. Factions form within departments or entire fields, self-interest or friendships or laziness or bias clouds judgments, funding influences the direction of research, and disciplinary experts turn into reactionary cartels, enforcing orthodoxies and resisting new ideas.²⁴⁵ These are problems endemic to a system in which faculty are hired, granted tenure, and given promotions and raises based almost entirely on the judgment of their peers.

In considering mandated diversity statements, then, it seems fitting that we should treat them no differently than the mandated research and teaching statements that faculty and faculty applicants are already accustomed to filing — and having evaluated by their disciplinary peers.

There too, difficult questions will arise about who is setting research or teaching priorities. Are they emerging from the faculty or being imposed from above or outside — from administrators, legislators, or donors? Interdisciplinarity and cluster hires aren’t only invoked to diversify faculties; they are a feature of the modern university. Depending on a hiring unit’s goals, in certain faculty searches, research topics or teaching skill might be a threshold test that applicants have to satisfy before receiving more holistic consideration. Should things be any different for hires made through programs like the Advancing Faculty Diversity initiative described in Part I? And, of course, faculty set in their ways may often fail to give fair consideration to newcomers with challenging ideas or unusual (for that field) backgrounds. Research statements and resumes already make self-perpetuating viewpoints and backgrounds possible. The danger is hardly unique to diversity statements.

On the flip side, there also seems to be little reason why diversity statements should be treated differently by their *proponents* than

²⁴⁴ Memorandum from Univ. Comm. on Acad. Freedom, Univ. of California, to Kum-Kum Bhavnani, Chair, Acad. Senate, Univ. of California (Mar. 13, 2020) (on file with author).

²⁴⁵ See Robert C. Post, *The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University*, in *THE FREE SPEECH CENTURY* 106, 116 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019) (“Disciplines that do not allow freedom of inquiry wither and atrophy; but disciplines that do not evaluate the quality and merit of disciplinary work disintegrate and become incoherent.”).

research and teaching statements already are. University administrators do not standardly prescribe rubrics for judging faculty research and teaching. Why should they do so for contributions to diversity? No one thinks that the chemistry department should look for the same kinds of publications as the philosophy department, or that a drama class should employ the same teaching methods as the medical school does. There is little reason to think that diversity statements should be any more uniform.

In developing a framework for the permissible use of diversity statements, Part III will thus need to attend both to the valid academic freedom worries that have been raised inside and outside universities, but also to the danger of treating diversity statements as somehow categorically different than research or teaching statements when it comes to peer review, disciplinary expertise, and need (and danger) of faculty autonomy.

C. Political Tests

In the Summer of 1950, over thirty faculty at the University of California were fired for refusing to sign an oath, required by the Regents, stating that they were “not a member of the Communist Party.”²⁴⁶ The Faculty Senate pushed back, arguing on behalf of “traditional University principles of . . . academic freedom, including the essential right of the faculty to determine the qualifications for membership.”²⁴⁷ But even the Senate had been willing to deem as unqualified those colleagues whose “obligations” to Communism or other organizations “prejudice impartial scholarship and the free pursuit of truth.”²⁴⁸

Though the Regents’ oath was struck down by the California Supreme Court in 1952,²⁴⁹ the state’s statutory anti-Communist oath was not only upheld,²⁵⁰ but constitutionalized, ensuring that all state workers

²⁴⁶ Am. Ass’n of Univ. Professors, *Academic Freedom and Tenure in the Quest for National Security: Report of a Special Committee of the American Association of University Professors*, 42 AAUP BULL. 49, 64, 101 (1956) [hereinafter *Academic Freedom & Tenure in the Quest for National Security*]. As early as 1940, UC’s Regents had publicly stated that “membership in the Communist Party is incompatible with membership in the faculty of a State University.” *Id.* at 102.

²⁴⁷ *Id.* at 106.

²⁴⁸ *Id.* at 102-03.

²⁴⁹ *Tolman v. Underhill*, 249 P.2d 280, 283 (Cal. 1952).

²⁵⁰ *Pockman v. Leonard*, 249 P.2d 267, 273 (Cal. 1952) (upholding the Levering Act, CAL. GOV’T CODE §§ 3100-3109 (1951) (enacted by Stats. 1950, 3d Ex. Sess., ch. 7, p. 15, § 1, (Cal. 1950), amended by Stats. 1971, ch. 38, p. 50, § 5 (Cal. 1971))).

would have to swear that they weren't, wouldn't become, and in the previous five years hadn't been a member "of any party or organization, political or otherwise," that advocates for the forceful, violent, or otherwise unlawful overthrow of the U.S. or California government.²⁵¹

Loyalty oaths in the mid-twentieth century were not limited to the University of California, although nearly half of the faculty firings nationwide occurred there.²⁵² A 1956 AAUP report detailed anti-Communist efforts at eighteen universities across the country.²⁵³ And the various cases in the U.S. Supreme Court that gradually led to the California oath's demise came from teachers in Florida,²⁵⁴ Washington,²⁵⁵ Arizona,²⁵⁶ New York,²⁵⁷ and Maryland.²⁵⁸ The reasoning in these cases was not always consistent or crystalline,²⁵⁹ but as the California Supreme Court recognized in 1967, the cases taken together prohibited states from requiring vague or overbroad oaths that would penalize party members who had no personal intention of overthrowing the government or engaging in illegal activity.²⁶⁰ To do so would amount to "guilt by association," which the Constitution does not permit.

Underlying some of the Supreme Court's loyalty oath cases were additional concerns about academic freedom.²⁶¹ The rhetoric, if not the holding, of cases like *Keyishian v. Board of Regents*, emphasized that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."²⁶² Justice Brennan's opinion for the Court continued: "That

²⁵¹ CAL. CONST. art. XX, § 3. The ballot measure constitutionalizing the Levering Act oath passed with sixty-nine percent of the vote. BOB BLAUNER, *RESISTING MCCARTHYISM: TO SIGN OR NOT TO SIGN CALIFORNIA'S LOYALTY OATH* 215 (2009).

²⁵² BLAUNER, *supra* note 251, at xiii.

²⁵³ See Am. Ass'n of Univ. Professors, *Academic Freedom & Tenure in the Quest for National Security*, *supra* note 246, at 64.

²⁵⁴ *Cramp v. Bd. of Pub. Instruction of Orange Cnty.*, 368 U.S. 278, 279 (1961).

²⁵⁵ *Baggett v. Bullitt*, 377 U.S. 360, 361 (1964).

²⁵⁶ *Elfbrandt v. Russell*, 384 U.S. 11, 13 (1966).

²⁵⁷ *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

²⁵⁸ *Whitehill v. Elkins*, 389 U.S. 54, 55 (1967).

