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In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia

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In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia

Cover Page Footnote

Daniel Ortner is an attorney at the Pacific Legal Foundation (PLF), a public interest law firm that fights for individual liberty, including freedom of speech. He thanks the many PLF colleagues that have helped him think through the issues raised in this article, including Ethan Blevins, Jim Manley, Erin Wilcox, Joshua Thompson, Caleb Trottier, and Deborah La Fetra. He is also very grateful for the assistance of many professors in the University of California that would likely rather remain anonymous, as well as a variety of groups that advocate for free speech and academic freedom on campus, including the California Association of Scholars, National Association of Scholars, Heterodox Academy, and the Foundation for Individual Rights in Education.

IN THE NAME OF DIVERSITY: WHY MANDATORY DIVERSITY STATEMENTS VIOLATE THE FIRST AMENDMENT AND REDUCE INTELLECTUAL DIVERSITY IN ACADEMIA

Daniel Ortner⁺

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In the 1950s and 1960s, in many parts of the country, a professor could be fired or never hired if he refused to denounce communism or declare loyalty to the United States Constitution. The University of California (also referred to as “UC”) system took the lead in enforcing such loyalty oaths.¹ These oaths were challenged all the way up to the United States Supreme Court and were soundly rejected, establishing the centrality of academic freedom and open inquiry on the university campus.²

So why are loyalty oaths making their resurgence in the form of mandatory diversity statements? Universities have begun requiring faculty members to declare fealty to a particular worldview and approach towards matters of

1. Robert G. Sproul, President of the University of California, drafted a loyalty oath to be taken by all university staff in 1949. Robert Greenberg, *The Loyalty Oath at the University of California: A Report on Events, 1949–1958*, FREE SPEECH MOVEMENT ARCHIVES, http://www.fsm-a.org/stacks/AP_files/APLoyaltyOath.html. The following year, the State of California adopted the Levering Act, which required all public employees to take a loyalty oath. *Id.* Ultimately, twenty-six faculty members were dismissed, and thirty-seven others resigned in protest. *Id.*

2. See *infra* Section I

diversity.³ Campus diversity bureaucrats appear to miss the irony that these statements are being deployed in the name of diversity. In another historical irony, this trend has once again been spearheaded by the UC system.

While these diversity statements were initially conceived of as just an additional factor to be weighed along with academic merit, teaching, and service, the purpose and use of these statements has radically morphed over the past few years. At some UC campuses today, a prospective professor who does not produce a diversity statement that satisfies diversity bureaucrats will be excluded from consideration without a review of any other aspect of his application.⁴ The rubrics that are being deployed engage in blatant viewpoint discrimination as well as a viewpoint-based evaluation of the applicant's research.⁵ It is unlikely, for instance, that an aspiring professor who shares the viewpoint of Chief Justice Roberts that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"⁶ would be hired. Can a university employ such viewpoint-based criterion in its hiring process, or do the First Amendment rights of individual professors foreclose such viewpoint-based discrimination?

This question turns on a long-standing debate that has divided courts and academics across the country. Do professors have a personal First Amendment right in their academic profession, or do free speech rights in academia extend only collectively to academic faculty and departments? The Supreme Court's curtailment of public employee speech in *Garcetti v. Ceballos* has only exacerbated this lingering tension.⁷ This article begins with a recap of the ongoing debate.

Many of the battles over faculty speech have traditionally concerned speech or conduct in the classroom. Classroom speech raises difficult concerns over whether the professor is speaking of his own accord or merely acting as an agent of the University.⁸ Other fights have concerned professors' publications of particularly controversial and offensive speech, such as when Ward Churchill described workers in the World Trade Center as "little Eichmanns."⁹ These cases have involved individualized assessments as to whether a particular faculty member was likely to be disruptive or harmful to a university's mission or otherwise violated university protocol.¹⁰ In these cases, the university has often, but not always, prevailed.

3. See *infra* Section II.

4. See *infra* Section II.

5. See *infra* Section II.A.2.

6. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 US 701, 748 (2007).

7. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). See *infra* Section I.D.

8. See *infra* Section I.C.1.

9. Associated Press, *Professor Fired After 9/11-Nazi Comparison*, NBC NEWS (July 24, 2007), http://www.nbcnews.com/id/19940243/ns/us_news-education/t/professor-fired-after-nazi-comparison/#.Xdwk3FdKgzw.

10. See, e.g., *Churchill v. Univ. of Colo. at Boulder*, 285 P.3d 986, 991–92 (Colo. 2012). The University of Colorado found that Churchill's essay "did not engender imminent violence or

The introduction of the mandatory diversity statement shifts the battleground away from the classroom and away from the publication of particularly controversial faculty speech towards systematic evaluation of viewpoint that is largely unrelated to classroom activities and unrelated to whether the viewpoint is expressed in a particularly offensive or divisive fashion. Surprisingly, thus far scholarly attention to this new shift has been limited,¹¹ and public attention muted,¹² although that appears to be changing.¹³ This is perhaps because the

unduly interfere with university operations, constituted protected free speech and therefore could not serve as the grounds for a for-cause dismissal of a tenured employee.” *Id.* at 992. However, the University also investigated several other complaints of academic misconduct and found good cause for his removal. *Id.* at 992–93.

11. Professor Erica Goldberg discussed diversity statements in an article published in the FIU Law Review in the spring of 2019. *See generally* Erica Goldberg, “Good Orthodoxy” and the Legacy of *Barnette*, 13 FIU L. REV. 639 (2019). However, Professor Goldberg’s discussion of diversity statements is limited for two reasons. First, she does not focus on the specifics of how these statements are being used (and her article was likely written before some of the most recent and more troubling developments). Second, her article is not focused on the central question that this article seeks to address, which is whether diversity statements impinge on the First Amendment rights of faculty members. Professor Goldberg focuses instead on a more generalized issue of compelled speech, rooted in the Supreme Court’s *Barnette* decision. *Id.* at 639–40.

12. Jeffrey Flier, the former dean of Harvard Medical School, sent out a tweet critical of mandatory diversity statements in November 2018. *See* Colleen Flaherty, *Making a Statement on Diversity Statements: Former Harvard Dean’s Tweet Against Required Faculty Diversity Statements Sets off Debate*, 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>. He followed up this tweet with a column in the Chronicle of Higher Education in January 2019. *See generally* Jeffrey Flier, *Against Diversity Statements*, CHRON. HIGHER EDUC. (Jan. 3, 2019), <https://www.chronicle.com/article/Against-Diversity-Statements/245400>. A response was published a few days later. *See generally* Charlotte M. Canning & Richard J. Reddick, *In Defense of Diversity Statements*, CHRON. HIGHER EDUC. (Jan. 11, 2019), <https://www.chronicle.com/article/In-Defense-of-Diversity/245463>. In 2019, a few opinion pieces and articles focused on the use of these statements at the University of California, including an op-ed in the Daily Caller by the author Daniel Ortner. *See* Daniel Ortner, *Don’t Expect Diversity of Thought at University of California*, DAILY CALLER (Sept. 24, 2019), <https://dailycaller.com/2019/09/24/ortner-diversity-university-california>; *see also* Dan Walters, *UC Faculty “Diversity Statement” Mandate a Political Litmus Test*, DESERT SUN: CALMATTERS COMMENTARY (July 28, 2019), <https://www.desertsun.com/story/opinion/columnists/2019/07/28/uc-faculty-diversity-statement-policy-litmus-test-dan-walters-calmatters-commentary/1843207001/>. Attention to the issue picked up in 2020. *See, e.g.*, Daniel Ortner, *What is UC Davis Hiding About Its Use of Diversity Statements?*, THE HILL (Feb. 3, 2020), <https://thehill.com/opinion/education/480603-what-is-uc-davis-hiding-about-its-use-of-diversity-statements>; Michael Poliakoff, *How Diversity Screening at the University of California Could Degrade Faculty Quality*, FORBES (Jan. 21, 2020), <https://www.forbes.com/sites/michaelpoliakoff/2020/01/21/how-diversity-screening-at-the-university-of-california-could-degrade-faculty-quality/#2c0a4bf41598>; Robby Soave, *Berkeley Weeded Out Job Applicants Who Didn’t Propose Specific Plans to Advance Diversity*, REASON (Feb. 3, 2020), <https://reason.com/2020/02/03/university-of-california-diversity-initiative-berkeley/>.

13. Abigail Thompson, a vice president of the American Mathematics Society (AMS) and Chair of Mathematics at UC Davis, wrote a column in the December issue of AMS Notices critiquing diversity statements and labeling them a modern version of the loyalty oath. *See* Abigail Thompson, *A Word From . . .*, 66 NOTICES AM. MATHEMATICAL SOC’Y 1778, 1778–79 (2019), <https://www.ams.org/journals/notices/201911/rmoti-p1778.pdf>. Her column triggered a sharp

extent to which universities plan to rely on these statements is only slowly coming into focus. This article, therefore, breaks new ground by painting a detailed picture of how diversity statements are being utilized.¹⁴ It relies on documents received from public record requests and conversations with concerned faculty at UC schools and shows the extent these diversity statements have become tools of viewpoint discrimination.¹⁵ It identifies four key concerns with the use of mandatory diversity statements: the overt role that race and gender plays, the risk of viewpoint-based discrimination, the risk of viewpoint-based evaluation of academic research, and the employment of a requirement that professors take affirmative steps above and beyond their job duties to promote diversity.

After laying this rather startling foundation, this article then advances three closely related arguments concerning First Amendment protections for university professors and prospective faculty against discrimination by their academic institutions.¹⁶ First, the use of diversity statements is symptomatic of several shifting trends in higher education that threaten to undermine professorial speech rights. These trends show why it is vital that courts recognize a professor's individual right to First Amendment protection at the university and accord meaningful protection to that right.¹⁷ Relatedly, these same trends show why *Garcetti* cannot and should not be applied to a professor's speech outside of the classroom (including academic writing, conference presentations, and purely extramural speech).¹⁸

Finally, while a university must maintain the right to evaluate faculty members based on their research contributions and their fit for a particular department, a university crosses the line when it imposes the equivalent of an ideological litmus test that excludes candidates who do not share a particular viewpoint.¹⁹ While courts have often been reluctant to interfere in the academic selection process, the abuse of diversity statements shows a need for more

backlash, including calls to fire her or remove her from her position on the AMS. See, e.g., Chad Topaz, *Diversity Statements in Hiring, the American Mathematical Society, and UC Davis*, QSIDE (Nov. 19, 2019), <https://qsideinstitute.org/2019/11/19/diversity-statements-in-hiring-the-american-mathematical-society-and-uc-davis/>. On the other hand, hundreds of individuals signed a letter supportive of Thompson as a rejoinder to her critics. See Scott Aaronson et al., *Letter to the Editor: Responses to "A Word from . . . Abigail Thompson"*, AM. MATHEMATICAL SOC'Y 9 (Dec. 2019), <https://www.ams.org/journals/notices/202001/rnoti-o1.pdf>. Abigail Thompson followed up with an op-ed in the Wall Street Journal and the University offered a response. See Abigail Thompson, *The University's New Loyalty Oath*, WALL ST. J. (Dec. 19, 2019), <https://www.wsj.com/articles/the-universitys-new-loyalty-oath-11576799749>; Renetta Garrison Tull & Gary S. May, *UC Davis Defends Its "Diversity Statements"*, WALL ST. J. (Dec. 26, 2019), <https://www.wsj.com/articles/uc-davis-defends-its-diversity-statements-11577392382>.

14. See *infra* Section II.

15. See *infra* Section II.

16. See *infra* Sections III and IV.

17. See *infra* Section III.

18. See *infra* Section IV.

19. See *infra* Section IV.

careful thinking about how universities can engage in content or viewpoint-based distinctions.²⁰ This article accordingly argues that viewpoint-based distinctions are particularly pernicious and should be subject to heightened scrutiny. Even content-based distinctions must also be carefully evaluated to ensure that they do not serve as a smokescreen for viewpoint-based discrimination. The article ends by putting forward criterion that should be considered when evaluating a university's actions that potentially discriminate based on content or viewpoint.²¹ Mandatory diversity statements fall short of each of these. Hopefully, these criteria will serve as a starting point for further dialogue on this vital topic.

I. HISTORY OF PROFESSORIAL FIRST AMENDMENT PROTECTION²²

A. Foundational Supreme Court Precedent²³

Protection for the free speech rights of teachers and professors got off to a rather inauspicious start.²⁴ In *Adler v. Board of Education*, the Supreme Court

20. See *infra* Section IV.

21. See *infra* Section V.

22. The First Amendment's guarantee of freedom of speech is distinguishable from academic freedom. Scholars have debated extensively as to whether academic freedom is part of "the larger class of rights enjoyed by citizens of a free society," or whether it is solely based in "professional autonomy" and professional norms. Henry Reichman, *Academic Freedom and the Common Good: A Review Essay*, 7 AAUP J. ACAD. FREEDOM, 2016, at 2, https://www.aaup.org/sites/default/files/Reichman_1.pdf (summarizing the debate at great length). The minimalist perspective suggests that "academic freedom [i]s little more than a guild slogan that speaks to the desire of the academic profession to run its own shop." *Id.* at 3. (quoting STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* (2014)). Under this minimalist lens, professors are not entitled to claim any right or entitlement to producing academic knowledge free from institutional restraints. On the other hand, other scholars emphasize the individual and rights protecting the nature of academic freedom and argue that "academic freedom is a category of political freedom," which protects "[t]he liberty to speak one's mind." David Bromwich, *Academic Freedom and Its Opponents*, in *WHO'S AFRAID OF ACADEMIC FREEDOM* 27, 27–28 (Akeel Bilgrami & Jonathan R. Cole eds., 2015).

This article is primarily concerned with legal protections that exist to protect professorial speech, rather than professional protections such as those extended by the AAUP. As will be discussed shortly, the Supreme Court has folded the concept of "academic freedom" within the fold of the First Amendment. Such legal protection of academic freedom is necessary and is becoming increasingly necessary in light of trends in academia. In keeping with the Supreme Court's pattern, the phrase "academic freedom" will be used to refer to First Amendment freedoms.

23. Whole articles can and have been written about the Supreme Court's historical treatment of faculty speech and about how circuit courts have applied this precedent. This article is not intended to comprehensively cover all these cases. Instead, this overview is focused on two themes. First, the tension between the First Amendment rights of individual faculty members and academic institutions, and second, what happens when academic institutions attempt to impose content- or viewpoint-based restrictions on faculty members.

24. This "extremely narrow interpretation of the first amendment" hearkened back to Blackstone's Commentaries. William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, LAW &

flatly rejected a challenge to a New York law that forbade any members of “subversive groups,” such as the Communist Party, from becoming a teacher.²⁵ The Supreme Court explained that while the First Amendment protects an individual’s “right under our law to assemble, speak, think and believe as they will,” the law did not guarantee a “right to work for the State in the school system on their own terms.”²⁶ Accordingly, the school board did no harm to the First Amendment when it forbade members of “subversive groups” from teaching.²⁷ Moreover, since “[a] teacher works in a sensitive area in a schoolroom” and “shapes the attitude of young minds towards the society in which they live,” the school had the right to ensure “fitness and loyalty” and could base its determination on “the organizations and persons with whom they associate.”²⁸

Justices Black and Douglas both voiced powerful and prescient dissents. Justice Black voiced his concern that these kinds of laws “make it dangerous . . . to think or say anything except what a transient majority happen to approve at the moment” and his conviction that the First Amendment “rests on the belief that government should leave the mind and spirit of man absolutely free.”²⁹ Justice Douglas explained that “[t]he public school is in most respects the cradle of our democracy” and that freedom of speech and thought must be protected.³⁰ But when “suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect.”³¹ Such a result is contrary to “the pursuit of truth which the First Amendment was designed to protect.”³²

Within just a few years, Justices Black and Douglas would find themselves in the majority.³³ The reconsideration of *Adler* began with a case only loosely related to public education that nevertheless gave the Court a chance to deploy a more robust interpretation of the First Amendment. In *Sweezy v. New Hampshire*, the Supreme Court overturned the conviction of an individual who refused to answer questions asked by the New Hampshire Attorney General as part of an investigation into left wing organizations in the state.³⁴ One of the lines of questioning concerned Sweezy’s lecturing at the University of New

CONTEMP. PROBS., Summer 1990, at 79, 83. It was also pithily expressed by then Judge Oliver Wendell Holmes: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

25. *Adler v. Bd. of Educ.*, 342 U.S. 485, 489, 496 (1952).