²⁵⁹ See Note, *Loyalty Oaths*, 77 YALE L.J. 739, 748-53 (1968). The Supreme Court later summarized its own case law on loyalty oaths in *Cole v. Richardson*, 405 U.S. 676, 680-82 (1972).

²⁶⁰ *Vogel v. County of Los Angeles*, 68 Cal.2d 18, 23 (1967) (citing *Elfbrandt*, 384 U.S. at 17-19 and *Keyishian*, 385 U.S. at 589).

²⁶¹ Because the California Supreme Court's case, *Vogel*, was brought as a facial challenge to an oath that applied to all state employees, not just professors, the court made no mention of academic freedom.

²⁶² *Keyishian*, 385 U.S. at 603.

freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom,” for the classroom “is peculiarly the ‘marketplace of ideas.’”²⁶³

In 1969, two years after the California Supreme Court struck down the state’s constitutional loyalty oath, the Regents of the University of California unanimously approved a standing order, in effect to this day, instructing that “no political test shall ever be considered in the appointment or promotion of any faculty member or employee.”²⁶⁴

This is the background against which critics now claim that mandated diversity statements at the University of California constitute a “new loyalty oath”²⁶⁵ or a “political litmus test.”²⁶⁶ The rhetorical power of these claims is clear, even if their precise legal basis sometimes is not.²⁶⁷ In their defense, the precise legal basis of the opinions striking down the old loyalty oaths was not always clear either.

To some extent, the arguments against loyalty oaths overlap with ones already discussed: those who objected to oaths in the 1950s often raised academic freedom as part of their defense, and viewpoint

²⁶³ *Id.* But see POST, *supra* note 168, at 62 (“[A]cademic freedom cannot usefully be conceptualized as protecting a marketplace of ideas.”).

²⁶⁴ *Appointment Procedures for Tenure Staff Changed; Political Test Barred*, 17 UNIV. BULL. 1, 159 (1969) https://www.google.com/books/edition/University_Bulletin/8vI2AQAAMAAJ?hl=en&gbpv=1 [<https://perma.cc/V7PR-FQXX>]; see also UC REGENTS STANDING ORDER 101.1(d), *supra* note 208; UC REGENTS BYLAW 40.3(a), *supra* note 208.

²⁶⁵ Goldberg, *Good Orthodoxy*, *supra* note 18, at 651 (“[M]any have argued that mandated diversity statements force professors to swear loyalty to a particular view of diversity that maps onto political ideology in a way that resembles the unconstitutional loyalty oaths that professors had to sign in the 1940s and 1950s.” (citing one blog post)); see also Epstein, *supra* note 8, at 1549, 1561, 1566-68; McGinnis, *supra* note 22; Thompson, *New Loyalty Oath*, *supra* note 7.

²⁶⁶ OR. ASS’N OF SCHOLARS, *supra* note 100, at 1, 5, 10; Flier, *Against Diversity Statements*, *supra* note 101; Thompson, *New Loyalty Oath*, *supra* note 7.

²⁶⁷ Consider, for example, Brian Leiter’s dizzying analysis of the “analogy to loyalty oaths” in the *Chronicle of Higher Education*. Leiter, *Diversity Statements Legal Problem*, *supra* note 114. Compelled speech is disfavored, he says, but the problem with loyalty oaths wasn’t that, but instead (he rightly notes) their vagueness and their infringement on freedom of association. Yet mandatory diversity statements “do not affect freedom of association,” says Leiter; rather they “cast a pall of orthodoxy over the classroom” — though Leiter immediately goes on to admit that “there is nothing in Berkeley’s policies to suggest the university would restrict a faculty member’s teaching” in the classroom. Leiter’s ultimate worry is that a particular view of diversity has become the “‘orthodox’ view in the California system,” and that agreement with that view is now a “condition of employment.” *Id.*

discrimination can of course include viewpoints associated with a political party, as we saw in the Iowa Law hiring case, *Wagner v. Jones*.²⁶⁸

But in addition to those claims already covered, the loyalty oath cases raise their own unique considerations. For one, there is the freedom of association element — the worry about guilt by association, judging people for the company they keep rather than their own beliefs (as viewpoint discrimination does). Second, there is the problem of vagueness, which drove several of the Supreme Court's decisions.²⁶⁹ Uncertain standards increase the discretion of employers and tend to chill expression at the margin, especially someone's job is at stake. Finally, anti-communist oaths underscore how, in many areas of law, political parties and political activity are treated differently than other associations or activities. Think, for example, of the distinction between using university funds to research or teach politically related subjects versus using funds to support a candidate, political party, or ballot measure.²⁷⁰ Worries about political litmus tests draw on similar principles. The university is not to be an arm of any political party.

Taking these concerns one by one: the guilt by association problem seems to be less pressing in regard to diversity statements than to the loyalty oaths of yore. John McGinnis complains that mandated diversity statements are *worse* than the Anglican creeds once required at Oxford and Cambridge, since academics there only had to “profess a set of beliefs but did not have to *do* anything to advance their social realization.”²⁷¹ But as a legal matter, this gets things backwards. Judging people for what they *do* wasn't the constitutionally problematic part of the anti-Communist fervor. The freedom of association problem arose in the loyalty cases because people were being punished for others' acts simply because they and the others shared certain ideological *beliefs*.

²⁶⁸ 664 F.3d 259, 264 (8th Cir. 2011); see also *supra* notes 204–212 and accompanying text.

²⁶⁹ See *supra* notes 254–260 and accompanying text.

²⁷⁰ See, e.g., UNIV. OF CAL., OFF. OF GEN. COUNS., ADVISORY: PROHIBITION ON POLITICAL CAMPAIGN INTERVENTION (2019), <https://ucnet.universityofcalifornia.edu/news/2020/01/uc-office-of-general-counsel-advisory-prohibition-on-political-campaign-intervention.pdf> [<https://perma.cc/M86Q-RBXP>] [hereinafter *Campaign Intervention Prohibition Advisory*] (“It is important to draw a distinction between prohibited political activities on the one hand, and instruction and research on politically related subjects on the other. Certainly, scholarly instruction and research on politics is not only appropriate but desirable.”); cf. Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 16 (“Whether it is the free speech clause or the structure of the Constitution more generally doing the work, we generally all acknowledge that the government cannot use its voice to campaign for particular candidates for office.”).

²⁷¹ McGinnis, *supra* note 22 (emphasis added).

As applied to current diversity statement mandates, the lesson of the association claims is this: people should be judged for what they do, not for abstract beliefs they might share with others who are doing things the university happens to like or dislike. Diversity statements are on firmest ground when they ask about actions and plans rather than viewpoints. (An additional benefit: statements about past actions are not as likely to devolve into canned, potentially insincere clichés about the value of diversity. Reports of past actions, as opposed to sentiments, cannot be faked in quite the same way.)

The remaining two allegations — of vagueness and political litmus tests — at first seem to fit awkwardly together. The former Harvard dean, Jeffrey Flier, claims that “[t]he meanings of ‘diversity,’ ‘equity,’ and ‘inclusion’ require clarification” since they are “rarely defined with specificity, and their meaning has been subtly shifting.”²⁷² “That’s a serious problem,” Flier adds, “especially if diversity efforts are to be a criterion for faculty evaluation.”²⁷³ But this claim seems to be in tension with allegations that “diversity” has a meaning so specific that it constitutes a political litmus test. Flier himself claims that academic DEI literature “often incorporates key elements of a theoretical corpus known as ‘critical race theory,’” thereby linking diversity-related terms “to a particular leftist ideology.”²⁷⁴ Meanwhile, Brian Leiter alleges that UC Berkeley is currently “conditioning employment, in effect, on believing that *Bakke* was correctly decided, and that diversity is the most important reason for affirmative action.”²⁷⁵ (By “*Bakke*,” Leiter is referring to Justice Powell’s influential opinion upholding diversity as the one permissible justification for affirmative action in university admissions.²⁷⁶) That is a specific political view indeed.

This tension may be more apparent than real though. When critics complain about the vagueness of terms like “diversity,” the complaint is likely not that we do not know what it means, but that *everyone knows* what universities mean when they talk about diversity, even if universities do not always say it. The vagueness worry sounds less in the due process aspect of the First Amendment — in notice-based

²⁷² Flier, *Against Diversity Statements*, *supra* note 101.

²⁷³ *Id.*; see also Kissel Letter, *supra* note 15, at 6 (“[T]his requirement amounts to an ideological loyalty oath to an entirely abstract concept — ‘diversity’ — that can represent vastly different things to different people. This flexibility might seem to be a virtue until professors realize that they are to be judged on the quality of their commitment to such an abstract concept.”).

²⁷⁴ Flier, *Against Diversity Statements*, *supra* note 101.

²⁷⁵ Leiter, *Diversity Statements Legal Problem*, *supra* note 114.

²⁷⁶ See sources cited *supra* note 117 and accompanying text.

concerns about subjecting people to uncertain rules — and more in the First Amendment’s equal protection aspect, with its worries about selective, discriminatory enforcement.²⁷⁷ The claim is that everyone knows, or everyone in-the-know knows, what universities really want when they request statements on contributions to diversity. According to John Cochrane, Senior Fellow at the Hoover Institution:

My friends (anonymous!) in the UC system report that the criteria are clear and the word is out: Don’t try to be clever. . . . Don’t write vibrant essays on the importance of ideological, political or religious diversity. . . . Are you thinking of writing about your hil[1]billy elegy background, your time in the military, your support for gun rights and Trump, and how this background and viewpoint would enrich a faculty and staff that likely has absolutely zero people like you? Don’t bother. We all know what “diversity” means.²⁷⁸

“We all know” arguments do a good deal of work in the critiques of diversity statements as political litmus tests. Cochrane refers to a diversity statement UCLA law professor Stephen Bainbridge publicly shared, where he describes his support of “conservative students and students of faith[, who] often feel alienated and estranged.”²⁷⁹ On his blog, Bainbridge followed his diversity statement with the comment: “I’ll let you know if I get the raise.”²⁸⁰ On his own blog, Cochrane winked, “Let’s see if he gets that raise,”²⁸¹ while Richard Epstein, writing in the *Illinois Law Review*, smirked that Bainbridge “shouldn’t hold his breath waiting.”²⁸² One catch: Professor Bainbridge apparently did get his raise.²⁸³

These arguments express a shared suspicion that faculties are taking illicit considerations into account when they review diversity

²⁷⁷ See Richard Fallon, *Making Sense of Overbreadth*, 100 YALE L.J. 853, 903-04 (1991).

²⁷⁸ Cochrane, *supra* note 105.

²⁷⁹ Stephen Bainbridge, *I Submit Herewith My “Diversity, Equity, and Inclusion” Statement for My Merit Raise at UCLA*, PROFESSORBAINBRIDGE.COM (Dec. 23, 2019), <https://www.professorbainbridge.com/profes-sorbainbridgecom/2019/12/i-submit-herewith-my-diversity-equity-and-inclusion-statement-for-my-merit-raise-at-uclaw.html> [<https://perma.cc/Q2VX-MBB2>].

²⁸⁰ *Id.*

²⁸¹ Cochrane, *supra* note 105.

²⁸² Epstein, *supra* note 8, at 1566.

²⁸³ Steve Bainbridge (@PrawfBainbridge), TWITTER (Jan. 21, 2021, 11:18 AM), <https://twitter.com/PrawfBainbridge/status/1352334658109800448> [<https://perma.cc/L9WW-5XZ3>].

statements. As the previous Section noted, this, even if true, is a danger endemic to the peer review system as a whole, not one unique to diversity statements. Political considerations, like racist and sexist ones, surely sometimes seep into evaluations where they have no place — in judgments of research and teaching no less than contributions to diversity.

Putting aside bad faith, the harder question is whether the criteria universities actually *say* they are applying count as political tests.

We might be tempted to answer no, thinking that the “political” in UC’s “no political tests” rule refers only to political *parties* — or maybe also specific ballot measures — as in the University’s limits on the use of its resources.²⁸⁴ According to this answer, being a supporter of diversity is not like being a registered Democrat. Indeed, when the diversity rationale from *Bakke* was being reargued at the Supreme Court in 2003, some of its most persuasive backers were big corporations and the military,²⁸⁵ while its sharpest critics included critical race theorists like Derrick Bell.²⁸⁶ Party lines here are not clearly drawn.

I hesitate to offer that answer, though, in part because of UC’s own history. In 1969, the very year the Regents banned political tests in hiring, they also stepped in to stop UCLA from hiring Angela Davis because of her Communist Party membership.²⁸⁷ Their excuse at the time: “the character of the Communist Party is so different from ordinary ‘political’ activity or association that the flat exclusion of Communists from employment is not a ‘political test.’”²⁸⁸ Narrowing the bounds of the political when convenient is not a strategy that has aged well.

Abigail Thompson, the UC Davis department chair who spoke out against diversity statements, has argued for a broader notion:

²⁸⁴ Compare CAMPAIGN INTERVENTION PROHIBITION ADVISORY, *supra* note 270 (stating that the University is prohibited from supporting or opposing political candidates, parties, and measures that have qualified for the ballot), with UC REGENTS BYLAW 40.3(a), *supra* note 208 (prohibiting political tests when considering the appointment or promotion of a University employee).