26. *Id.* at 492.

27. *Id.* at 489, 493.

28. *Id.* at 493.

29. *Id.* at 496–97 (Black, J., dissenting).

30. *Id.* at 508 (Douglas, J., dissenting).

31. *Id.* at 510.

32. *Id.* at 511.

33. The shift in perspective on First Amendment issues was not limited to academic freedom but instead impacted most aspects of First Amendment jurisprudence. *See generally* Van Alstyne, *supra* note 24, at 91.

34. *Sweezy v. New Hampshire*, 354 U.S. 234, 238, 244–45, 255 (1957) (plurality opinion).

Hampshire. During his class, Sweezy had allegedly extolled the virtues of socialism and declared that it was “inevitable in America.”³⁵ A plurality of the Supreme Court held “that there unquestionably was an invasion of petitioner’s liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread.”³⁶ The Court extolled the virtue “of freedom in the community of American universities” and “the vital role in a democracy that is played by those who guide and train our youth.”³⁷ While in *Adler* the Court found that teachers must conform to expected norms of “fitness and loyalty,” in *Sweezy* the plurality instead extolled the necessity of open intellectual inquiry: “Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”³⁸ Indeed, the plurality emphasized that “[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”³⁹

Justice Frankfurter, in his concurrence, also set out one of the enduring definitions of academic freedom:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “the four essential freedoms” of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.⁴⁰

A few years later in *Shelton v. Tucker*, the Supreme Court invalidated an Arkansas statute that required all teachers in public schools to file affidavits providing the name and address of all organizations they belonged to or contributed to within the prior five years as a prerequisite to employment.⁴¹ The Court once again extolled the importance of academic freedom, emphasizing that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”⁴² Any “unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential

35. *Id.* at 260 (Frankfurter, J., concurring).

36. *Id.* at 250.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 263. (Frankfurter, J., concurring) (quoting CONFERENCE OF REPRESENTATIVES OF THE UNIVERSITY OF CAPE TOWN AND THE UNIVERSITY OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (*Albert van de Sandt Centlivres et al. eds., Johannesburg: Witwatersrand Univ. Press, 1957*)).

41. *Shelton v. Tucker*, 364 U.S. 479, 480, 490 (1960).

42. *Id.* at 487.

teachers.”⁴³ Because the disclosure requirement put “pressure upon a teacher to avoid any ties which might displease those who control his professional destiny” that was “constant and heavy,” it was an “impairment of constitutional liberty.”⁴⁴

Justice Frankfurter dissented from the decision, and in his dissent one can see early echoes of the debate between the speech rights of individual educators and academic institutions that is at the center of this article and the battle over diversity statements. Justice Frankfurter explained that in his view academic freedom “in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers.”⁴⁵ Academic hiring decisions “must be based upon a comprehensive range of information” and are “a matter of fine judgment.”⁴⁶ Because information about a teacher’s associations might be relevant to determining his or her dedication to the job or his or her overall qualifications for the position, Justice Frankfurter refused to invalidate the statute.⁴⁷ But he noted that using the information gathered “to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations” would be unconstitutional if proven.⁴⁸ So for Justice Frankfurter, deference was due to academic institutions so long as they did not discriminate against a particular viewpoint.

The trend towards more and more robust protections of academic freedom peaked⁴⁹ a few years later in *Keyishian v. Board of Regents*.⁵⁰ Professors at the University of Buffalo were required to either sign a certificate or declare under oath that they had never been part “of any society or group of persons which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means.”⁵¹ Several professors either resigned, were fired, or faced imminent termination at the expiration of their contracts.⁵²

43. *Id.* (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

44. *Id.* at 486–87.

45. *Id.* at 495–96 (Frankfurter, J., dissenting).

46. *Id.* at 496.

47. *Id.*

48. *Id.* Justice Harlan also wrote a separate dissent. He similarly emphasized that the information sought was legitimate and that it was “impossible to determine *a priori* the place where the line should be drawn between what would be permissible inquiry and overbroad inquiry in a situation like this.” *Id.* at 498 (Harlan, J., dissenting). According to Justice Harlan, schools should be given wide range to inquire and to take all meaningful factors into account. *See id.* at 498–99.

49. This review of the Supreme Court’s cases concerning loyalty oaths and investigations into subversive elements is not comprehensive, and there are several other decisions which “proved to be quite uneventful in the long run.” Van Alstyne, *supra* note 24, at 112–13. Professor Alstyne’s article is far more comprehensive than space permits me to cover here.

50. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

51. *Id.* at 592. Full time professors were required to sign the oath, while a part-time lecturer was only required to answer the question under oath. *Id.*

52. *Id.*

The Supreme Court brusquely rejected application of *Adler*, noting that “pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested.”⁵³ It then emphasized that the New York law was vague and could encompass “mere advocacy of abstract doctrine” or “mere expression of belief.”⁵⁴ As a result, the law would dramatically chill teaching and research endeavors, for “[i]t would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery.”⁵⁵ The law would therefore “stifle ‘that free play of the spirit which all teachers ought especially to cultivate and practice’”⁵⁶

The Supreme Court then unambiguously embraced the notion of academic freedom: “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”⁵⁷ Academic freedom “is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom,” which “is peculiarly the ‘marketplace of ideas.’”⁵⁸ The Court’s rhetoric went even further: “The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”⁵⁹ The Court further explained that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”⁶⁰ Under that standard, New York’s loyalty oath could not withstand scrutiny.⁶¹

Keyishian has rightfully been described as a landmark decision and an “important rite of passage” for academic freedom.⁶² After *Keyishian*, “[t]he measured protection of academic freedom from hostile state action had become a settled feature of first amendment law.”⁶³

53. *Id.* at 595.

54. *Id.* at 600–01.

55. *Id.* at 601. *See also id.* at 604 (“When one must guess what conduct or utterance may lose him his position, one necessarily will ‘steer far wider of the unlawful zone’”) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

56. *Id.* at 601 (quoting *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

57. *Id.* at 603.

58. *Id.*

59. *Id.* (quoting *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945)).

60. *Id.* at 604 (quoting *NAACP v. Button*, 371 U.S. 415, 432–33 (1963)).

61. *Id.*

62. Van Alstyne, *supra* note 24, at 114; *see also* Elliot Friedman, “A Special Concern”: The Story of *Keyishian v. Board of Regents*, 38 J. COLL. & U.L. 195, 195 (2011) (“The Court’s decision in *Keyishian v. Board of Regents* did more than vindicate its plaintiffs. It also fundamentally altered First Amendment law.”).

63. Van Alstyne, *supra* note 24, at 115.

The Supreme Court also expanded the rights of students in public schools and universities in a similar fashion by relying on substantially similar rhetoric to which it used to defend the right of teachers and professors.⁶⁴ Hence, in *Tinker v. Des Moines*, the Supreme Court closely linked the two and declared that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students,” because “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁶⁵

Up to this point, all of the Supreme Court’s cases discussed have concerned speech-adverse policies being implemented by governments or school boards. In such cases the Supreme Court has continued to offer robust protection of the First Amendment and academic freedom. For instance, in *Board of Education v. Pico*, the Supreme Court invalidated a school board’s decision to ban several books from school libraries.⁶⁶ The Court, in a plurality opinion that was largely joined by Justice Blackmun in his concurrence, emphasized that it had “long recognized certain constitutional limits upon the power of the State to control even the curriculum and classroom.”⁶⁷ While school boards “possess significant discretion to determine the content of their school libraries,” they could not exercise that power “in a narrowly partisan or political manner,” because “[o]ur Constitution does not permit the official suppression of ideas.”⁶⁸ In this case, the interest of students to have access to books and the interest of teachers to use and encourage reading of those books aligned perfectly. But the picture is far less certain when the right of individual faculty members and the right of academic institutions clash.⁶⁹

64. See, e.g., *Healy v. James*, 408 U.S. 169, 187–88 (1972) (“The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.”); *Widmar v. Vincent*, 454 US 263, 273–74 (1981) (asking whether student groups can be excluded from the public forum “because of the content of their speech”).

65. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 US 503, 506; see also *Van Alstyne*, *supra* note 24, at 120.

66. *Bd. of Educ. v. Pico*, 457 U.S. 853, 875 (1982) (plurality opinion).

67. *Id.* at 861.

68. *Id.* at 870–71 (emphasis in original). Justice Blackmun in his concurrence expressed his view that while the state had no “affirmative obligation to provide students with information or ideas,” nevertheless “certain forms of state discrimination *between* ideas are improper” and that “the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.” *Id.* at 878–79 (Blackmun, J., concurring) (emphasis in original). The key for Justice Blackmun was that “school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials’ disapproval of the ideas involved.” *Id.* at 879–80 (emphasis in original). In other words, while the school could “choose one book over another” for a variety of reasons, such as which books were more relevant to the curriculum, it could not act based on viewpoint discrimination. *Id.* at 880. Schools could not engage in “an intentional attempt to shield students from certain ideas that officials find politically distasteful.” *Id.* at 882.

69. The tension between institutional and individual academic freedom has been described as “seriously incompatible and probably ultimately irreconcilable.” Walter P. Metzger, *Profession*

There were early signs—such as Justice Frankfurter’s dissent in *Shelton*—that even stalwart defenders of free speech would be conflicted when faced with a clash between the rights of individual professors and their academic institutions.⁷⁰ An even more surprising divergence from free speech protection of teachers came from Justice Black just a year after *Keyishian*. The majority decision in *Epperson v. Arkansas* concerned the Establishment Clause, which the Court concluded prohibited the teaching of creationism in the classroom.⁷¹ Justice Black expressed his grave concern that the majority decision would “thrust the Federal Government’s long arm . . . further into state school curriculums.”⁷² Justice Black emphasized that states should be “absolutely free to choose their own curriculums for their own schools so long as their action does not palpably conflict with a clear constitutional command,” and that the state had the “power to withdraw from its curriculum any subject deemed too emotional and controversial for its public schools.”⁷³ Justice Black was surprisingly dismissive of a teacher’s ability to freely introduce controversial topics, declaring, “I am also not ready to hold that a person hired to teach school children takes with him into the classroom a constitutional right to teach sociological, economic, political, or religious subjects that the school’s managers do not want discussed.”⁷⁴

In contrast, Justice Stewart in his separate concurrence emphasized that while a state would be free “to decide that the only foreign language to be taught in its public school system shall be Spanish,” it would not “be constitutionally free to punish a teacher for letting his students know that other languages are also spoken in the world.”⁷⁵ By penalizing a teacher for merely “mention[ing] the very existence of an entire system of respected human thought,” a state “would clearly impinge upon the guarantees of free communication contained in the

and Constitution: Two Definitions of Academic Freedom in America, 66 TEX. L. REV. 1265, 1267 (1988). In a seminal article, Dean Mark G. Yudof described “three . . . faces of academic freedom,” and explored how the “personal autonomy face of academic freedom” can come into tension with the “institutional face.” Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 832, 834, 851-53 (1987).

70. See *supra* notes 45–48 and accompanying text.

71. *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968).

72. *Id.* at 111.

73. *Id.* at 112–13.

74. *Id.* at 113–14. Justice Black’s position is best contextualized as part of his general skepticism of First Amendment rights in the public school setting. The following year, Justice Black wrote a dissenting opinion in the *Tinker* case warning:

that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 518 (1969). As already discussed, Justice Black was far more protective of the rights of professors and students in institutions of higher education. See *supra* note 29 and accompanying text.

75. *Epperson*, 393 U.S. at 116 (Stewart, J., concurring).

First Amendment.”⁷⁶ So, Justice Stewart would have deferred to the state’s determination of its schools’ curriculum and pedagogy, but not at the expense of forbidding a teacher from expressing a different perspective.⁷⁷

More than a decade after *Keyishian*, the Supreme Court issued its most detailed defense of *institutional* academic freedom, notably in the context of the University of California’s efforts to craft an affirmative action program. In *Regents of the University of California v. Bakke*, the Supreme Court found that a university is protected by the First Amendment in its desire “to make its own judgments as to education[,] includ[ing] the selection of its student body.”⁷⁸ The Court relied on Justice Frankfurter’s explication of the “four essential freedoms” from *Sweezy*, and emphasized that these freedoms are “of transcendent value to all of us and not merely to the teachers concerned.”⁷⁹ The Court, therefore, found that the university had a First Amendment interest in creating a campus where students could be exposed “to the ideas and mores of students as diverse as this Nation of many peoples.”⁸⁰

But the Supreme Court also sounded a necessary note of caution: “Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.”⁸¹ The “fatal flaw” in UC’s “preferential program is its disregard of individual rights” and individualized consideration.⁸² *Bakke* thus stands for the principle that deference to institutional concerns for diversity is limited by constitutional restraints that protect individual liberty.

In several other decisions, the Supreme Court continued to affirm the institutional academic freedom rights of universities. For instance, in *Regents of the University of Michigan v. Ewing*, the Court upheld the University of Michigan’s decision to drop a student from a program rather than allow him to retake a test he had failed.⁸³ As annotated by one scholar, the Court declared:

When judges are asked to review the substance of a genuinely academic decision . . . they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment. . . . Added to our concern for lack of standards (there are none obviously provided by the Constitution or elsewhere according to which judges or juries can say what norms of academic competence are suitable or unsuitable for any university as such) is a

76. *Id.*

77. *Id.*

78. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

79. *Id.* (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) and quoting *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

80. *Id.* at 313.

81. *Id.* at 314.

82. *Id.* at 320.

83. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 215, 227–28 (1985).

reluctance to trench on the prerogatives of . . . educational institutions and our responsibility to safeguard their academic freedom, “a special concern of the First Amendment.”⁸⁴

In these cases, and others, academic freedom becomes a shield intended to prevent the judiciary from engaging in intensive and intrusive review of the actions of the institutional university.

In his concurrence in *Widmar v. Vincent*, Justice Stevens propounded a particularly robust version of this deference.⁸⁵ He suggested that “[b]ecause every university’s resources are limited, an educational institution must routinely make decisions concerning the use of the time and space that is available.”⁸⁶ For instance, it could chose to prioritize “a program that illuminates the genius of Walt Disney” over “an amateur performance of Hamlet.”⁸⁷ Similarly, the university could “regard some subjects as more relevant to its educational mission than others.”⁸⁸ But for Justice Stevens, deference was nevertheless limited. The university could not “allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted.”⁸⁹ Thus, while the university could “prefer[] some subjects over others,” it could not exclude competing perspectives: “Quite obviously, however, the University could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege.”⁹⁰ Under Justice Steven’s standard, in other words, a university would be given great deference in content-based judgments, but would face aggressive scrutiny for viewpoint-based judgments.⁹¹

84. Van Alstyne, *supra* note 24, at 140 (quoting *Regents of Univ. of Mich.*, 474 U.S. at 225–26).

85. *Widmar v. Vincent*, 454 U.S. 263, 277–80 (1981) (Stevens, J., concurring).

86. *Id.* at 278.

87. *Id.*

88. *Id.* at 280.

89. *Id.*

90. *Id.* at 281.

91. In a small number of additional cases, the Supreme Court has considered professors’ individual rights that have abutted against institutional rights. In those cases, the Court has tended to side with the institution. In *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), the Supreme Court upheld the exclusive bargaining provisions of the State of Minnesota against the claim that exclusive bargaining violated the right of faculty members to participate in faculty governance. *Minn. St. Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 273 (1984). The Court emphasized that these sessions were “occasions for public employers, acting solely as instrumentalities of the State, to receive policy advice from their professional employees” and that there was “no constitutional right to force the government to listen to their views.” *Id.* at 282–83. However, the implications of this case are limited by the fact that it involved faculty members claiming the right to have their views heard by the administration, rather than a situation where faculty members were reprimanded, criticized, or in any way penalized for their speech. The Court properly concluded that accepting the right to participate in governance “would work a revolution in existing government practices.” *Id.* at 284. Moreover, the decision’s pro-union sentiment runs contrary to the Supreme Court’s most recent decisions, such as *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), which more highly prioritize individual speech and association rights. Even

Despite decades of ambiguous and inconsistent precedent, the Supreme Court has never squarely resolved the central question of whose rights prevail in a contest between institutional and individual speech rights. But it is clear from the Court's precedent that whatever degree of control an academic institution has over content, it cannot impose an ideological test on its employees or require viewpoint conformity.

B. *The Pickering Test*

The Supreme Court's precedent concerning public employees, including teachers and professors, is similarly inconclusive with respect to the clash between institutional and individual liberty in the academic context.

In *Pickering v. Board of Education*, the Supreme Court considered whether a school board could properly terminate a teacher who had written an opinion editorial in the local newspaper that was highly critical of a tax increase that the school board had proposed.⁹² The Supreme Court quoted its academic freedom decisions in *Keyishian* and *Shelton* and emphasized that the premise "that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work . . . has been unequivocally rejected."⁹³ The Supreme Court recognized that allowing public school teachers to speak out is in the public interest because these individuals are often "the members of a community most likely to have informed and definite opinions" about significant matters of public concern involving the operation of schools.⁹⁴ However, the Court also recognized that a public employee is in a different position than a member of the general public. Accordingly, the Court laid out a balancing test "between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer."⁹⁵ Under *Pickering* there is a strong "public interest in having free and unhindered debate on matters of public importance,"⁹⁶ but this interest must be balanced against the employer's right to prevent speech that would "impede[] the teacher's proper performance of his daily duties in the classroom" or "interfere[] with the regular operation of the schools generally."⁹⁷ Unfortunately, the *Pickering* case did little to flesh out that balancing test, leaving it nearly impossible for lower courts to apply it with any consistency.⁹⁸

more importantly, there is no indication that the school board would have been entitled to exclude certain perspectives based on either content or viewpoint.

92. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564–65 (1968).

93. *Id.* at 568.

94. *Id.* at 572.

95. *Id.* at 568.

96. *Id.* at 573.

97. *Id.* at 572–73.

98. See Cynthia Estlund, *Harmonizing Work and Citizenship: A Due Process Solution to a First Amendment Problem*, 2006 SUP. CT. REV. 115, 118–20 (2006) ("*Pickering* guaranteed a

The Court's subsequent decisions have only furthered the uncertainty. On the one hand, the Supreme Court made clear that the protections of *Pickering* apply to even untenured professors.⁹⁹ The Court also found that a "public employee who arranges to communicate privately with his employer rather than to spread his views before the public" is nevertheless protected.¹⁰⁰

On the other hand, the Supreme Court put several additional roadblocks in the way of a professor seeking to raise a First Amendment claim. In *Connick v. Myers*, the Supreme Court emphasized that an employee is only protected when speaking about "matters of public concern."¹⁰¹ The Court has also broadened what may be considered in termination decisions to include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."¹⁰²

The Supreme Court further made it procedurally more difficult for public employees to prevail in *Pickering*-style cases. In *Mt. Healthy City School District Board of Education v. Doyle*, a non-tenured teacher leaked an internal memorandum concerning a new dress code to a radio station and was fired.¹⁰³ The teacher had also engaged in other unrelated improper conduct, such as making an obscene gesture at two girls.¹⁰⁴ The Supreme Court found that a public employee first bears a burden to show that constitutionally protected speech was a "substantial factor" in the school's conduct, and then the burden shifts to the school board to show that it would have reached the same decision

steady flow of doctrinal disputes for decades to come."); Jessica Reed, Note, *From Pickering to Ceballos: The Demise of the Public Employee Free Speech Doctrine*, 11 N.Y. CITY L. REV. 95, 98 (2007) ("[T]he Court's ruling created a compartmentalization that not only leaves public employees vulnerable to retaliation for exposing governmental misconduct or inefficiencies, but also neglects the public's interest in hearing such speech."); Molly K. Smith, Note, *Compelled Investigatory and Testimonial Speech: An Overdue Clarification of the Public Employee Speech Doctrine that Rehabilitates "All of the Values at Stake"*, 101 KY. L.J. 403, 408 (2013) ("As the public employee speech doctrine evolved, certain drawbacks of the case-by-case approach of *Connick-Pickering* became apparent.").

99. See *Perry v. Sindermann*, 408 U.S. 593, 597–98 (1972). Circuit courts have also applied *Pickering* to job applicants. See *Oyama v. Univ. of Haw.*, 813 F.3d 850, 866 n.12 (9th Cir. 2015) (compiling cases).

100. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979).

101. *Connick v. Myers*, 461 U.S. 138, 147 (1983). This facet of the *Pickering-Connick* test has been aptly criticized as a "Crank Protection Plan" because under it, "an employee who mouths off about matters in which he has no credibility is granted more of a hearing in the public square than an employee who actually knows what she is talking about." Michael Bérubé, *Talking out of School: Academic Freedom and Extramural Speech*, MLA: PROF. (Winter 2019), <https://profession.mla.org/talking-out-of-school-academic-freedom-and-extramural-speech/>. This critique is particularly appropriate in light of *Garcetti*. See discussion *infra* Section D.

102. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering*, 391 U.S. at 570–73).

103. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977).

104. *Id.* at 281–82.

in the absence of protected conduct.¹⁰⁵ This standard has made it extremely difficult for teachers or professors to prevail in disputes with their institutions, since the school is simply required to point to non-protected reasons for its conduct. In *Waters v. Churchill*, the Supreme Court held that an employer is merely required to “make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished” rather than showing that the speech in question was in fact disruptive.¹⁰⁶ These decisions made it substantially more difficult for a public employee to prevail in First Amendment claims against his employer.

C. Protection of Faculty Speech under Pickering

Under the *Pickering* standard, lower courts have been all over the map when professorial speech rights have been raised. The decisions largely break down into three categories: classroom speech, academic research, and extramural speech. Each will briefly be considered.

1. Classroom Speech

One of the more prominent First Amendment issues to arise in the university setting involves professorial speech in the classroom itself. Courts have typically been highly solicitous of the institution’s right to establish its own curriculum and pedagogy. For instance, the Third Circuit has held that “a public university professor does not have a First Amendment right to decide what will be taught in the classroom,” and that the university is free to “make content-based decisions when shaping its curriculum.”¹⁰⁷

On the other hand, the Sixth Circuit has declared that “the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction, is totally unpersuasive.”¹⁰⁸ To the contrary, the court emphasized that “[b]ecause the essence of a teacher’s role is to prepare students for their place in society as responsible citizens, classroom instruction will often fall within the Supreme Court’s broad conception of ‘public concern.’”¹⁰⁹ The Sixth Circuit has been particularly protective of the individual rights of professors in connection to classroom speech and related

105. *Id.* at 287.

106. *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

107. *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491–92 (3d Cir. 1998); *see also* *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1176–77 (3d Cir. 1990) (“Although a teacher’s out-of-class conduct, including her advocacy of particular teaching methods, is protected . . . her in-class conduct is not.”).

108. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001).

109. *Id.* at 679; *see also* *Bonnell v. Lorenzo*, 241 F.3d 800, 816–17 (6th Cir. 2001) (“Stated more broadly, there is a public interest concern involved in the issue of the extent of a professor’s independence and unfettered freedom to speak in an academic setting.”); *Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1055 (6th Cir. 2001) (holding that a professor’s classroom discussion about the uses of hemp was protected speech).

activity. For instance, it held that a professor has “the right to review each of his students’ work and to communicate, according to his own professional judgment, academic evaluations and traditional letter grades,” and accordingly, a university could not order a professor to change a grade to prevent the professor from communicating his personal evaluation to the student (although the university could change the grade itself).¹¹⁰ In contrast, several other circuits have rejected very similar claims regarding grading decisions.¹¹¹

Other circuits have a mixed legacy with respect to their handling of classroom speech cases. The Second Circuit has “held that school administrators may limit the content of school-sponsored speech so long as the limitations are ‘reasonably related to legitimate pedagogical concerns.’”¹¹² On the other hand, the Second Circuit also rejected the notion that a university could “retaliate[] against [a professor] based upon the content of his classroom discourse,” declaring that such an action would be “as a matter of law, objectively unreasonable.”¹¹³

By and large, however, faculty members tend to lose their suits against universities with great frequency.¹¹⁴ These numbers are in some ways inflated in favor of universities by the existence of frivolous complaints and the tendency of schools to only contest cases they have predetermined are winnable.¹¹⁵ Nevertheless, classroom speech appears to be an area where courts are particularly prone to defer to academic institutions and their ability to regulate the content of what is actually being taught to students. On the other hand, when an administration takes action based on “the content of . . . classroom discourse,”¹¹⁶ and particularly the viewpoint of that discourse, Courts have been willing to second guess academic actions.

110. *Parate v. Isibor*, 868 F.2d 821, 829 (6th Cir. 1989).

111. See *Brown v. Armenti*, 247 F.3d 69, 79 (3d Cir. 2001); *Keen v. Penson*, 970 F.2d 252, 257 (7th Cir. 1992). Scholarship has been split on whether grading decisions are protected speech. See Jennifer L.M. Jacobs, Note, *Grade “A” Certified: The First Amendment Significance of Grading by Public University Professors*, 87 MINN. L. REV. 813, 814 (2003) (arguing that grading is the university’s speech rather than the professor’s speech). But see Kevin A. Rosenfield, Note, *Brown v. Armenti and the First Amendment Protection of Teachers and Professors in Grading Their Students*, 97 NW. U. L. REV. 1471, 1474 (2003) (arguing that grading may be protected by the First Amendment if pedagogically based).

112. *Panse v. Eastwood*, 303 F. App’x 933, 934–35 (2d Cir. 2008) (quoting *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722 (2d Cir. 1994)).

113. *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 598 (2d Cir. 1990).

114. Michael H. LeRoy, *How Courts View Academic Freedom*, 42 J. COLL. & U.L. 1, 27 (2016).

115. *Id.* at 40.

116. *Dube*, 900 F.2d at 598.

2. Academic Research

Just as with cases concerning classroom speech, decisions regarding academic research generally come out in favor of the university.¹¹⁷ However, almost none of the cases have involved faculty being discriminated against for engaging in research that an administration disagrees with or dislikes. Instead, these cases often involve professors being denied certain perquisites or job opportunities such as the ability to apply for certain grants,¹¹⁸ access to laboratory space,¹¹⁹ travel to countries designated as terrorist states to conduct research,¹²⁰ or the ability to be on a particular research grant project.¹²¹ Other cases involve clear misconduct not related to First Amendment activities.¹²²

The most prominent campus speech case involving academic research is *Urofsky v. Gilmore*.¹²³ In that case, the en banc Fourth Circuit rejected the argument that a Virginia law restricting state employees (including professors) from accessing sexually explicit material with state-owned computers violated the First Amendment.¹²⁴ The reasoning of *Urofsky* is disturbing because the Fourth Circuit essentially rejected any special First Amendment protection for professors, concluding that “[t]he Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.”¹²⁵ Even worse, the Fourth Circuit effectively rejected the claim “that professors possess a First Amendment right of academic freedom to determine for themselves the

117. Lawrence White, *Fifty Years of Academic Freedom Jurisprudence*, 36 J. COLL. & U.L. 791, 832 (2010).

118. See, e.g., *Martinez v. Univ. of P.R.*, Civil No. 06-1713 (JAF), 2006 U.S. Dist. LEXIS 92925, at *3, 11 (D.P.R. Dec. 22, 2006) (emphasizing that the university had taken action based on “the mere idea or proposal to write a book, and not to any actual, created speech”).

119. See, e.g., *Naftchi v. N.Y. Univ.*, 14 F. Supp. 2d 473, 481–82, 492–93 (S.D.N.Y. 1998).

120. See, e.g., *Faculty Senate of Fla. Int’l Univ. v. Winn*, 477 F. Supp. 2d 1198, 1207 (S.D. Fla. 2007) (“The Act does not prohibit scholarship about the designated countries, or discussion (in or outside of the classroom) about those countries, their governments, policies, etc. Nor does it prohibit students, faculty members, or researchers from traveling to the countries, or punish them in any way for engaging in such travel. The Act simply establishes that Florida, as a state, will not pay for these excursions.”).

121. See, e.g., *Radolf v. Univ. of Conn.*, 364 F. Supp. 2d 204, 215 (D. Conn. 2005) (“It is important at the outset to emphasize precisely what Dr. Radolf claims was a violation of his First Amendment right to academic freedom. He does not assert that Defendants prevented him from teaching or performing research on any subject matter. Nor does he claim in Count 2 that Defendants retaliated against him for engaging in protected First Amendment activities, by, for example, denying him the opportunity to participate in a grant available to others because of his speech on matters of public concern.”).

122. See, e.g., *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1135 n.14 (3d Cir. 1992) (“He was not dismissed, nor does he allege that he was dismissed, for any reason relating to anything that could be considered a free expression issue.”).

123. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

124. *Id.* at 404.

125. *Id.* at 412.

content of their courses and scholarship.”¹²⁶ This decision has properly been described as the “nadir” of court protection for individual academic freedom.¹²⁷ But for purposes of this article, it is significant that *Urofsky* is not an example of discrimination based on the content of academic research. Instead, *Urofsky* concerned the ability of a professor to carry out his research using state funded resources. Thus, *Urofsky* cannot be read as supportive of the ability of an academic institution to penalize a professor for the subject matter of his academic research. *Urofsky* also seems to have been tacitly overturned, or at the very least seriously undermined.¹²⁸

One other case comes a bit closer to suggesting that a university can take action based on the content of academic research, but still does not involve any kind of viewpoint-based discrimination. A professor at the University of Illinois was denied tenure and terminated purportedly because “his area of research overlapped that of an already tenured professor.”¹²⁹ The Seventh Circuit rejected this argument as “patently frivolous.”¹³⁰ It emphasized that “[a]cademic freedom does not empower a professor to dictate to the University what research will be done using the school’s facilities or how many faculty positions will be devoted to a particular area.”¹³¹ The Court’s curt dismissal of this claim is likely attributable to the fact that the claim was raised for the first time on appeal, and it also does not appear that there was any evidence of discrimination based on viewpoint.¹³²

On the other hand, faculty freedom to engage in research has been upheld in two cases involving an attempt to subpoena research, rather than disputes within the academy.¹³³ Although these cases are not directly on point, they indicate the significance of the relationship between academic research and a professor’s ability to access academic freedom. The Seventh Circuit recognized that such subpoenas would be “capable of chilling the exercise of academic freedom”

126. *Id.* at 414.