²⁸⁵ Brief of General Motors Corporation as Amicus Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); Brief of Lt. Gen. Julius W. Becton, Jr., et al. as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241); Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter*, 539 U.S. 306 (No. 02-241); see also JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 262 (2007) (referring to the military officers’ brief as possibly “the most influential amicus brief in the history of the Court”).

²⁸⁶ Bell, *supra* note 24, at 1622.

²⁸⁷ Am. Ass’n of Univ. Professors, *Academic Freedom and Tenure: The University of California at Los Angeles*, 57 AAUP BULL. 382, 382-84 (1971).

²⁸⁸ *Id.* at 386.

Politics are a reflection of how you believe society should be organized. Classical liberals aspire to treat every person as a unique individual, not as a representative of their gender or their ethnic group. . . . Requiring candidates to believe that people should be treated differently according to their identity is indeed a political test.²⁸⁹

Thompson's is a particularly forthright statement of the worry about compelled political orthodoxy. And note how her version differs from the viewpoint discrimination and academic freedom claims discussed above. Unlike the viewpoint worries, the claim here is not that faculty are being judged for something irrelevant to their jobs. Nor is the worry one about who is doing the judging, faculty or administrators. Even if Thompson's colleagues in the math department decided that "promoting different identity groups" was a relevant part of their jobs, Thompson's objection would remain: giving up one's core political beliefs, like one's religious beliefs, should not be the price of a university job.

It is worth recognizing that this objection has limits. If your political beliefs, or religion, dictate that women belong at home, or that some races are inherently superior to others, you will need to violate those beliefs if you want to have a job. It is also worth asking whether Thompson has correctly described what UC's various rubrics require. Do the rubrics really require respondents to treat people "differently according to their identity," rather than, say, to recognize ways that people *have been* treated differently according to their identity, or to take steps to ensure that "different identity groups" are all thriving?

We do not need to answer that last question here, for what the question really does is point aspirationally to the kinds of diversity statements we *want*. The following Part uses the lessons drawn from the critiques canvassed in this Part to provide a framework for our aspirations.

III. A FRAMEWORK FOR DIVERSITY STATEMENTS

Consider a memo from the university provost to the faculty: "Our school prizes diversity. For that reason, after consultation with the President, I am requiring all faculty applicants and those seeking tenure or promotion to submit a statement describing how their past work and future plans demonstrate their belief that diversity is a compelling governmental interest, as Justice Powell described in *Regents of the University of California v. Bakke*."

²⁸⁹ Thompson, *A Word from . . .*, *supra* note 102.

The memo, of course, is fictional, which is a good thing, as it would be unconstitutionally viewpoint discriminatory, a violation of academic freedom, and a political test akin to the loyalty oaths of the previous century — all the things critics say the University of California’s current policies are, or could soon become. In fact, some critics might think the memo is not that far off from reality: recall Brian Leiter’s allegation that Berkeley is currently “conditioning employment, in effect, on believing that *Bakke* was correctly decided, and that diversity is the most important reason for affirmative action.”²⁹⁰

The point: it is possible to envision a diversity statement requirement that is guilty in all the ways critics charge. The fleshing out of those criticisms in Part II puts us in the position where we can now say exactly what is wrong with the mandate above. And by doing so, we can clarify how diversity statements might be (or have been) required and evaluated in ways that are *right*. In other words, we can map the multiple variables that make DEI statements more or less viewpoint discriminatory, more or less intrusive on academic freedom, and more or less akin to a political test or loyalty oath. We can do so in order to mark out the space where diversity statements are *not* liable to the criticisms so often heard against them.

It is worth repeating that the goal here is to build a framework that shows how those who want to use diversity statements as a means to realizing their institutional goals can do so. I leave for others to decide what any given institution’s goals should be, and whether diversity statements are the right means of attaining them.²⁹¹

So what is wrong with the pro-*Bakke* statements required above? To put it briefly, the policy is too top-down, too uniform, too specific in what it wants, and too all-encompassing. These are related but distinct concerns about what we might call a policy’s source, tailoring, content, and intrusiveness. The policy comes from central administration rather than disciplinary experts on the faculty. It imposes the same requirement across disciplines, positions, and types of application — whether for hiring, tenure, and promotion. It imposes a highly specific, thickly described conception of diversity. And its emphasis on beliefs leaves little space for dissent from faculty speaking in the context of shared governance or as citizens.²⁹² The rest of this Part discusses each

²⁹⁰ Leiter, *Diversity Statements Legal Problem*, *supra* note 114.

²⁹¹ See, e.g., sources cited *supra* notes 23–25 (citing authors from across the ideological spectrum on the value of diversity and the usefulness of diversity statements in promoting that value).

²⁹² Daniel Ortner identifies certain similar variables as well at the end of his article on diversity statements. See Ortner, *In the Name of Diversity*, *supra* note 18, at 75–84.

of these variables, using the cautionary example above as a reference point to help map the many better ways of framing and evaluating diversity statements, should universities want to do so.

A. Source and Tailoring

A policy that the administration imposes uniformly across the university, like the one above, implicates two distinct values, though ones easily blurred. Whereas the policy's source raises academic freedom concerns, its lack of tailoring raises worries about viewpoint discrimination — or what we saw in Part II is better described as *irrelevant* viewpoint discrimination: judging someone based on views that are not relevant to the job they seek or hold.²⁹³

Academic freedom speaks to who should be making what decisions. In a system of shared governance,²⁹⁴ “appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal” are, in the words of the AAUP's 1966 *Statement on Government of Colleges and Universities*, “primarily a faculty responsibility,” since “scholars in a particular field or activity have the chief competence for judging the work of their colleagues.”²⁹⁵ Meanwhile, a university's “general educational policy, i.e., the objectives of an institution and the nature, range, and pace of its efforts” are said to require a joint effort among the administration, board, and faculty ideally resulting in “a reasonably explicit statement on general education policy.”²⁹⁶

As this last point makes clear, policy pronouncements may come from above even in a system of shared governance. The extent and form of collaboration between administration and faculty will vary — and the AAUP's aspirational Statement frowns on a policy, like the *Bakke* hypothetical, developed without faculty input at all — and yet top-down policymaking is generally to be expected.

There is little to be said from an academic freedom perspective when a university administration enshrines diversity, equity, and inclusion as

²⁹³ See *supra* Part II.A.

²⁹⁴ As Judith Areen points out, shared governance is not a constitutional requirement or even necessarily a good system for all types of schools, see Areen, *supra* note 172, at 984, though faculty (or shared) control of appointments and tenure is the norm. See *id.* at 966.

²⁹⁵ AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON GOVERNMENT OF COLLEGES AND UNIVERSITIES (1966), <https://www.aaup.org/report/statement-government-colleges-and-universities> [<https://perma.cc/5NBU-ZGLK>] [hereinafter 1966 AAUP STATEMENT].