127. White, *supra* note 117, at 832–33. *Urofsky* has been the subject of a particularly robust critique over the years. See e.g., J. Peter Byrne, *Constitutional Academic Freedom in Scholarship and in Court*, CHRON. HIGHER EDUC. (Jan. 5, 2001) (“Because the [en banc *Urofsky*] court relied in no small part on a scholarly article by me to support its conclusion, I feel a duty to express my professional view that the opinion is profoundly wrong as a matter of law, and threatens the freedom of higher education.”); Michael D. Hancock, Note, *Why Urofsky v. Gilmore Still Fails to Satisfy*, RICHMOND J.L. & TECH. (Winter 1999–2000), <http://jolt.richmond.edu/jolt-archive/v6i3/note2.html>; Steven G. Olswang, *The Demise of Academic Freedom: Urofsky v. Gilmore*, 22nd Annual Law & Higher Education Conference, STETSON U. COLL. L., (Feb. 18–20, 2001), https://www.stetson.edu/law/conferences/highered/archive/2001/The_Demise_of_Academic_Freedom.doc.

128. See *infra* note 179 and accompanying text.

129. *McElearney v. Univ. of Ill.*, 612 F.2d 285, 287 (7th Cir. 1979).

130. *Id.* at 288.

131. *Id.*

132. *Id.*

133. *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1265–66 (7th Cir. 1982); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 710 (1st Cir. 1998); see also White, *supra* note 117, at 831–32.

because the danger of research being inappropriately expropriated and scrutinized would “tend to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor.”¹³⁴ These cases therefore set an important baseline for the importance of academic freedom in research endeavors. Academic speech must be protected because otherwise scholars will be inhibited in their willingness to pursue knowledge that is innovative, cutting-edge, or controversial.

In the absence of cases directly on point, it is difficult to say what courts will do if faced with an example of a professor who is being excluded or rewarded for the viewpoint expressed in her research. Scholarship on this point, however, tends to favor robust protection for academic research, even when the author may be supportive of greater restrictions on classroom speech.¹³⁵ There is something uniquely personal about academic research, which suggests that university efforts to trample on this kind of academic freedom should be met with especially rigorous scrutiny.

3. Extramural Speech

Extramural speech is a broad category of speech that can encompass anything a professor says and does outside of teaching and research. Extramural speech is generally recognized as one of the key aspects of religious freedom, even though it may be “the most mysterious and the most elusive of the three.”¹³⁶ Scholars debate whether extramural speech is in fact academic speech at all.¹³⁷ This debate is largely theoretical in nature, however, since in practice extramural speech is the most fully and consistently protected kind of professorial speech.

For instance, an Eastern Michigan University professor was allowed to challenge his suspension for racially tinged tweets critical of the university’s

134. *Dow Chem. Co.*, 672 F.2d at 1276 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring)).

135. See, e.g., Yudof, *supra* note 69, at 842 (“First, there must be unbridled freedom to do research, while the constraints in the classroom are more severe. Research outside of the classroom may be thought to be more analogous to the speaker in the park than to the hired speaker in the post office or university building.”).

136. Bérubé, *supra* note 101. Michael Bérubé intriguingly analogized extramural speech to the “Holy Spirit of the Christian Trinity.” *Id.*

137. Matthew W. Finkin and Robert C. Post have called extramural speech “[t]he most theoretically problematic aspect of academic freedom” since it does not concern the development of specialized academic knowledge. MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 127 (2009). See also *infra* note 335 for further discussion of Finkin and Post. Professor Keith E. Whittington has recently written a thoughtful account of extramural speech and how its protection serves as a “prophylactic rule” that protects efforts to disseminate knowledge outside of the scholarly community. Keith E. Whittington, *Academic Freedom and the Scope of Protections for Extramural Speech*, ACADEME (Winter 2019), <https://www.aaup.org/article/academic-freedom-and-scope-protections-extramural-speech#.YDLEMjKSlyy>. Whittington’s highly persuasive account shows why the protection of extramural speech is vital to both free speech and academic freedom.

response to an incident of racially motivated graffiti on the university campus.¹³⁸ The court first concluded that the professor spoke as a private citizen because “[u]sing a public forum to comment on the University’s response to recent racial incidents would not appear to be within a history professor’s official duties.”¹³⁹ Significantly, the court rejected the university’s claim that the speech in question would cause disharmony between the professor, his colleagues, and the students.¹⁴⁰ The court emphasized that “[i]n the academic setting ‘dissent is expected’ and, accordingly, so is at least some disharmony.”¹⁴¹

Similarly, the Second Circuit found that a university erred when it penalized a professor for his controversial racial views that were expressed solely outside of the classroom.¹⁴² The university created alternative class sections for all students that felt offended by the professor’s views and threatened to take further disciplinary action against the professor.¹⁴³ Both the Southern District of New York and the Second Circuit critiqued the administration for not taking further action to prevent disruption of the professor’s class.¹⁴⁴ The District Court noted that the university’s claim “that exposure in the campus environment to [the] Professor[’s] views might somehow have caused some students harm . . . could have constitutionally been accorded no weight” because a university “may not hinder the exercise of first amendment rights simply because it feels that exposure to a given group’s ideas may be somehow harmful to certain students.”¹⁴⁵

In summary, looking at the vast run of professorial speech cases in the lower courts, courts tend to be highly deferential to academic institutions. But there is a consistent thread that when professors are punished because of disagreement based on the viewpoint of the speech, courts are much more likely to intervene and to scrutinize university action closely and carefully. Courts are also much more likely to scrutinize university action when it concerns speech that is removed from the classroom and involves the professor’s own personal thoughts on topics of public concern.

138. Initially, the plaintiff filed with his union and an arbiter reversed the suspension. However, the court in this case ruled on a motion to dismiss based on a claim of qualified immunity and said that the university may prevail on summary judgment after more discovery. Final judgment was never issued and the case was dismissed at the request of the parties after the first motion. *Higbee v. E. Mich. Univ.*, 399 F. Supp. 3d 694, 697, 700 (E.D. Mich. 2019), *case dismissed*, No. 19-1751, 2019 WL 5079254 (6th Cir. Aug. 7, 2019).

139. *Id.* at 702.

140. *Id.* at 703–04.

141. *Id.* at 704 (quoting *Smith v. Coll. of the Mainland*, 63 F. Supp. 3d 712, 718–19 (S.D. Tex. 2014)).

142. *Levin v. Harleston*, 966 F.2d 85, 89–90 (2d Cir. 1992).

143. *Id.* at 87–88.

144. *Id.* at 90.

145. *Levin v. Harleston*, 770 F. Supp. 895, 923 (S.D.N.Y. 1991), *aff’d in part, vacated in part*, 966 F.2d 85 (2d Cir. 1992) (quoting *Gay All. of Students v. Matthews*, 544 F.2d 162, 166 (4th Cir. 1976)).

D. Garcetti

Pickering and its progeny left public employee speech rights in a somewhat precarious position. But, as previously discussed, professors could still prevail under *Pickering*, especially when viewpoint discrimination was involved or when the restrictions concerned extramural speech. However, the Supreme Court's 2006 decision in *Garcetti v. Ceballos* put continued protection for professorial speech rights in great jeopardy.¹⁴⁶

In *Garcetti*, a district attorney wrote a memo criticizing his office's handling of a case and urging its dismissal.¹⁴⁷ The defense called the attorney and testified regarding his concerns.¹⁴⁸ His employer then retaliated against him.¹⁴⁹ The Ninth Circuit had found that the attorney's speech was protected under the *Pickering* test.¹⁵⁰ The Supreme Court reversed.¹⁵¹ In doing so, the Supreme Court imposed two significant limitations on *Pickering*'s employee speech protections. The first is that an employer is entitled to take action against speech that merely "has some potential to affect the entity's operations."¹⁵² The second, even more dramatic change, was that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."¹⁵³ Restrictions on such speech "does not infringe any liberties the employee might have enjoyed as a private citizen."¹⁵⁴ Instead, it "reflects the exercise of employer control over what the employer itself has commissioned or created."¹⁵⁵

The potential implications for academic freedom are enormous. Much of what a professor does, such as teaching, writing, publishing, and presenting at symposia, could be described as "pursuant to their official duties."¹⁵⁶ If *Garcetti*'s logic were strictly applied to professors, then it could eviscerate any protection they had at all. Justice Souter, in his pointed dissent, noted that teachers "necessarily speak and write 'pursuant to . . . official duties'" and, therefore, the majority opinion could have grave consequences for the protection of academic freedom.¹⁵⁷ In response, the majority opinion recognized that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not

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

147. *Id.* at 414.

148. *Id.* at 413.

149. *Id.* at 415.

150. *Id.* at 415–16.

151. *Id.* at 417.

152. *Id.* at 418.

153. *Id.* at 421.

154. *Id.* at 421–22.

155. *Id.* at 422.

156. *Id.* at 421.

157. *Id.* at 438 (Souter, J., dissenting).

fully accounted for by this Court's customary employee-speech jurisprudence."¹⁵⁸ But rather than resolve the issue, the Court punted, declaring that it "need not . . . decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."¹⁵⁹

Scholars have largely shared Justice Souter's concern, arguing that professors are employed to engage in a career of open inquiry and that this vocation makes *Garcetti* inapplicable to them.¹⁶⁰ On the other hand, some scholars have defended *Garcetti*, arguing that *Garcetti* properly protects the right of academic institutions to weigh the quality and relevance of academic speech.¹⁶¹

158. *Id.* at 425.

159. *Id.*

160. See, e.g., Joseph J. Martins, *Tipping the Pickering Balance: A Proposal for Heightened First Amendment Protection for the Teaching and Scholarship of Public University Professors*, 25 CORNELL J.L. & PUB. POL'Y 649, 657–58 (2016); Hilary Habib, Note, *Academic Freedom and the First Amendment in the Garcetti Era*, 22 S. CAL. INTERDISC. L.J. 509, 536–37 (2013); David Fox, Comment, *Turning Up the Heat on Science: A New Threat to Academic Freedom*, 43 U. TOL. L. REV. 173, 193–94 (2011); Erica Goldberg & Kelly Sarabyn, *Measuring a "Degree of Deference": Institutional Academic Freedom in a Post-Grutter World*, 51 SANTA CLARA L. REV. 217, 250–52 (2011); Lauren K. Ross, *Pursuing Academic Freedom After Garcetti v. Ceballos*, 91 TEX. L. REV. 1253, 1278–79 (2013) ("My proposed academic freedom exception to *Garcetti* would go beyond simply protecting professors when they talk in a classroom or publish research and would ensure that they are protected when they further the academic function of the university. This exception should include protecting professors' speech when they talk about the university's curriculum; when they challenge hiring decisions based on professional standards, that speech should be protected as well."); Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post-Garcetti World*, 37 SEATTLE U. L. REV. 1, 20–21 (2013); Matthew Reid Krell, *The Ivory Tower Under Siege: A Constitutional Basis for Academic Freedom*, 21 GEO. MASON U. CIV. RTS. L.J. 259, 266–68 (2011).

161. Kermit Roosevelt III, *Not as Bad as You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 656–57 (2012) (arguing that *Garcetti* should apply to universities in full because academic institutions should be able to make content and quality-based distinctions) ("The point, again, is that the academic environment is one in which assessments of quality are vitally important. There may be no such thing as a false idea, as far as the First Amendment is concerned, but in reality, there is such a thing as a bad article or a soporific lecture, and schools cannot function if they are denied the ability to make that judgment. The math teacher who decides to lecture on political science instead may be discussing matters of public concern in a nondisruptive manner, but he is doing his job badly."); Nancy J. Whitmore, *First Amendment Showdown: Intellectual Diversity Mandates and the Academic Marketplace*, 13 COMM. L. & POL'Y 321, 338 (2008) ("The academic marketplace functions neither as an economic marketplace driven by laws of supply and demand nor as a wide-open, uninhibited marketplace where multitudes of differing ideas can clash. At its core, it is a closed community of scholars and administrators committed to expression that advances knowledge. Knowledge, in this community, is largely based on the collective judgment of those scholars and administrators [] whose work conforms to the standards set and accepted by the academic marketplace."); Paul Forster, *Teaching in a Democracy: Why the Garcetti Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 696–97 (2011).

E. The Circuit Split over *Garcetti*

Courts following *Garcetti* have been largely split as to whether *Garcetti* applies in the academic setting.

1. Courts Applying *Garcetti*

The Seventh Circuit has applied *Garcetti* and, in *Renken v. Gregory*, ruled that a professor who criticized how his university administered grant funds was not protected because he had been a grant recipient as part of his “teaching and service responsibilities.”¹⁶² Similarly, in an earlier case, the Seventh Circuit held that an elementary school teacher could be fired for telling students about how she had honked her car in solidarity with protests against the Iraq war.¹⁶³ The court emphasized that a teacher is hired for her speech and that “[e]xpression is a teacher’s stock in trade, the commodity she sells to her employer in exchange for a salary.”¹⁶⁴ Accordingly, this was “an easier case for the employer than *Garcetti*.”¹⁶⁵ However, the court appeared to reserve the question of “[h]ow much room is left for constitutional protection of scholarly viewpoints in post-secondary education.”¹⁶⁶ But post-*Renken* in the states within the Seventh Circuit, a professor’s in-class speech would likely be entitled to no First Amendment protection at all, and most other forms of academically related speech would be on extremely thin ice.

Other than the Seventh Circuit, most of the other courts embracing *Garcetti* have done so rather tepidly and tentatively, or without any analysis at all.¹⁶⁷ In a non-precedential decision, the Fifth Circuit applied *Garcetti* to the speech of a professor who was seeking a prestigious professorship and a deanship.¹⁶⁸ The

162. *Renken v. Gregory*, 541 F.3d 769, 773, 775 (7th Cir. 2008).

163. *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 478, 480 (7th Cir. 2007).

164. *Id.* at 479.

165. *Id.*

166. *Id.* at 480.

167. Some courts have applied *Garcetti* without discussing the Supreme Court’s qualifying language. For instance, the Second Circuit applied *Garcetti* to a school teacher’s speech expressing concern that the school district had not disciplined a student because the speech concerned his duty “to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning.” *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 203 (2d Cir. 2010). Judge Calabresi dissented and critiqued the court’s expansive interpretation of *Garcetti*, but also did not discuss the language in *Garcetti* concerning academic freedom. *See id.* at 205–09. Perhaps that is because this case arose in the secondary education context rather than higher education. *See also Fernandez v. Sch. Bd.*, 898 F.3d 1324, 1329–30 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1345 (2019). Scholars have critiqued courts for failing to discuss this tension between *Garcetti* and the First Amendment rights of professors and have raised concerns that these decisions “could effectively extinguish constitutionally based faculty academic freedom in the classroom.” Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 J. COLL. & U.L. 75, 96 (2008); Neal H. Hutchens, *A Confused Concern of the First Amendment: The Uncertain Status of Constitutional Protection for Individual Academic Freedom*, 36 J. COLL. & U.L. 145, 160 (2009).