²⁹⁶ *Id.*

core values within its institutional policies;²⁹⁷ when a university requires diversity statements from all faculty applicants or faculty seeking advancement;²⁹⁸ when it instructs peer evaluators to take account of the ways faculty are advancing those values;²⁹⁹ or when administrators offer financial incentives for schools or departments to run faculty searches specifically focused on contributions to diversity, equity, and inclusion.³⁰⁰ To repeat: mandating diversity statements from the top down is not problematic in and of itself.

Mandating the criteria for evaluating those statements is another thing entirely. When the Faculty Senate at UC Davis wrote to its administration in 2020 that “[t]here is no enthusiasm for a top-down mandated DEI rubric,”³⁰¹ this was in part because of academic freedom concerns that arise when “specific rubrics are imposed without regard to the faculty’s disciplinary judgments about how diversity, equity, and inclusion are best evaluated and promoted in their particular field.”³⁰² Imposing DEI rubrics, as Davis’s Provost asked deans to do in 2019,³⁰³ threatens to treat contributions to diversity differently than faculty’s other teaching and research contributions, where it would be highly unusual for the administration to impose numerical cutoffs, particularly based on a rubric not developed by the faculty itself.³⁰⁴

Since the worry at hand here concerns academic freedom, what is appropriate or not turns on the respective competencies of administrators and faculty. It is entirely appropriate, for example, for a university’s central administration to offer legal guidance on what kinds of considerations faculty evaluators can and can’t take into account under state and federal law and university regulations.³⁰⁵ Diversity

²⁹⁷ See, e.g., *Regents Policy 4400*, *supra* note 34 (indicating that diversity is a “defining feature” of the University of California).

²⁹⁸ Waugh Memo, *supra* note 3.

²⁹⁹ EVALUATING CONTRIBUTIONS, *supra* note 5, at 2.

³⁰⁰ *Advancing Faculty Diversity*, *supra* note 238.

³⁰¹ Lagattuta & Tucker Letter, *supra* note 6.

³⁰² Memorandum from the Acad. Senate Comm. on Acad. Freedom & Responsibility to Kristin H. Lagattuta, Chair, Davis. Div. of the Acad. Senate, Univ. of Cal., Davis (Feb. 11, 2020), https://asis.ucdavis.edu/sitefarm/file.cfm?view=rfc_response&id=15860 [<https://perma.cc/3BC4-4J2L>] [hereinafter CAFR Memo]. I was a member, but not chair, of the committee that submitted this statement.

³⁰³ Hexter Letter, *supra* note 82 (“I ask that you give distinct attention to your faculty’s diversity throughout the [hiring] process, including . . . using the required diversity statements by scoring them with rubrics provided by Academic Affairs, and requir[ing] applicants to achieve a scoring cutoff to be considered.”).

³⁰⁴ See CAFR Memo, *supra* note 302 (criticizing the Provost’s instruction).

³⁰⁵ See Philip Kass, Vice Provost, Univ. of Cal., Davis, Presentation on UC Davis Advancing Faculty Diversity Grant 2018-2019 (Oct. 23, 2019),

offices within the university are well-positioned to provide training on techniques that have proven effective in diversifying faculty, reducing bias, supporting and retaining a diverse faculty, and promoting success across a diverse range of students. Requiring faculty to participate in this kind of training, particularly before serving on hiring and tenure committees, is normally not a violation of academic freedom. Administrators can also provide sample rubrics so that individual departments can benefit from others' experience without having to reinvent the wheel. These are all appropriate because they still leave faculty the space to develop and apply criteria of evaluation that reflect their disciplinary expertise.³⁰⁶

But here is where the concerns about academic freedom — about a policy's source — blend into the charge of viewpoint discrimination, which arises when policies are insufficiently tailored. The two are related, since top-down often implies uniform: a single prompt or rubric that applies across the university. If administrators ignore faculty's disciplinary expertise in developing rubrics, they are likely to produce rubrics that are not sufficiently tailored to specific disciplines or faculty positions. And that raises the specter of irrelevant viewpoint considerations seeping into hiring, tenure, and promotion.

There are, of course, ways of framing rubrics at such a high level of generality that they might cut across disciplines and positions. UC Irvine's old rubric awards a point for simply writing a statement, a point for awareness of "inequities and challenges in education faced by historically underrepresented or economically disadvantaged groups," two points for a demonstrated track record in reducing barriers to such groups, and one point for specific plans for the future.³⁰⁷ If, as a matter of institutional policy, diversity is seen as "integral to the University's achievement of excellence," then it is hard to imagine a discipline or position within the university where the awareness, actions, and plans Irvine describes would not be relevant to job performance. The

<https://andponline.org/wp-content/uploads/2019/11/2-Diversity-in-Academia-and-Science-Kass.pptx> [<https://perma.cc/6QBZ-VU64>].

³⁰⁶ There might also be exceptional circumstances when a department is so hostile to diversifying its faculty that a more assertive administrative response is needed. Exceptional instances where university administrators are justified in overruling faculty recommendations on hiring or tenure are hardly unique to diversity; they may also be justified, for example, when teaching or research coverage in a department becomes unbalanced or captured. See 1966 AAUP STATEMENT, *supra* note 295 ("The president must at times, with or without support, infuse new life into a department."); Areen, *supra* note 172, at 996; Rabban, *supra* note 227, at 286.

³⁰⁷ UCI Recruitment Resources, *supra* note 74. (The old rubric can be reached by clicking "FAQs" in the menu and then "Applicant Diversity Statement FAQ (PDF)").

vagueness of Irvine's rubric leaves departments plenty of room to decide what inequalities and challenges are most dire in their field, and what counts as effective ways of responding.

But when rubrics get more specific, they also need to get better tailored. Consider the different ways DEI concerns might be incorporated into professors' work in different fields. In law, for example, research connections are often quite explicit: people write articles like this one, or address topics concerning race or gender and policing, housing, employment, immigration, corporate boards, consumer finance, transportation policy, and so on. In my other field, the philosophy of art, contributions to diversity often involve broadening the range of examples studied, looking beyond the standard canon of painting, novels, and European classical music.³⁰⁸ In still other fields, from physics to veterinary medicine, the emphasis might be less on what is studied and more on who is doing the studying. Disciplinary experts in each field are best positioned to know what kinds of work are needed and effective.

Obvious as this last point might seem, much of the criticism of diversity statements has arisen out of worries that it privileges some areas of the university over others.³⁰⁹ Tailoring by field avoids this concern.

Because faculty and applicants should only be judged for views of theirs that are relevant to their particular jobs,³¹⁰ tailoring prompts and rubrics to job positions, not just disciplines, may also be necessary. What might seem like a burden, however — the need for tailored requirements or evaluative criteria — can actually prove to be freeing, for review committees can be far more specific in what they seek the more tailored their criteria are to a particular position.