168. *Wetherbe v. Smith*, 593 F. App’x 323, 325, 327–28 (5th Cir. 2014).

professor was excluded from the search because he opposed the tenure system and, accordingly, had not taken tenure himself and had spoken out against tenure.¹⁶⁹ The court found that “his tenure status is a condition of employment that is inextricably entwined with his role as an employee” and that, accordingly, “[h]e is no more protected from adverse action for his tenure status than a plaintiff would be for refusing to attend training or complete peer evaluations.”¹⁷⁰ Because the professor’s speech had arisen in the context of the hiring search, he “was not speaking as a private citizen on a matter of public concern.”¹⁷¹ The court then emphasized that *Garcetti* was the proper standard for speech relating to a job interview because “[i]nterviews necessarily involve discussions that touch on matters that—when addressed in the public sphere—might count as issues of public concern,” and an employer must be free to ask about such thing as “leadership philosophy” in order “to gauge whether the applicant will be an effective employee.”¹⁷² An employer must be free to “screen applicants to ensure that they actually will perform their duties with maximal diligence.”¹⁷³ In a footnote, however, the Fifth Circuit qualified its opinion by noting that “[w]e need not answer today whether and to what degree the questioning must be related to the position that the applicant is seeking.”¹⁷⁴

2. Courts Refusing to Apply *Garcetti*

In sharp contrast to the Seventh Circuit, the Ninth Circuit sharply rejected the application of *Garcetti* to state-employed teachers. In *Demers v. Austin*, the court considered the case of a tenured college professor who was punished for critiquing the nature of social science research in the academy.¹⁷⁵ The Ninth Circuit explained that this was “the kind of case that worried Justice Souter” since “teaching and academic writing are at the core of the official duties of teachers and professors.”¹⁷⁶ Because such speech is “‘a special concern of the First Amendment’ . . . *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court.”¹⁷⁷ Accordingly, the court would continue to apply the *Pickering* test rather than *Garcetti* to “teaching and academic writing.”¹⁷⁸

169. *Id.* at 325.

170. *Id.* at 327.

171. *Id.* at 328.

172. *Id.* at 329.

173. *Id.*

174. *Id.* at 329 n.8.

175. *Demers v. Austin*, 746 F.3d 402, 406, 408 (9th Cir. 2014).

176. *Id.* at 411.

177. *Id.* (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967)).

178. *Id.* at 412. See also *Kerr v. Hurd*, 694 F. Supp. 2d 817, 843–44 (S.D. Ohio 2010) (construing a broad academic freedom exception to *Garcetti*); *Sheldon v. Dhillon*, No. C-08-03438 RMW, 2009 U.S. Dist. LEXIS 110275, at *10–11 (N.D. Cal. Nov. 25, 2009).

The Fourth Circuit similarly rejected the application of *Garcetti*.¹⁷⁹ It acknowledged that “[t]here may be instances in which a public university faculty member’s assigned duties include a specific role in declaring or administering university policy, as opposed to scholarship or teaching.”¹⁸⁰ In such circumstances, *Garcetti* might apply. But “[a]pplying *Garcetti* to the academic work of a public university faculty member . . . could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment.”¹⁸¹ In other words, general First Amendment principles would apply unless a professor’s speech was “tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields.”¹⁸²

Most recently, the Sixth Circuit issued a significant decision rejecting *Garcetti* in the context of a professor’s in-class speech.¹⁸³ Nicholas Meriwether is a philosophy professor at Shawnee State University.¹⁸⁴ Because of his deeply-held religious beliefs he objected to a requirement that all professors refer to students by the students’ preferred gender pronouns.¹⁸⁵ The university repeatedly rejected Merriweather’s requests for various accommodations or compromises, such as the option of complying with the policy but putting a disclaimer in the class syllabus that he was doing so under compulsion.¹⁸⁶ The university investigated and found that Merriweather’s treatment of transgender students was discriminatory and placed a formal warning in his personnel file.¹⁸⁷ The Court found that *Garcetti* did not apply to a professor “at least when

179. See generally *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011). This decision by the Fourth Circuit is somewhat curious, given that in 2000, the en banc Fourth Circuit essentially rejected the notion that professors have any distinct First Amendment protections above and beyond any other public employee. See generally *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000). The court held that “[t]he Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.” *Id.* at 412. It is difficult to reconcile *Urofsky* and *Adams* in any way other than seeing *Adams* as a tacit rejection of the conclusion that professors are not entitled to special First Amendment protection. See *supra* notes 123–127 and accompanying text for further discussion of *Urofsky*.

180. *Adams*, 640 F.3d at 563.

181. *Id.* at 564.

182. *Id.* at 563–64.

183. The Sixth Circuit previously applied *Garcetti* in a high school setting and said that *Garcetti* “has particular resonance in the context of public education.” On the other hand, it noted that academic freedom “‘was conceived and implemented in the university’ out of concern for ‘teachers who are also researchers or scholars—work not generally expected of elementary and secondary school teachers.’” *Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 342–44 (6th Cir. 2010).

184. *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021).

185. *Id.* at 498–99.

186. *Id.* at 500.

187. *Id.* at 501.

engaged in core academic functions, such as teaching and scholarship.”¹⁸⁸ In light of the Supreme Court’s declaration of the “essentiality of freedom in the community of American universities,”¹⁸⁹ it would be “alarming” if professors lacked free-speech protections when teaching.¹⁹⁰ A few additional circuits also appear to have rejected the application of *Garcetti*, but without much analysis as to why.¹⁹¹

3. *A Note of Concern from the Supreme Court*

Recently, four members of the Supreme Court expressed their concern with how some courts have expansively applied the *Garcetti* test. In *Kennedy v. Bremerton School District*, a football coach had been fired for praying on the football field before games.¹⁹² The Ninth Circuit applied *Garcetti* and affirmed the dismissal.¹⁹³ Justices Alito, Thomas, Gorsuch, and Kavanaugh all concurred in the denial of certiorari, but voiced their concern with the Ninth Circuit decision below. They accused the Ninth Circuit of “appear[ing] to regard teachers and coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students.”¹⁹⁴ But “[t]his Court certainly has never read *Garcetti* to go that far.”¹⁹⁵ Although this case is not about *Garcetti*’s application to higher education, it does suggest that the Court’s more conservative members may have grown uncomfortable with an expansive reading of *Garcetti*. If so, this would be a significant development since Justice Breyer, who dissented in *Garcetti*, remains on the Court, while the original author of *Garcetti*, Justice Kennedy, has retired.

4. *A Brief Recap*

Just as the Supreme Court has not resolved or squarely addressed the centralized tension between individual and institutional speech rights, it has

188. *Id.* at 505.

189. *Id.* at 504 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

190. *Id.* at 506.

191. See *McCullough v. Univ. of Ark. for Med. Scis.*, 559 F.3d 855, 865 (8th Cir. 2009); *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019) (quoting *Bonnell v. Lorenzo*, 241 F.3d 800, 810 (6th Cir. 2001)), *cert. denied*, 140 S. Ct. 432 (2019). The Second Circuit has gone in a somewhat different direction. It has not yet resolved whether *Garcetti* applies to teachers or professors, but it has “held that school administrators may limit the content of school-sponsored speech so long as the limitations are reasonably related to legitimate pedagogical concerns.” *Lee-Walker v. N.Y.C. Dep’t of Educ.*, 220 F. Supp. 3d 484, 492 (S.D.N.Y. 2016) (quoting *Panse v. Eastwood*, 303 F. App’x 933, 934–35 (2d Cir. 2008)), *aff’d*, 712 F. App’x 43 (2d Cir. 2017). This intermediate standard would allow for some limited First Amendment protection of academic speech but would largely defer to the institution.

192. *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 635 (2019) (Alito, J., concurring).

193. *Id.* at 636.

194. *Id.* at 636.

195. *Id.*

similarly not addressed the lingering division over the application of *Garcetti*. In some circuits, a professor has little to no protection, while in other circuits, the *Pickering* test applies with some force. In either event, courts are prone to defer to academic institutions in their academic judgments and evaluations. But that deference may be more limited when dealing with extramural speech or when viewpoint discrimination can be detected. With this legal background established, it is time to take a close look at mandatory diversity statements and consider how changes to the nature of higher education could or should alter the legal landscape.

II. THE DEVELOPMENT OF THE DIVERSITY STATEMENT

Requiring faculty applicants to complete a diversity statement is a recent trend in higher education that has been employed most aggressively by the UC system. But UC is far from the only university to encourage or require faculty members or applicants to write about diversity issues.¹⁹⁶ For instance, at Virginia Tech, a professor is encouraged to reference “active involvement in diversity and inclusion” as part of her personal statement, and also to include a “list of activities that promote or contribute to inclusive teaching, research, outreach, and service.”¹⁹⁷ In 2017, the Oregon Association of Scholars estimated that twenty major universities or university systems in the U.S. made use of mandatory diversity statements.¹⁹⁸ This number has likely grown since then. This article, nevertheless, focuses on the UC system because it has been on the forefront of the growth of the diversity statement, and holds itself out as a model for others to emulate.¹⁹⁹ It is likely that whatever trends have developed in the UC system will sooner or later spread elsewhere, especially if UC does not face significant legal or political pushback.²⁰⁰

196. See Goldberg, *supra* note 11, at 650–51.

197. Office of the Exec. Vice President and Provost, *Virginia Tech Guidelines for Promotion and Tenure Dossiers for 2021–22*, VA. TECH (May 13, 2021), https://faculty.vt.edu/content/faculty_vt_edu/en/promotion-tenure/_jcr_content/content/vtcontainer_76178668/vtcontainer-content/vtmultitab_copy/vt-items_4/download/file.res/Professors%20of%20Practice%20Dossier%20Guidelines%202020-2021.pdf.

198. *The Imposition of Diversity Statements on Faculty Hiring and Promotion at Oregon Universities*, OR. ASS'N OF SCHOLARS 4 (Mar. 7, 2017), https://www.oregonscholars.org/wp-content/uploads/2017/01/DiversityStatements_Rev16Mar17.pdf.

199. The UC system describes its policy as “a national model for universities to recognize and credit contributions to equal opportunity and diversity when evaluating faculty achievement for appointment, advancement, and promotion.” Letter from Aimée Dorr, Provost and Exec. Vice President Acad. Affs. to Chancellors, UC OFF. OF THE PROVOST & EXEC. VICE PRESIDENT FOR ACAD. AFFS. (June 29, 2015), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-210-1-d-issuance/apm-210-1-d-issuance-ltr.pdf.

200. BENJAMIN GINSBERG, *THE FALL OF THE FACULTY* 113 (2011) (noting that universities are prone to copy diversity programs and policies set by peer institutions).

Consideration of a “contribution[] to diversity” at UC began very modestly and rather unobjectionably.²⁰¹ In 2005, the Academic Personnel Manual (APM) was revised to include several references to contributions to diversity in the Appointment and Promotion section. The stated goal of these changes was to ensure that “[t]eaching, research, professional and public service contributions that promote diversity and equal opportunity are to be encouraged and given recognition in the evaluation of the candidate’s qualifications.”²⁰² Already at that time, there were some signs of concern that previewed the subsequent role these statements would come to play. For instance, the policy suggested that credit should be given for “research in a scholar’s area of expertise that highlights inequalities,” which suggests that certain kinds of research would be viewed more favorably than others in the hiring process.²⁰³

Nevertheless, the policy as written is mostly innocuous. Professors who engage in activities such as mentoring underprivileged students may expend significant energy that is not reflected in traditional scholarly output. It is difficult to see anything wrong or sinister with taking these kinds of contributions to the university community into account. In 2015²⁰⁴, the policy was expanded modestly to emphasize that contributions to diversity “should be evaluated and credited in the same way as other faculty achievements,” but the role that contributions to diversity plays remained largely unchanged.²⁰⁵ The APM is a document that emerges only through extensive university-wide discussion, which includes faculty senate deliberations.²⁰⁶ It is, therefore, the document that best captures what policies maintain a robust consensus among all the UC schools, and what is absent from the APM is, therefore, especially striking.

The systemwide consensus, as recently as 2015, rested on two foundational pillars:

201. *Academic Personnel Manual, Appointment and Promotion (APM-210)*, UC 4 (Feb. 1, 1994), https://web.archive.org/web/20140809092341/http://www.ucop.edu/academic-personnel-programs/_files/apm/apm-210.pdf.

202. *Id.*

203. *Id.*

204. *See Academic Personnel Policy Issuance (APM-210-1-d)*, UC SANTA BARBARA 4 (July 1, 2015), <https://ap.ucsb.edu/news.and.announcements/memos/?7.1.2015.Revised.APM.210.1.d;.Review.and.Appraisal.Committees>.

205. *Academic Personnel Manual, Appointment and Promotion (APM-210)*, UC 4 (Feb. 1, 1994), https://web.archive.org/web/20140809092341/http://www.ucop.edu/academic-personnel-programs/_files/apm/apm-210.pdf. This relatively modest change engendered extensive disagreements among the various faculty committees that considered changes, which underscores that this topic remains controversial among faculty members. *See* Letter from Aimée Dorr, *supra* note 199; Office of the President, *Chronology of the Consultation Process for APM-210-1-d Effective July 1, 2015*, UC (June 29, 2015), https://www.ucop.edu/academic-personnel-programs/_files/apm/apm-210-1-d-issuance/apm-210-1-d-iss-ltr-appdx.pdf.

206. Office of Acad. Pers., *Academic Personnel Manual (APM) Policy Development Process Guide*, UC 1–3, https://www.ucop.edu/academic-personnel-programs/_files/policy-development-process/policy-development-process-guide.pdf (last visited Feb. 18, 2021).

[F]irst, that faculty efforts in promoting equal opportunity and diversity 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; and second, that these contributions should not receive more credit than other contributions simply on the basis of their subject matter.²⁰⁷

Consideration of a contribution to diversity is not intended to give a leg up “simply on the basis of their subject matter.”²⁰⁸ There is no mandate that every applicant fill out a separate diversity statement and no suggestion that a candidate without contributions to diversity should be rejected out of hand. Instead, as originally envisioned and currently enshrined in a system-wide policy, contributions to diversity were intended to be seen as a plus-factor and *not* a separate and discreet hiring requirement.

Almost immediately various campuses of the UC system began to interpret this policy in dramatically different ways. Over the past few years, almost all of the UC schools have adopted a requirement that all faculty applicants file a separate standalone diversity statement.²⁰⁹ UC Santa Barbara had long been a holdout against the trend towards requiring these separate statements,²¹⁰ but

207. Letter from Mary Gilly, Chair of the Assembly of the Acad. Senate, UC, to Susan Carlson, Vice Provost for Acad. Pers. and Programs, in *Chronology of the Consultation Process for APM-210-1-d*.

208. *Id.*

209. There is some uncertainty as to what exactly the policy is at UC Berkeley at the moment. Berkeley’s Senate Search Guide at one point stated that “[a]ll applications require a Curriculum Vitae and a statement on diversity, equity, and inclusion.” This was pointed out to UC Berkeley administrators in January 2020. Conversation with Dan Mogulof, Assistant Vice Chancellor for Exec. Commc’ns, U.C. (Jan. 29, 2020) (on file with author). Thereafter, the language was updated to read: “The default assumption in AP Recruit (with standard auto-populated language) is to require a statement on diversity, equity, inclusion, and belonging (DEIB) as part of the initial application. Given the requirement to assess DEIB as part of the evaluation process, the majority of committees choose to ask for such a statement up front.” However, a department could also choose to ask for the statement from a more limited portion of the applicant pool (e.g., candidates under serious consideration). Office for Faculty Equity and Welfare, *Senate Search Guide*, UC BERKELEY, <https://ofew.berkeley.edu/senate-search-guide> (last visited Mar. 10, 2021). So, diversity statements are technically not required at UC Berkeley but are expected unless a search committee affirmatively decides not to require them.