Consider how diversity statement prompts and rubrics might vary in how specifically they define diversity. "Historically underrepresented or economically disadvantaged groups"³¹¹ is quite broad. Requiring an "accomplished track record (calibrated to their career stage) of

³⁰⁸ See, e.g., *Diversity Curriculum Grants*, AM. SOC'Y FOR AESTHETICS, <https://aesthetics-online.org/general/custom.asp?page=CurriculumGrants> (last visited Jan. 3, 2022) [<https://perma.cc/7BDN-Y3NR>] (listing ASA grants for aesthetic curricula that promote diversity in aesthetics).

³⁰⁹ See Ortner, *In the Name of Diversity*, *supra* note 18, at 561-62. This concern also motivated the revision of APM 210-1(d) at the University of California, which some had "read to say that research into diversity and equity holds a privileged position above other academic disciplines." Green & Roxworthy Letter, *supra* note 27.

³¹⁰ See *supra* Part II.A.

³¹¹ *UCI Recruitment Resources*, *supra* note 74 (The rubric can be reached by clicking "FAQs" in the menu and then "Applicant Diversity Statement FAQ (PDF)").

teaching, research or service activities addressing the needs of African-American, Latino(a)/Chicano(a)/Hispanic, and Native American students or communities” is considerably more particular.³¹²

Unlike the former definition, used in rubrics intended for faculty applicants across the board, the latter definition was used in the eight Advancing Faculty Diversity searches at UC Davis, where contributions to those three named communities were a central part of the job descriptions. To ask about candidates’ experiences and plans for helping those specific communities *within those specific job searches* is, at least arguably, little different than asking candidates their views on asylum when interviewing for clinical positions in a law school’s immigration clinic.³¹³ There is nothing unconstitutionally viewpoint discriminatory about doing that, even though asking the same question when hiring in Physics or Musicology would be illegal. Viewpoint discrimination is unconstitutional when it involves views that are not relevant to the job in question.

Source, tailoring and content, the variable to which we now turn, end up all being related: the more a prompt or rubric is developed based on genuine academic judgments (source) about the nature of a particular job and field (tailoring), the more specific the desired content in candidates’ diversity statements can potentially be.

B. Content

We just saw one way the content sought in diversity statements might vary: in terms of the specificity intended by words like “diversity.” At one end is the broad and open-ended list of identity categories enshrined in the UC Regents diversity policy; at the other is a focus on specific underrepresented racial or ethnic groups, as in the Advancing Faculty Diversity Initiative.³¹⁴ To avoid viewpoint discrimination — which, again, really means irrelevant viewpoint discrimination — questions and rubrics need to be more open-ended the more widely they are used across the university.

What then of those critics who have alleged that diversity is too vague a term to be useful in faculty evaluations? And what should happen to

³¹² *Advancing Faculty Diversity*, *supra* note 238.

³¹³ *See supra* note 66 and accompanying text.

³¹⁴ *Compare Regents Policy 4400*, *supra* note 34 (broadly listing “race, ethnicity, gender, age, religion, language, abilities/disabilities, sexual orientation, gender identity, socioeconomic status, and geographic region, and more”), *with Advancing Faculty Diversity*, *supra* note 238 (listing “African-American, Latino(a)/Chicano(a)/Hispanic, and Native American students or communities”).

applicants who respond to a vague prompt by talking about their “hil[l]billy elegy background” or their “support for gun rights and Trump”?³¹⁵

Law professor Lisa Pruitt has written about a diversity statement she submitted to UC Davis in 2012 that described her white, rural, working class background and her scholarly work on rural poverty issues.³¹⁶ Pruitt’s conception of diversity may not have been fully shared by her school’s leadership, which edited out parts of her statement focused on class before submitting it.³¹⁷ But in her articles and elsewhere, Pruitt continued to argue why “scholarship explicitly about class and the mentorship of first-generation students [should] qualify as contributions that promote ‘diversity.’”³¹⁸ Whether due to her arguments or not, UC Davis now sponsors a First Generation Advocates program in its Law School, with mentors that include not just Professor Pruitt, but also the school’s Dean and Senior Associate Dean.³¹⁹ The university-wide Office of Diversity, Equity, and Inclusion now touts the program’s achievements.³²⁰ At its best, the open-endedness of terms like “diversity” can lead to intradisciplinary debate about what kinds of contributions to prioritize and value. Doing so treats diversity, once again, on par with research and teaching contributions, where approaches once dismissed can gain favor within a given discipline over time.

Claims that someone contributes to a school’s *ideological diversity* may be a harder sell. Whereas faculty members at a public university surely have a duty to help ensure that members of all the state’s racial groups (and other identity categories) are welcomed and helped to thrive at the university, there is no parallel duty to ensure that all viewpoints held within the state are affirmed and encouraged in the university. The very point of disciplinary expertise, after all, is to judge some of those viewpoints as insufficiently supported or just plain wrong. Moreover, when it comes to hiring, any affirmative effort to

³¹⁵ Cochrane, *supra* note 105.

³¹⁶ Lisa R. Pruitt, *Who’s Afraid of White Class Migrants? On Denial, Discrediting, and Disdain (and Toward a Richer Conception of Diversity)*, 31 COLUM. J. GENDER & L. 196, 223 (2015).

³¹⁷ *Id.*

³¹⁸ *Id.* at 224.

³¹⁹ *First Generation Advocates*, UC DAVIS SCH. OF L., <https://law.ucdavis.edu/first-generation-advocates/> (last visited Jan. 3, 2022) [<https://perma.cc/UNC3-ANUS>].

³²⁰ Thomas O’Donnell, *UC Davis School of Law Graduates Its Inaugural First Generation Advocates Cohort*, UC DAVIS SCH. OF L. (May 27, 2020), <https://diversity.ucdavis.edu/news/uc-davis-school-law-graduates-its-inaugural-first-generation-advocates-cohort> [<https://perma.cc/G42F-QPYF>].

increase ideological diversity could involve the very kind of irrelevant viewpoint discrimination that critics allege against DEI mandates.

This talk of ideology, however, raises another way the content sought in diversity statements might vary: some, like the *Bakke* pledge above, seek a *thicker* conception of diversity than others. That is to say, some employ a notion of diversity that is enmeshed in a larger web of beliefs. Justice Powell's opinion in *Bakke*, for example, expressed interconnected beliefs about what role race should play in our views of other people, of how racial inequalities should be addressed, and of what racial diversity adds to education.³²¹ The thicker the web of beliefs involved in your conception of diversity, the more you begin to describe "how you believe society should be organized" — Abigail Thompson's definition of politics.³²²

The problem with thickness hearkens back to the freedom of association concerns at the heart of the loyalty oath cases.³²³ There, remember, the idea was that firing professors for being a communist imputed to them the whole web of beliefs and intended actions attributable to the Communist Party as a whole. Someone interested only in the redistribution of capital might get lumped in with those seeking violent revolution and branded guilty by association.