210. As recently as September 2020, the UC Santa Barbara “Red Binder” stated that “[t]here is no presumption that all faculty will engage with this opportunity, nor are diversity statements required As with the teaching self-assessment, the diversity statement is an opportunity to provide context and evidence of impact or effectiveness towards a fuller understanding of those contributions.” *Red Binder § I-75: Appointment and Advancement*, UC SANTA BARBARA 11 (Sept. 2020), https://ap.ucsb.edu/policies.and.procedures/red.binder/sections/%5B1_75%5D%20Appointment%20and%20Advancement.pdf. The UC Santa Barbara Committee on Academic Personnel has also declared that it “is opposed to requiring statements for merit cases.” Comm. on Acad. Pers., *Videoconference Minutes*, UC ACAD. SENATE 3 (May 8, 2019), https://senate.universityofcalifornia.edu/_files/committees/ucap/ucap-5-8-2019-minutes.pdf.

appears to have finally relented.²¹¹ Similarly, some schools, such as UCLA, have already begun mandating consideration of contributions to diversity in tenure and advancement decisions.²¹²

In the past few years, there has been a push by system-wide diversity officers to force all campuses in the UC system to more aggressively adopt these diversity statements. In November 2018, the UC Systemwide Equal Opportunity/Affirmative Action Administrators Group developed a statement jointly with the statewide faculty Senate Committee on Affirmative Action, Diversity and Equity (UCAADE) entitled “Recommendations for The Use of Contributions to Diversity, Equity, and Inclusion (DEI) Statements for Academic Positions at the University of California.”²¹³ This document was approved by the Academic Council on January 23, 2019.²¹⁴ It made a series of six recommendations:

Require all faculty applicants at the University of California to submit a DEI statement.

Provide guidance to potential candidates on how to prepare DEI statements.

Create an assessment rubric, in consultation with the Equity Advisor or equivalent, to evaluate the candidate’s ability.

Further assess candidates’ readiness to advance diversity, equity, and inclusions during the campus visit.

Ensure department-level accountability.

Each campus should develop guidelines to implement the use of DEI statements in a consistent manner to align expectations regarding assessment of diversity contributions from time of hiring through academic reviews for merit and promotion.²¹⁵

There are a couple of elements in these recommendations that are noteworthy and troubling. With regard to the development of an assessment rubric, candidates would be required to “[a]rticulate awareness and understanding of

211. See *Diversity Statement Guidelines*, UC SANTA BARBARA, THE GEVIRTZ SCHOOL, <https://education.ucsb.edu/diversity-statement-guidelines> (last visited Mar. 10, 2021) (“A Diversity Statement is required as one component of a complete application, and will be reviewed by the search committee along with your other materials.”).

212. Memorandum from Scott L. Waugh, Exec. Vice Chancellor & Provost, to Deans, the University Librarian, Department Chairs, and Equity Advisors, UCLA (May 24, 2018), <https://equity.ucla.edu/news-and-events/new-edi-statement-requirement-for-regular-rank-faculty-searches/>. However, based on a private conversation with a faculty member at UCLA, who recently went through the advancement process, but wishes to remain anonymous, it appears that diversity statements are not being required with any real rigor in this process.

213. Letter from Robert C. May, Chair of Academic Council, U.C. to Michael Brown, Provost, and Academic Senate Division Chairs, UC, 1 (Feb. 25, 2019), https://senate.universityofcalifornia.edu/_files/reports/rm-mb-divchairs-use-of-dei-statements.pdf.

214. *Id.*

215. *Id.* at 3–4.

diversity, equity, and inclusion, especially as they related to underrepresented groups in higher education.”²¹⁶ In addition, these recommendations expressly state that “[l]ife experiences may be an important aspect” of the evaluation of contributions to diversity, which, as will later be discussed, opens up the door for consideration of an applicant’s own race or gender.²¹⁷ This document also recommends a separate “written assessment of the proposed faculty hire’s awareness, record, and future plans to advance diversity, equity, and inclusion.”²¹⁸ In other words, if these policies were adopted, all UC schools would move much closer to treating a diversity statement as an independent “fourth leg” of evaluation.²¹⁹ Finally, and most controversially, this document would require that all current faculty be evaluated for contributions to diversity, preferable “through a DEI statement that foregrounds and makes explicit DEI contributions to research, teaching, and/or service.”²²⁰ In light of that recommendation, the assurances that “DEI statements do *not* represent a new criterion for evaluation” do not seem particularly reassuring.²²¹

This final recommendation also appears to have been adopted without full consultation with the University Committee on Academic Personnel, which thus far has not embraced the requirement that current faculty be evaluated for contributions to diversity.²²² According to the Academic Council, “contributions to diversity are not mandatory” and “individuals lacking a diversity profile will not be held back.”²²³ The battle between diversity officers and the faculty will likely continue over the next few years, which may limit how quickly these changes are adopted.²²⁴

216. *Id.* at 3.

217. *Id.*; see *infra* Section II.A.1.

218. UCAADE & EO/AA, *supra* note 213, at 4.

219. See Acad. Council, *Minutes of Meeting*, UC ACAD. SENATE 7 (July 25, 2018), https://senate.universityofcalifornia.edu/_files/committees/council/council-7-25-18-minutes.pdf (recommending reopening debate on whether to add diversity as a “fourth criterion for promotion and tenure”). *But cf.* Letter from Mary Gilly, *supra* note 207 (noting that efforts to promote diversity should “not be understood as constituting a ‘fourth leg’ of evaluation”).

220. UCAADE & EO/AA, *supra* note 213, at 4.

221. *Id.*

222. Acad. Council, *Minutes of Meeting*, UC ACAD. SENATE 2 (Jan. 23, 2019), https://senate.universityofcalifornia.edu/_files/committees/council/council-1-23-19-minutes.pdf (“UCAADE Chair Siu noted that UCAADE revised recommendation 6 to clarify that academic reviews will not require DEI statements. Supporting language was also added to clarify that recommendation 6 is consistent with existing language in APM 210-1-d; that exceptional contributions to DEI may warrant additional recognition as aspects of research, teaching, and/or service, but that DEI statements do not represent a fourth criterion for evaluation; and that campuses may determine the best format for the submission of statements.”).

223. *Id.* (“The intent of the recommendations is to raise awareness, and to regularize and highlight existing APM language, which is clear that contributions to diversity are not mandatory, but can help enhance and boost a file; individuals lacking a diversity profile will not be held back.”).

224. Mona Lynch, UCAADE Chair, recently urged the Faculty Senate to “to take diversity contributions seriously in promotion and tenure reviews, and apply consistent use of the

But those advocating for an increased role for diversity statements at UC Schools have found another, even more effective mechanism to rapidly accelerate their use. Since 2015, the California legislature has been offering grant funding for programs aimed at increasing faculty diversity.²²⁵ Accordingly, the Office of the President (UCOP) has been issuing RFPs (Requests for Proposals) for Advancing Faculty Diversity Recruitment.²²⁶ These programs come from the individual campuses “through each campus’ Office of the Provost/Executive Vice Chancellor,” and, therefore, bypass the need to get the faculty senate on board with a policy.²²⁷ Campuses are encouraged to develop increasingly radical diversity programs in order to qualify for up to a half million dollars of funding per proposal.²²⁸ The pilot programs that have received this funding have focused on a variety of approaches, some of which are unobjectionable, such as extending additional mentoring to minority faculty hires.²²⁹ But several schools—including UC Davis, UC Santa Cruz, UC Berkeley, and UC Riverside—have focused on an expanded use of mandatory diversity statements as a central part of their pilot programs.²³⁰ These pilot programs have thus far featured several innovations.

First, diversity statements are treated as a threshold requirement for consideration. If an applicant’s statement falls short, then the applicant will no longer be considered. At UC Davis, for instance, those evaluating candidates were told that, “[n]o one crosses into threshold unless they look outstanding with

statements.” Acad. Council, *Minutes of Meeting*, UC ACAD. SENATE 6 (Sept. 25, 2019), https://senate.universityofcalifornia.edu/_files/committees/council/council-9-25-19-minutes.pdf.

225. Letter from Susan L. Carlson, Acting Provost, Exec. Vice President Acad. Affairs, to Exec. Vice Chancellors/Provosts, UC at 2 (June 7, 2019), https://www.ucop.edu/faculty-diversity/_files/advancing-faculty-diversity-rfp/afd-recruitment-rfp.pdf.

226. *Id.* at 2.

227. *Id.* at 3.

228. *Id.* at 2.

229. UCOP is required to issue an annual legislative report, which provides critical insights into the programs that have been approved and their outcomes. UC OFFICE OF THE PRESIDENT, FINAL REPORT ON THE 2016–2017 USE OF ONE-TIME FUNDS TO SUPPORT BEST PRACTICES IN EQUAL EMPLOYMENT OPPORTUNITY IN FACULTY EMPLOYMENT 5 (Nov. 2017), https://www.ucop.edu/faculty-diversity/_files/reports/adv-fac-div-2016-17-final-leg-report.pdf.

230. This is the list of searches that have used or are currently using this methodology:
 UC Berkeley - Engineering 2017-2018; Life Sciences 2018-2019;
 UC Davis - Eight open discipline hires (one in each college/school) 2018-2019; School of Medicine 2019-2020 or 2020-2021; The College of Agricultural and Environmental Sciences 2019-2020 or 2020-2021; The College of Engineering 2019-2020 or 2020-2021.
 UC Riverside - Mathematics 2018-2019; Engineering 2018-2019; Physical Sciences 2019-2020 or 2020-2021.
 UC San Francisco- Biomedical Sciences 2017-2018.
 UC Santa Cruz- Arts 2019-2020 or 2020-2021; Engineering 2019-2020 or 2020-2021; Global and Community Health Program in the divisions of Physical and Biological Sciences and Social Sciences 2019-2020 or 2020-2021.
 UC San Diego- Division of Physical Science (including Departments of Mathematics, Chemistry, and Physics) 2017-2020.

regard to their contributions to diversity.”²³¹ Moreover, evaluators were told to set a “high bar” and to eliminate any candidate that receives a low score on any of the elements of the diversity statement.²³² Or as UC Davis put it in its outward promotional material for the program: “Only those candidates with a strong and compelling Statement of Contributions to Diversity will move forward in the evaluation process.”²³³

Relatedly, diversity statements are now the first, and perhaps the only, thing that a reviewer will see.²³⁴ Thus, a reviewing panel will no longer have a holistic picture of the applicant when they evaluate the diversity statement. This is a key feature of the search process rather than a bug. The UC Davis Provost/Vice Chancellor Ralph Hexter spoke at a conference on faculty diversity in April 2019, and explained that “[t]he game-changer is that, in these searches, it is the candidate’s diversity statement that is considered first; only those who submit persuasive and inspiring statements can advance for complete consideration.”²³⁵

This is not a toothless requirement. For instance, in a pilot program at UC Berkeley in Life Sciences, all but 214 of 893 qualified applicants were eliminated because their diversity statement did not meet the school’s “high standard.”²³⁶ In other words, seventy-six percent of qualified applicants were rejected without even considering their teaching skills, their publication history, their potential for academic excellence, or their ability to contribute to their field. As far as the university knew, these applicants could have well been the next Albert Einstein or Jonas Salk, or they might have been outstanding and innovative educators who would make a significant difference in students’ lives. At UC Davis, in some departments over fifty percent of the applicants were eliminated using this same methodology.²³⁷ In addition, the initial review of diversity statements is increasingly being shifted away from academic faculty members and towards administrators.²³⁸

231. Office of the Vice Provost – Academic Affairs, Orientation Presentation PowerPoint (Jan. 2019) (attached as Appendix A).

232. *Id.*

233. *Advancing Faculty Diversity Grant, 2018–2019*, UC DAVIS, <https://academicaffairs.ucdavis.edu/advancing-faculty-diversity-pilot-project> (last visited Dec. 5, 2020).

234. Orientation Presentation PowerPoint, *supra* note 231.

235. Conference Notes on file with author.

236. Rebecca Heald & Mary Wildermuth, *Initiative to Advance Faculty Diversity, Equity and Inclusion in the Life Science at UC Berkeley Year End Summary Report: 2018–2019*, UC BERKELEY, https://ofew.berkeley.edu/sites/default/files/life_sciences_initiative_year_end_report_summary.pdf (last visited Mar. 11, 2021).

237. Letter from Ralph J. Hexter, Provost and Executive Vice Chancellor, to the U.C. Davis Academic Senate (Jan. 17, 2020), https://651d7eef-05d1-4785-8f04-93b49cc8d71f.filesusr.com/ugd/257e28_99034734731c4b748f6c7df78005bb99.pdf.

238. For instance, seven of the UC campuses now have Equity Advisor programs, and six provide stipends to these advisors. Acad. Council, *Minutes of Meeting*, UC ACAD. SENATE 2 (June 26, 2019), https://senate.universityofcalifornia.edu/_files/committees/council/council-6-26-19-minutes.pdf. These advisors are “tenured faculty or senior staff members selected by a committee of faculty and administrators involved in diversity and equity issues.” *Id.* The Faculty Senate has

Some of these programs are also employing a very narrow definition of diversity. For instance, the UC Davis pilot program focused solely on “commitment to the advancement of diversity, equity, and inclusion for underrepresented minority students and groups (African-American, Latino (a)/Chicano (a)/Hispanic, and Native American).”²³⁹ At UC Santa Cruz, applicants are evaluated on whether they “demonstrate an understanding of the barriers facing women and people of color” rather than any other types of diversity.²⁴⁰ In contrast, some other UC schools have continued to emphasize a broad and multifaceted definition of diversity.²⁴¹

Perhaps most troubling of all has been the development of particularly aggressive rubrics that expressly discriminate on the basis of viewpoint. While originally diversity statements were seen as a plus factor in hiring or admission, the development of scoring rubrics at schools such as UC Davis, Berkeley, and Santa Cruz has pushed the evaluation of these statements in a different and much more radical direction. These rubrics now include things an applicant could say that would result in a low or failing score. For instance, a candidate who “[d]efines diversity only in terms of different areas of study or different nationalities, but doesn’t discuss gender or ethnicity/race” would get a low score, as would a candidate who “[m]ay discount the importance of diversity” or “[m]ay provide reasons for not considering diversity in hiring, or sees it as antithetical to academic freedom or the university’s research mission.”²⁴²

Similarly, at UC Berkeley or UC Santa Cruz, a candidate who “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” would get a low score on their awareness of diversity

expressed concern that these equity advisors may come to be seen as “overseers” rather than advisors. *Id.*

239. *Open Rank Faculty Position in Public Health Sciences*, UC DAVIS: RECRUIT, <https://recruit.ucdavis.edu/JPF03925> (last visited Feb. 16, 2021).

240. *Physical and Biological Sciences: Biomedical Sciences—Assistant Professors*, UC SANTA CRUZ: RECRUIT, <https://recruit.ucsc.edu/JPF00756> (stating that “[i]nitial screening of candidates will be based on statements of contributions to diversity, equity, and inclusion”).

241. UC’s Regents Policy 4400 defines diversity broadly: “Diversity—a defining feature of California’s past, present, and future—refers to the variety of personal experiences, values, and worldviews that arise from differences of culture and circumstance. Such differences include race, ethnicity, gender, age, religion, language, abilities/disabilities, sexual orientation, gender identity, socioeconomic status, and geographic region, and more.” Bd. of Regents, *Regents Policy 4400: Policy on University of California Diversity Statement*, UC (Sept. 16, 2010), <https://regents.universityofcalifornia.edu/governance/policies/4400.html>.