We do not generally see people self-identifying as *Bakkeans*, although perhaps that is a good description for parts of the diversity industry that has sprung up at universities and corporations in *Bakke's* wake.³²⁴ But other thickly described employment requirements are more familiar. Abigail Thompson sees UC's position on diversity to be opposed to that of "classical liberals,"³²⁵ and academic centers like the Institute for Humane Studies ("IHS") at George Mason University list among their job qualifications a "strong understanding of and passion for classical

³²¹ In short, the Powell/*Bakke* conception is individualist but not color-blind, treating race as just one of many factors that make up an individual, like being a football player, a musician, or a "farm boy from Idaho." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978), Racial preferences can only be used to remedy specific legal injuries, not the lingering effects of "societal discrimination," *id.* at 307, and an "ethnically diverse student body" has educational benefits for everyone in the classroom. *Id.* at 306, 311-14.

³²² Thompson, *A Word from . . .*, *supra* note 102.

³²³ See Leiter, *Diversity Statements Legal Problem*, *supra* note 114 (noting that the loyalty oaths were ultimately held unconstitutional "because they violated the right of citizens to 'freedom of association,'" but mandatory diversity statements, by contrast "do not affect freedom of association"). I am arguing that if UC's mandatory diversity statements actually did take the form Leiter alleges they do, there *would* be an effect on professors' freedom of association.

³²⁴ See sources cited *supra* note 25.

³²⁵ Thompson, *A Word from . . .*, *supra* note 102.

liberal principles.”³²⁶ The IHS website’s description of those principles suggests what a comprehensive worldview the classical liberal tradition offers.³²⁷ In recent times, critics have treated Critical Race Theory as a similarly comprehensive worldview, describing it in thick terms³²⁸ that have since been incorporated into anti-Critical Race legislation across the country.³²⁹

The dangers of banning (or requiring) thickly described belief systems are on display here: teachers who simply assign material from the 1619 Project in their classroom³³⁰ get ascribed, and blamed for, all the purported sins of “postmodernism, postcolonialism, identity politics, neo-Marxism, critical race theory, intersectionality, and the therapeutic mentality,” to quote Bari Weiss’s list.³³¹ As happened with the loyalty oaths, people are held accountable not just for their own actions and beliefs, but for any of those that get lumped together with theirs in what is seen as an inextricable web of beliefs. The cautionary *Bakke* oath at the start of Part III shows how *not* to do something similar when it comes to diversity.

³²⁶ *Program Manager — Career Portal*, INST. FOR HUMANE STUD. AT GEORGE MASON UNIV. (Dec. 6, 2021), <https://us61e2.dayforcehcm.com/CandidatePortal/en-US/ihs/Posting/View/147> [<https://perma.cc/9DPX-9AJE>].

³²⁷ *Who We Are*, INST. FOR HUMANE STUD. AT GEORGE MASON UNIV., <https://theihs.org/who-we-are/> (last visited Jan. 3, 2022) [<https://perma.cc/HX6E-JGLJ>].

³²⁸ See, e.g., Mike Gonzalez & Lindsey M. Burke, *To Tackle Critical Theory in the K–12 Classroom, Start with Colleges of Education*, NAT’L REV. (Oct. 5, 2020, 6:30 AM), <https://www.nationalreview.com/2020/10/higher-education-critical-theory-attacks-america-norms-traditions/> [<https://perma.cc/NDM9-X5Y6>] (claiming that critical race theory attacks American traditions); Bari Weiss, *Stop Being Shocked*, TABLET (Oct. 14, 2020), <https://www.tabletmag.com/sections/news/articles/stop-being-shocked> [<https://perma.cc/WF3Y-U2TM>] (calling critical race theory “the beating heart” of a new ideology that aims to replace liberalism).

³²⁹ See JONATHAN FRIEDMAN & JAMES TAGER, EDUCATIONAL GAG ORDERS: LEGISLATIVE RESTRICTIONS ON THE FREEDOM TO READ, LEARN, AND TEACH 4 (2021), <https://pen.org/report/educational-gag-orders/> [<https://perma.cc/59VE-XVX3>]; Michelle Goldberg, *The Campaign to Cancel Wokeness*, N.Y. TIMES (Feb. 26, 2021), <https://www.nytimes.com/2021/02/26/opinion/speech-racism-academia.html> [<https://perma.cc/6UUT-S4BZ>]; Jeffrey Sachs, *The New War on Woke*, ARC DIGIT. (Feb. 26, 2021), <https://medium.com/arc-digital/the-new-war-on-woke-ced9fd3699b> [<https://perma.cc/P5HV-P5RD>].

³³⁰ See Sachs, *supra* note 329 (citing bills in three states banning material from the 1619 Project in public schools).

³³¹ Weiss, *supra* note 328.

C. *Intrusiveness*

Because the content of the *Bakke* statements employs such a thick conception of diversity, approaching a political worldview, it ends up reaching beyond faculty's actions at work; it intrudes into their expressive activities outside of their jobs.³³² Ordinarily, someone can do their assigned job while still arguing, whether at work or in public, that their job should be differently defined. By contrast, one cannot, on pain of hypocrisy, affirm a belief at work while also arguing, either on or off duty, that belief to be false. The *Bakke* statements above ask faculty to endorse a certain *belief*. That is what makes the request intrusive: it cuts off the possibility of contestation.

Policies like this trigger the kind of worries that arose in cases, described above, about government employment, funding, and contracting.³³³ The major takeaway there was that viewpoint discrimination might be permissible within the contours of a job or funding program, but it generally cannot be all-encompassing. *Garcetti* stands for the proposition that speech made in the course of one's job duties should get treated differently than speech outside of work.³³⁴ Similarly, unconstitutional conditions cases like *AOSI* reject government leveraging, using funding within a given program to coerce recipients' expression or agreement on matters outside the program's bounds.³³⁵ The shared point is that, aside from the rare jobs that require party loyalty,³³⁶ taking a government job or accepting government funds generally shouldn't mean giving up all your rights as a citizen to speak. For faculty, academic freedom also requires protection for faculty's right to participate in shared governance, even though it is something they do *qua* faculty, not as citizens.

Diversity statements thus need to be framed in ways that leave room for faculty to speak as citizens and as participants within a university's system of shared governance. Consider again Abigail Thompson, writing against UC Davis's use of diversity statements in the *Wall Street Journal*, or Davis faculty making similar comments during discussion of

³³² Boundaries are always a complicated issue when it comes to faculty jobs, see Amar & Brownstein, *First Amendment Academic Freedom Rights*, *supra* note 147, but here "at work" refers to actions taken in faculty's teaching, research, and public service, as opposed to their participation in institutional governance and extramural speech, including speech about their university employer.