242. *Rubric to Assess Candidate Contributions to Diversity, Equity, and Inclusion*, UC BERKLEY [hereinafter Berkley Rubric], <https://ofew.berkeley.edu/recruitment/contributions-diversity/rubric-assessing-candidate-contributions-diversity-equity>. (last visited Mar. 10, 2021); *Criteria for Scoring URM = African-Americans, Latin(x)/Hispanics, and Native Americans*, UC IRVINE (on file with author).

issues.²⁴³ Moreover, applicants are expected to not merely embrace generalized expectations such as treating all students equally or mentoring a diverse pool of students. Achieving such generalized requirements would only earn an applicant a middling and likely failing score.²⁴⁴

A faculty member's research focus can also play an important role in the evaluation. For instance, both UC Berkeley and UC Santa Cruz would give a high score on work done to advance "Diversity, Equity, and Inclusion" to faculty members who are "applying their research skills or expertise to investigating diversity, equity and inclusion."²⁴⁵

Emboldened by their success, UC campuses are dramatically expanding the use of the pilot methodology. UC Santa Cruz recently announced that in 2019, one-third of faculty searches will be part of their pilot program where "search committees will first review and assess candidates' statements on contributions to diversity, equity, and inclusion before determining whether to evaluate the rest of the application materials."²⁴⁶ UC Davis is expanding this approach to "approved searches planned for the 2019–20 academic year."²⁴⁷

Many of these policies, such as the scoring of diversity statements prior to the rest of the application, are now being recommended as "new best practices for faculty searches."²⁴⁸ Similarly, faculty members are encouraged to "require applicants to achieve a scoring cutoff to be considered."²⁴⁹ It appears that the same rubrics developed for such pilot programs are being held out as a model to be used for all faculty applicants.²⁵⁰ It seems only a matter of time before the innovations in the use of diversity statements from these pilot programs is

243. Berkeley Rubric; UCSC *Starting Rubric to Assess Candidate Contributions to Diversity, Equity, and Inclusion*, UC SANTA CRUZ [hereinafter UCSC Rubric] <https://apo.ucsc.edu/policy/communications/docs/ucsc-rubrics-c2deistatements.pdf> (last visited Feb. 18, 2021).

244. Berkeley Rubric, *supra* note 242; UCSC Rubric, *supra* note 243; *see also infra* Section II.A.2 and accompanying text.

245. Berkeley Rubric, *supra* note 242; UCSC Rubric, *supra* note 243.

246. Scott Hernandez-Jason, *Faculty Diversity, Retention Supported by New Grants*, UC SANTA CRUZ: NEWSCENTER (Nov. 1, 2019), <https://news.ucsc.edu/2019/11/faculty-diversity-grants.html>.

247. UC Office of the President, *2019–2021 Advancing Faculty Diversity: Preliminary Report*, UC (Dec. 2019), https://www.ucop.edu/faculty-diversity/_files/reports/adv-fac-div-2019-21-prelim-leg-report.pdf.

248. Email from Philip H. Kass, Vice Provost for Academic Affairs, UC Davis (on file with author); *see also* Letter from Ralph J. Hexter, Provost and Executive Vice Chancellor, to the Deans, UC DAVIS (June 13, 2019), https://651d7eef-05d1-4785-8f04-93b49cc8d71f.filesusr.com/ugd/257e28_3839c3707ec242de8862478af8cb414b.pdf.

249. Letter from Ralph J. Hexter, *supra* note 248.

250. A report prepared for the Academic and Student Affairs Committee described UC Berkeley as piloting "new guidelines for using these statements to evaluate candidates at all levels of decision-making." Discussion Item from the Office of the President, to Members of the Acad. and Student Affairs Comm., *Accountability Sub-Report on Diversity: Faculty Diversity Outcomes*, UC 19 (Sept. 26, 2018), <https://regents.universityofcalifornia.edu/regmeet/sept18/a2.pdf>.

imported in full into all faculty hiring decisions, and even to all retention, tenure, and advancement decisions.

A. Four Key Issues

As described above, the development of mandatory diversity statements at UC raises at least four significant issues. First, mandatory diversity statements can be used as a backdoor way to consider the race, gender, or other protected characteristics of applicants. Second, mandatory diversity statements allow for viewpoint discrimination against a professor's personal viewpoint. Third, mandatory diversity statements allow for discrimination in favor of certain kinds of academic research at the exclusion of others. Fourth, mandatory diversity statements require not merely agreement with the universities stated policies, but full-throated support.

1. Use of Race/Gender

First, mandatory diversity statements may serve as a backdoor way for the consideration of race and gender in the hiring process. This is a particularly salient issue in states like California or Michigan where the voters have enacted restrictions against affirmative action programs. This issue is largely outside of the scope of this article, and so it will only be addressed briefly.

In the face of the Supreme Court precedent banning race-based quotas, and the enactment of anti-affirmative action measures, such as California's Proposition 209, administrative supporters of diversity initiatives have increasingly become more creative in their efforts to develop facially neutral programs that nevertheless achieve the goal of increasing diversity²⁵¹ In 1996, California voters enacted Proposition 209, which banned the consideration of race and gender in higher education.²⁵² Since then, administrators have sought

251. These programs proliferate even though internal data shows that UC is currently outshining most of its competitor institutions in diversity hiring by hiring well above national availabilities, and even though projections indicate that without any further interventions the percentage of minorities on the UC faculty "will likely match recent national availabilities as early as 2025." *Id.* at 12. In fact, "compared to peer research institutions, UC places 3rd in terms of gender balance and 2nd in terms of URM faculty diversity." Shane White, Academic Senate Chair, *Remarks to the University of California Board of Regents: Towards a More Diverse Faculty* (May 2018), https://senate.universityofcalifornia.edu/_files/resources/regents-remarks/may-2018-regent-s-remarks.pdf.

252. *California Proposition 209, Affirmative Action Initiative (1996)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_209_Affirmative_Action_Initiative_\(1996\)](https://ballotpedia.org/California_Proposition_209_Affirmative_Action_Initiative_(1996)). In 2020, voters in California rejected an effort to repeal Proposition 209. *California Proposition 16, Repeal Proposition 209 Affirmative Action Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_16_Repeal_Proposition_209_Affirmative_Action_Amendment_\(2020\)](https://ballotpedia.org/California_Proposition_16_Repeal_Proposition_209_Affirmative_Action_Amendment_(2020)).

ways to continue to take race and gender into account in ways that will be “invisible to outsiders.”²⁵³

Diversity statements have been one of the more ingenious innovations of this initiative.²⁵⁴ Increasing faculty diversity is one of the key rationales for using mandatory diversity statements. In UC, these statements are touted as a way to “increase the diversity of the applicant pool[]” despite the limitations of Proposition 209.²⁵⁵ Terms like “diverse students” or “underrepresented students” are thinly veiled “euphemisms” for race and ethnicity.²⁵⁶ These faculty diversity hiring initiatives are being measured expressly (and solely) based on whether more woman and minorities are being hired as a result of these policies.²⁵⁷

253. HEATHER MAC DONALD, *THE DIVERSITY DELUSION: HOW RACE AND GENDER PANDERING CORRUPT THE UNIVERSITY AND UNDERMINE OUR CULTURE* 35, 39 (2018).

254. UC’s Office of General Counsel expressly links the use of diversity statements to the goal of getting around the limits of Proposition 209.

Proposition 209 prohibits UC from discriminating against or granting preferential treatment to individuals based on race, ethnicity, gender, or national origin. However, diversity remains a central part of UC’s mission, and while Prop 209 eliminated some prior diversity tools, UC still has many strategies available for addressing race and gender equity in academic programs that comply with Prop 209. UCOP has compiled many of these strategies in a set of guidelines. Strategies in the area of faculty diversity include recognizing and rewarding diversity contributions in appointment and advancement, requesting a diversity statement from candidates, diversifying search committees, and incentivizing departments for increasing diversity.

Minutes of Meeting, UC ACAD. SENATE, *supra* note 219, at 4.

Other innovations include the President’s Postdoctoral Fellowship Program where postdoctoral scholars with a “demonstrated record of commitment to diversity” are hired as fellows and then departments are provided incentives to hire from this program for full-time faculty positions. *Accountability Sub-Report on Diversity*, *supra* note 250, at 6.

255. *Guidelines for Enhancing Diversity at UC in the Context of Proposition 209*, UNIVERSITY OF CALIFORNIA 1, 7 (Sept. 2016), <https://diversity.universityofcalifornia.edu/files/documents/prop-209-summary.pdf>.

256. This is acknowledged even by supporters of affirmative action policies who are critical of the use of such “euphemisms.” See Lindsey Malcom-Piqueux, *Taking Equity-Minded Action to Close Equity Gaps*, PEER REV. (Spring 2017), <https://www.aacu.org/peerreview/2017/Spring/Malcom-Piqueux>.

257. UC OFFICE 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 3–5 (Nov. 2017), https://www.ucop.edu/faculty-diversity/_files/reports/adv-fac-div-2016-17-final-leg-report.pdf (evaluating the pilot programs exclusively based on how well they attracted women and minority applicants); UC OFFICE OF THE PRESIDENT, FINAL REPORT ON THE 2017–18 USE OF ONE-TIME FUNDS TO SUPPORT BEST PRACTICES IN EQUAL EMPLOYMENT OPPORTUNITY IN FACULTY EMPLOYMENT 2–3, 5 (Dec. 2018), https://www.ucop.edu/faculty-diversity/_files/reports/adv-fac-div-2017-18-final-leg-report.pdf; Orientation Presentation PowerPoint, *supra* note 231, at 5 (focusing on “the success of avid use of the diversity statement and valuing contributions to diversity in the selection process on attracting females and URM’s); *Accountability Sub-Report on Diversity*, *supra* note 250, at 15 (“With this \$6 million, UC has been able to support a coordinated systemwide program by awarding these funds on a competitive basis to support new efforts to increase LRE faculty diversity in selected units.”).

Departments are given strong incentives to consider and hire more minority students.²⁵⁸ The racial and gender composition of every search pool is scrutinized.²⁵⁹ An applicant pool that is inadequately diverse may be rejected by administrators and a department may be required to prolong its search.²⁶⁰ Campuses that develop innovative approaches to increase diversity hiring are able to receive precious funding from the Advancing Faculty Diversity grants discussed above.

Given all of the incentives for minority hiring, it is striking that faculty considering diversity are allowed to take into account “a candidates’ stated life experiences” when grading diversity statements.²⁶¹ With the express directive to diversify, it is natural to think that faculty members will evaluate statements based on the race or gender or other characteristics of the applicant. Indeed, sample statements provided to faculty members serving on a search committee

258. For instance, faculties are strongly incentivized to hire participants in the President’s Postdoctoral Fellowship Program (“PPFP”). For each PPFP hire, the university gives the campus \$85,000 per year for a five year period. Janet Napolitano, President University of California, Letter regarding PPFP incentives (July 18, 2019), <https://ppfp.ucop.edu/info/documents/hiring-incentive-letter.6.18.14.pdf>. Such PPFP candidates can also qualify for a search waiver, which greatly expedites the hiring process and saves departments needed resources. Email from Philip H. Kass, Vice Provost of Academic Affairs, UC Davis, President’s Postdoctoral and Chancellors’ Fellowship Program faculty hiring incentive (Jul. 31, 2019) (on file with author).

259. UC Berkeley requires new searches to expressly consider “how many women and underrepresented minorities have applied for past positions in your department or school, as a percentage of the total applicant pool” and to “redefin[e] departmental or school evaluation systems” if women or minorities are not hired. UC BERKELEY, OFFICE FOR FACULTY EQUITY AND WELFARE, SEARCH GUIDE FOR SENATE FACULTY RECRUITMENTS: POLICIES, PROCEDURES AND PRACTICES (Apr. 7, 2017), https://ofew.berkeley.edu/sites/default/files/senate_search_guide.pdf.

260. UC Davis encourages search committees to “ensure that qualified women and minorities are well represented in the applicant pool”, and states that “[r]equests may be denied or modified . . . if the proposed tenured level recruitment would significantly reduce the diversity of the applicant pool.” OFFICE OF ACADEMIC AFFAIRS, UC DAVIS, RECRUITMENT SECTION UCD-500 (June 9, 2011) <https://academicaffairs.ucdavis.edu/sites/g/files/dgvnsk2376/files/inline-files/UCD%20500.pdf>.

In her book *The Diversity Delusion*, Heather Mac Donald recounts one particularly stark example:

“Thus it was that UC San Diego’s electrical and computer engineering department a few years later found itself facing a mandate from campus administrators to hire a fourth female professor. The possibility of a new hire had opened up—a rare opportunity in that budget climate—and after winnowing down hundreds of applicants, the department put forward its top candidates for on-campus interviews. Scandalously, all were male. Word came down from on high that a female applicant who hadn’t even been close to making the initial cut must be interviewed. She was duly brought to campus for an interview, but she got mediocre reviews. The powers-that-be then spoke again: Her candidacy must be brought to a departmental vote. In an unprecedented assertion of secrecy, the department chair refused to disclose the vote’s outcome and insisted on a second ballot. After that second vote, the authorities finally gave up and dropped her candidacy. Both vote counts remained secret.”

MAC DONALD, *supra* note 253, at 175–76.

261. Orientation Presentation PowerPoint, *supra* note 231, at 21.

expressly disclosed an applicant's own racial or ethnic background: One model statement notes that the applicant "left India at 18 years old to attend school in England."²⁶² Another is even more explicit: "I am a Mexican-American" the first sentence reads.²⁶³ The same pattern holds for a series of sample diversity statements from UC San Diego. "As a woman in the sciences" one statement reads, "[a]s a Latino immigrant who lived in X, Y, and the United States" says another, and so on.²⁶⁴ It is no wonder that UC's Academic Writing Center encourages applicants to "explain how your experiences as part of an underrepresented group in your field has impacted you[.]"²⁶⁵ If these are the model statements that students are encouraged to emulate and faculty members are encouraged to take into account when evaluating statements, then many female or minority applicants for faculty positions will likely expressly identify that in their statements.²⁶⁶ Faculty members will likely give in to the pressure to increase diversity by favoring applicants based on the applicants own expressed diversity.

The evidence so far from the pilot programs at UC shows that the aggressive use of diversity statements has succeeded beyond even the wildest expectations of the diversity bureaucrats. In 2018–2019, UC Davis conducted eight searches using diversity statements as an initial cut-off requirement. 32.7% of applicants for these positions were minorities compares to 9.3% of applicants for all other positions at UC Davis.²⁶⁷ This likely reflects aggressive outreach to expand the diversity of the pool, as well as the emphasis placed in promotion of these searched on racial diversity. From total applicants to finalists, the pilot program

262. Orientation Presentation PowerPoint, *supra* note 231, at 19.

263. *Id.* at 20.

264. UC San Diego, *Six Examples of Submitted Diversity Statements (redacted)*, https://physicalsciences.ucsd.edu/_files/examples-submitted-diversity-statements.pdf.

265. See Academic Writing Center, *Writing a Diversity Statement for Academic Job Application*, UNIV. OF CAL. (Oct. 2018), [https://www.uc.edu/content/dam/uc/aess/docs/AWC/graduatehandouts/Diversity%20Statement%20\(Accessible\)%20%20.pdf](https://www.uc.edu/content/dam/uc/aess/docs/AWC/graduatehandouts/Diversity%20Statement%20(Accessible)%20%20.pdf).

266. One 2014 study suggested that less than a quarter of applicants making diversity statements at one particular university engaged in self-identification. Sara L. Beck, *Developing and Writing a Diversity Statement*, VAND. UNIV. CTR. FOR TEACHING (2018), <https://cft.vanderbilt.edu/guides-sub-pages/developing-and-writing-a-diversity-statement/>. Beck suggests that fear of implicit bias may weigh against disclosing personal identity. *Id.* But it seems likely that some of the features of the UC pilot programs will make self-disclosure more likely, since applicants will know that these statements will be evaluated independently and will be aware of the strong incentives in place in favor of advancing more minority applicants.

The existence of implicit bias is highly contested. See generally Heather Mac Donald, *Are We All Unconscious Racists?*, CITY J. (Autumn 2017), <https://www.city-journal.org/html/are-we-all-unconscious-racists-15487.html>. There is nevertheless a bit of irony in the fact that the proponents of diversity statements are also the most avid proponents of the contested theory of implicit bias.