³³³ See *supra* Part II.A.

³³⁴ See *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006).

³³⁵ See *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 220-21 (2013).

³³⁶ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79 (1990).

the campus's two faculty resolutions on the subject.³³⁷ The former is clearly protected by the First Amendment, while the latter comments are equally clearly protected as a matter of academic freedom. If Davis had mandatory diversity statements that asked applicants to “demonstrate their strong understanding of and passion for diversity as a compelling governmental interest in public universities,”³³⁸ Thompson and her colleagues might be unable to comply without contradicting their extramural speech and, presumably, their own true beliefs.

Still, plenty of other diversity statement requirements — including most prompts and rubrics *actually* being used in the UC system — do not impose this dilemma. Prompts that ask about faculty's awareness of barriers to underrepresented groups' success, steps taken to lower those barriers, and plans for the future³³⁹ can almost always be sincerely answered in ways that leave room for faculty to argue at a faculty meeting or in an op-ed that their institution should be focused on a broader set of groups, or perhaps that its focus on groups rather than individuals is a mistake.

In short, the statement at the start of Part III required a commitment that would intrusively limit what faculty could say without hypocrisy as part of public discourse or shared governance. By contrast, questions that ask what faculty have done to ensure the success of certain groups of students do not generally limit faculty's ability to speak out elsewhere — even against that very question.

It may be worth emphasizing “elsewhere” in the last sentence. To say that prompts and rubrics for diversity statements should allow space for contestation is not to say that the contestation has to (or should) be *within* the diversity statement itself. Here again, analogies to teaching and research statements are helpful. The person who thinks that teaching is a waste of time will probably be penalized for saying so within their teaching statement, even though they can of course argue for reduced course loads in the Faculty Senate or the local newspaper. Most faculty understand that they need to report their efforts and successes as teachers even if they think teaching is a distraction from (what they see as) their real work as scholars. There is no reason that

³³⁷ See *supra* notes 103, 131–133 and accompanying text.

³³⁸ See *Program Manager — Career Portal*, *supra* note 326.

³³⁹ See, e.g., *Diversity Statement Guidelines*, *supra* note 83 (asking for applicants' awareness of inequity, track record of activities to reduce barriers, and vision and plans for the future); *UCI Recruitment Resources*, *supra* note 74 (the rubric can be reached by clicking “FAQs” in the menu and then “Applicant Diversity Statement FAQ (PDF)”).

diversity statements cannot be framed and judged in similarly action-orientated ways, with similarly little controversy.

* * *

We began Part III with an example of a required diversity statement that would justify all three of the criticisms detailed in Part II: it is a viewpoint discriminatory, academic-freedom-threatening loyalty oath. The remainder of this Part was aimed at establishing a framework for making that judgment — and more importantly, for making more favorable judgments about diversity statement policies that do *not* give rise to constitutional and academic freedom concerns.

Mandated diversity statements vary in ways that can be mapped along several axes at once:

1. Source: administration versus faculty;
2. Tailoring: uniform instead of tailored to particular fields or positions;
3. Content: general or more specific in how prompts and rubrics define diversity and the web of beliefs surrounding it;
4. Intrusiveness: is it all-encompassing or does it leave space for contestation outside the statement? This often reduces to whether the statements are to focus on beliefs instead of actions.

Each of these describes an axis, not a binary: they all admit of degrees. Nor is this just a checklist. As we have seen, the more that prompts and rubrics are tailored to particular jobs, the more thickly and specifically they can define what counts as a contribution to diversity. “Diversity” might be given a more specific meaning, or a thicker web of commitments might be sought in candidates, when faculty are running a search that is part of a targeted diversity initiative as opposed to general hiring, tenure, or promotion. This is no stranger than the fact that faculty might consider candidates’ views on the free market when staffing their new program on entrepreneurship, but not when hiring generally, or when reading a tenure file from the physics department.

The first variable — source — can also color the rest, though in a somewhat different way. When faculty make genuinely academic judgments, applying their disciplinary expertise to decide who to hire, tenure, or promote, academic freedom protections are at their height, and judicial deference will be at its greatest. As a practical matter, this means that diversity statements gain more legal leeway on each of the other three axes when they are framed and evaluated according to

standards set by the faculty rather than administrators, much less donors, the legislature, or the clamor of the public.

CONCLUSION

Diversity statements do not just refer to the paragraphs faculty now often submit with their applications for jobs, tenure, or promotion. Universities too want to make their own statements on diversity, and they do so in part by monitoring and making explicit what work is being done to further diversity, equity, and inclusion on their campuses.

Like most statements, universities' diversity statements have their opponents. But unlike most statements, those of higher educational institutions can only be made through the actions and speech of others — namely, the people who comprise the institutions. And that is where problems arise. Insofar as universities can only speak through people who have expressive freedom of their own, institutional values and commitments often collide with dissenting faculty's freedom of speech, academic freedom, and freedom from so-called "loyalty oaths." This Article has been an attempt to navigate around that collision.

Doing so requires that we understand when viewpoint discrimination in faculty hiring and promotion is unconstitutional; how the principles of academic freedom operate in the contexts of hiring, advancement, and institutional governance; and what exactly is wrong with loyalty oaths and political tests. None of these issues is easy, and given the legal complexities involved, discussions of diversity statements on Twitter, blog posts, opinion pages, and even in most faculty committee meetings, generally have not been up to the task.

The framework this Article has offered reflects the complexities both of the law involved and of the facts on the ground — the varied and evolving ways diversity statements are actually being required and evaluated within universities. Bright lines about what is permissible are not possible. Still, some points are clear, and worth reiterating here by way of conclusion.

First, the mere fact that universities may be mandating diversity statements in faculty hiring, tenure, or promotion applications is not itself problematic. What matters, *second*, is what is being mandated: what kinds of statements are prompted, how they are evaluated, and who is making these decisions. *Third*, the more diversity statement prompts and rubrics are developed by faculty and tailored to specific jobs and disciplines, the more leeway there is about what can be sought. *Fourth* and finally, no matter what is asked and evaluated within faculty's diversity statements, it needs to be done in a way that leaves space for faculty to speak out, both as citizens and as participants in

shared governance, for or against diversity statements, even for or against the values those statements are meant to advance.

Insofar as universities decide that diversity statements are an effective way to advance their values — that they are part of the statement universities themselves want to make — this Article's framework is meant to show them how best to do so, free of the criticisms that these statements continue to inspire, and that legal scholarship, until now, has done little to answer.