267. UC OFFICE OF THE PRESIDENT, FINAL REPORT ON THE 2018–2019 USE OF ONE-TIME FUNDS TO SUPPORT THE BEST PRACTICES IN EQUAL EMPLOYMENT OPPORTUNITY IN FACULTY EMPLOYMENT, 22 (Dec. 2019), https://www.ucop.edu/faculty-diversity/_files/reports/adv-fac-div-2018-19-final-leg-report.pdf.

pool jumped to 82.1% minority compared to a decrease to 5.7% for all other searches.²⁶⁸ This represents the application of the diversity statement screening. It is hard to believe that this degree of seemingly systematic elimination of White and Asian applicants could have happened without consideration of the applicants' own racial or ethnic experiences. Finally, a full 100% of the eight hires were ultimately underrepresented minorities compared to only 2.3% of the other hires at UC Davis that year.²⁶⁹ Such dramatic results are unlikely to be coincidental especially given the incentive and the institutional support to engage in racial discrimination.

2. *Discrimination based on professorial viewpoint*

Mandatory diversity statements have been heavily critiqued as the “new loyalty oath.”²⁷⁰ Jeffrey Flier, the former dean of Harvard University’s medical school said that these statements are an “affront to academic freedom” that “diminishes the true value of diversity, equity of inclusion by trivializing it.”²⁷¹ Flier further declared that “[s]uch requirements risk introducing a political litmus test into faculty hiring and reviews.”²⁷² The Oregon Association of Scholars has noted that “[w]hile in theory, the concepts of diversity, equity, and inclusion could be interpreted in ways consistent with different political viewpoints, in practice they have been consistently and exclusively defined by university officials to emphasize the values and assumptions of left-wing viewpoints in society.”²⁷³

268. *Id.*

269. *Id.*

270. John O. McGinnis, *The University of California’s New Loyalty Oath*, L. & LIBERTY (Oct. 30, 2018), <https://www.lawliberty.org/2018/10/30/the-university-of-californias-new-loyalty-oath/>; Michael Tennant, “Diversity Statements:” *Academia’s New Loyalty Oath*, THE NEW AM. (Apr. 30, 2019), <https://www.thenewamerican.com/culture/education/item/32153-diversity-statements-academia-s-new-loyalty-oath>. See also Christian Schneider, *Secular universities now demand a ‘profession of faith’*, N.Y. POST (Apr. 26, 2019), <https://nypost.com/2019/04/26/secular-universities-now-demand-a-profession-of-faith/>; Max Diamond, *Pledging Allegiance to Diversity, and to the Tenure for Which It Stands*, REAL CLEAR INVESTIGATIONS (Oct. 23, 2018), https://www.realclearinvestigations.com/articles/2018/10/18/i_pledge_allegiance_to_diversity_and_to_the_tenure_for_which_it_stands.html; Mark J. Perry, *Quotation of the day on university corruption and the lack of diversity when it comes to ideology*, AM. ENTER. INST. (Mar. 27, 2019), <https://www.aei.org/carpe-diem/quotation-of-the-day-on-university-corruption-and-the-lack-of-diversity-when-it-come-to-ideology/>; Ortner, *supra* note 12.

271. 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>.

272. Flier, *supra* note 12.

273. OR. ASS’N OF SCHOLARS, *supra* note 198.

On the other hand, supporters of diversity statements have declared that those expressing these fears are “scaremongering”²⁷⁴ and that diversity statements will only ensure that faculty members are equipped to handle the growing diversity of students in their classrooms.²⁷⁵

Despite the well-intended defenders, there are reasons to believe that the critics’ fears are well-founded.

For one thing, the proponents of these statements have been the most willing to express the position that contrary views have no place on the university campus. For instance, Tanya Golash-Boza, a Professor of Sociology at University of California Merced, wrote a piece in *Inside Higher Ed* entitled “The Effective Diversity Statement.”²⁷⁶ In that article, Golash-Boza emphasizes that applicants who “do not care about diversity and equity” should not “waste [their] time” applying for academic positions at universities with such a demand.²⁷⁷ She further notes that while “many faculty members overtly reject campus efforts to enhance diversity and equity,” these statements are being carefully read by faculty members that care about these topics. Golash-Boza also encourages applicants to “acknowledge your privilege” and to focus on “commonly recognized form[s] of oppression” like “racial oppression, sexism, homophobia, transphobia, [and] ableism.”²⁷⁸ Another guide on diversity statements encourages applicants to avoid “inappropriate examples” such as “[p]erpetuating the idea that we are all equal - including in regard to access and potential for success.”²⁷⁹

Furthermore, the very idea of a diversity statement is rooted in theories that rely on contested notions such as “critical race theory.” As Professor Flier has explained,

One way to understand the problem is to examine the academic literature regarding equity and inclusion today. This literature, though not uniform, often incorporates key elements of a theoretical corpus known as “critical race theory,” little known to many academics outside of the social sciences and the humanities. It emphasizes

274. See Canning & Reddick, *supra* note 12. The authors nevertheless acknowledge the risk of the “bureaucratization of diversity” if diversity statements “ask faculty members . . . to toe a line or embrace a single ideology.” *Id.*

275. *Id.*; see also Carmen Mitchell, *Why Colleges Should Require Faculty Diversity Statements*, *INSIDE HIGHER ED* (Nov. 15, 2018), <https://www.insidehighered.com/views/2018/11/15/benefits-faculty-diversity-statements-opinion> (“So why go further and require an EDI [equity, diversity, and inclusion] statement? Because faculty members also play a role in fostering an inclusive environment through teaching and scholarship.”).

276. Tanya Golash-Boza, *The Effective Diversity Statement*, *INSIDE HIGHER ED* (June 10, 2016), <https://www.insidehighered.com/advice/2016/06/10/how-write-effective-diversity-statement-essay>.

277. *Id.*

278. *Id.*

279. *Diversity Statements*, INDIANA UNIV. BLOOMINGTON CTR. FOR INNOVATIVE TEACHING AND LEARNING, <https://citl.indiana.edu/programs/ai-support/resources/diversity-statements.html>.

structural racism, white privilege and supremacy, microaggressions, economically driven power relationships, and intersectionality. At the level of policy, it favors “race conscious” rather than “color blind” approaches to remedies . . . But it is obvious that these ideas and policy frameworks are not politically neutral. Rather, they map onto the left/progressive wing of the political spectrum, and their claims are arguable and highly contested. This ideological context is hardly subtle[.]²⁸⁰

The very concepts of “diversity” and “equity” are, therefore, not politically neutral or immune from debate. As one article on diversity published by the Association of American Colleges & Universities puts it, “equity-mindedness” requires “race-consciousness” and the embrace of explicit affirmative action programs.²⁸¹ As another article explains, “[e]quity-minded individuals are . . . color-conscious” as well as “[w]illing to assume responsibility for the elimination of inequality.”²⁸²

Supporters of this doctrine of diversity are quick to vilify those who disagree with them. For instance, Sociologist Eduardo Bonilla-Silva in his influential *Racism without Racists* explains that the concept of colorblindness is part of a “racial ideology” that is imposed by majority racial groups in order to perpetuate power dynamics and preserve the racial status quo.²⁸³ Bonilla-Silva refers to concepts of equal treatment and colorblindness as types of “abstract liberalism,” which “ignore[s] the multiple institutional and state-sponsored practices behind segregation and being unconcerned about these practices’ negative consequences for minorities.”²⁸⁴ But Bonilla-Silva’s theory has many critics as well. For instance, Professor John Staddon has argued that this framework of colorblind racism relies on faulty assumptions and a lack of any empirical evidence.²⁸⁵

Thus, diversity statement rubrics engage in viewpoint discrimination when they penalize candidates who “[m]ay provide reasons for not considering diversity in hiring, or sees it as antithetical to academic freedom or the

280. Flier, *supra* note 12.

281. Lindsey Malcom-Piqueux, *supra* note 256.

282. See also Estela Mara Bensimon, Alicia C. Dowd & Keith Witham, *Five Principles for Enacting Equity by Design*, 19 DIVERSITY & DEMOCRACY (Winter 2016), <https://www.aacu.org/diversitydemocracy/2016/winter/bensimon> (explaining that “equity” required “accounting for differences in individual attributes and experiences for the purposes of achieving equal outcomes”).

283. EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS* 2–3 (4th ed. 2018).

284. *Id.* at 56.

285. John Staddon, *The New Racism, Part I: How ‘Race and Ethnic Studies’ Made Color Blindness a Bad Thing*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Aug. 1, 2018), <https://www.jamesgmartin.center/2018/08/the-new-racism-part-1-how-race-and-ethnic-studies-made-color-blindness-a-bad-thing/>; See Thomas Sowell, “Affirmative Action”: A Worldwide Disaster, COMMENT. (Dec. 1989) <https://www.commentarymagazine.com/articles/affirmative-action-a-worldwide-disaster/>.

university's research mission"²⁸⁶ or who "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."²⁸⁷ These statements are squarely being employed on one side of a lingering academic debate²⁸⁸ of significant importance for the nature of the academy and the future of the country.²⁸⁹

UC Davis Mathematics Chair Abigail Thompson distilled this point very effectively in a recent essay critiquing the use of mandatory diversity statements:

Why is it a political test? 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. The sample rubric dictates that in order to get a high diversity score, a candidate must have actively engaged in promoting different identity groups as part of their professional life. The candidate should demonstrate "clear knowledge of, experience with, and interest in dimensions of diversity that result from different identities" and describe "multiple activities in depth." Requiring

286. Berkeley Rubric, *supra* note 242; see *supra* notes 243-45 and accompanying text.

287. *Id.*; Berkeley Rubric, *supra* note 242.

288. See John Staddon, *The Devolution of Social Science*, QUILLETTE (Oct. 7, 2018), <https://quillette.com/2018/10/07/the-devolution-of-social-science/>.

289. From speaking with those inside the UC system, it is clear that these statements are being evaluated in a narrow and ideological fashion looking for a particular kind of diversity, rather than broadly to encompass other types of diversity such as ideological or religious diversity. On his blog, John Cochrane notes a conversation he had with UC colleagues:

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 quote Martin Luther King, on judgement by content of character rather than color of skin. Don't write vibrant essays on the importance of ideological, political or religious diversity. Don't quote federal anti-discrimination law, the 14th Amendment, and the UC's own statements of non-discrimination in hiring. Don't write about class diversity, diverse experiences of immigrants, such as people born under communism in Eastern Europe or the amazingly diverse experience of the colleague you just hired who came from a small village in China. Don't write about the importance of freedom of speech, or anti-communist loyalty oaths in the 1950s. Are you thinking of writing about your hillbilly elegey 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. And, heaven forbid, don't express distaste for the project. The staff are on to all these tricks, and each of these specifically will earn you a downgrade.

John Cochrane, *Wokeademia*, THE GRUMPY ECONOMIST: JOHN COCHRANE'S BLOG (Jan. 30, 2020), <https://johnhcochrane.blogspot.com/2020/01/wokeademia.html>. My personal conversations with current UC faculty, as well as those who have recently applied to UC are consistent with what Cochrane writes.

candidates to believe that people should be treated differently according to their identity is indeed a political test.²⁹⁰

3. *Discrimination Based on Research Viewpoint*

UC's Guidelines for Evaluating Contributions to Diversity for Faculty Appointment and Promotion Under APM – 210 set out the kinds of research endeavors that would give a faculty member credit for a contribution to diversity.²⁹¹

Research contributions to understanding the barriers facing women and minorities in academic disciplines, for example:

- Studying patterns of participation and advancement of women and minorities in fields where they are under-represented
- Studying socio-cultural issues confronting under-represented students in college preparation curricula
- Evaluating programs, curricula, and teaching strategies designed to enhance participation of under-represented students in higher education

Research interests that will contribute to diversity and equal opportunity, for example, research that addresses:

- Race, ethnicity, gender, multiculturalism, and inclusion
- Health disparities, educational access and achievement, political engagement, economic justice, social mobility, civil and human rights
- Questions of interest to communities historically excluded by higher education
- Artistic expression and cultural production that reflects culturally diverse communities or voices not well represented in the arts and humanities²⁹²

290. Thompson, *supra* note 13, at 1778. In response to the backlash her article engendered, Thompson further elaborated on this process:

It is a misunderstanding to interpret my essay as an attack on the concepts of diversity and inclusiveness. There are constructive and destructive ways to achieve these goals. Some involve being helpful and welcoming, and being thoughtful about opening doors to the previously excluded. Others are destructive. They require adherence to a very particular view on identity and social justice. Destructive approaches alienate people who should be working together towards an inclusive community. Mandatory DEI statements are divisive and destructive.

John Cochrane, *More Wokeademia*, THE GRUMPY ECONOMIST (Jan. 31, 2020) <https://johnhcochrane.blogspot.com/2020/01/more-wokeademia.html> (quoting an email from Thompson).

291. UCOP Academic Personnel and Programs, *Evaluating Contributions to Diversity for Faculty Appointment and Promotion Under APM – 210*, UC SAN DIEGO 1, 4 (Feb. 2017), <https://www.ucop.edu/faculty-diversity/policies-guidelines/eval-contributions-diversity.pdf>.

292. *Id.*

It is not hard to see how this list will result in favoritism to certain kinds of viewpoints at the expense of others. Consider, for instance, a sample EDI statement provided by UCLA's Office of Equity, Diversity, and Inclusion. Since this statement is being offered as a sample or model, it is likely one that would score highly under UCLA's criteria. This prospective faculty member emphasizes that his "research broadly focuses on the socioeconomic, civic, and political integration of post-1965 immigrants and their children," and that he encourages students "through their scholarship and advocacy, to alleviate [] the vast inequities that continue to shape our world."²⁹³ This statement is held up as a model diversity statement.

Imagine, in contrast, a statement written by a sociologist whose research focuses on how inequality is fundamental to society's progress and how free market systems in the long run drastically reduce poverty and improve quality of life.²⁹⁴ It is unlikely that this statement would receive a positive score, let alone be held up as a model for others to emulate.

Or imagine two prospective law professors. One publishes an article strongly supporting affirmative action programs. Another argues that affirmative action programs are harmful because they create mismatch and are incompatible with the ideals of the equal protection clause. The first professor will get a high score on his contributions to diversity, while the second professor will receive low marks and may be excluded under the search method being utilized in UC Davis and elsewhere. In a highly competitive academic marketplace, this process of giving additional credit to certain kinds of research is likely to skew the academy even further away from conservative ideas and intellectual diversity.

4. Requirement that all Professors Dedicate Themselves to Contributing to Diversity

John O. McGinnis has analogized diversity statements to statements of faith required by Oxford and Cambridge Universities after the English Reformation.²⁹⁵ However, as McGinnis insightfully notes, these modern statements of faith require more than just intellectual assent: "[t]he old requirement of the British colleges was at least less intrusive. One had to profess a set of beliefs but did not have to do anything to advance their social realization. But under the California policy, a prospective faculty member must advance a designated social mission to advance his or her career."²⁹⁶

Take the rubrics used by UC Berkeley and UC Santa Cruz in their Advancing Faculty Diversity pilot programs. An applicant who "mentions activities that

293. *Example EDI Statements*, UCLA <https://ucla.app.box.com/v/sample-EDI-statements>.

294. See e.g. Phillip Aghion, et. al., *Innovation and Top Income Inequality*, 86 REV. ECON. STUDIES 1 (2019), (arguing that while innovation can increase income inequality it can also dramatically increase social mobility); Mark Tovey, *The Social Function of Economic Inequality*, MISES INSTITUTE (Dec. 19, 2014), <https://mises.org/library/social-function-economic-inequality>.

295. See McGinnis, *supra* note 270.

296. *Id.*

are already the expectation of faculty as evidence of commitment and involvement” such as “always invit[ing] and welcom[ing] students from all backgrounds to participate in [a] research lab” or being willing to mentor women or minority students would get a low (likely failing) score on her statement.²⁹⁷ Nor would faculty members receive credit for “[d]escrib[ing] only activities that are already the expectation of our faculty such as mentoring, treating all students the same regardless of background, etc.”²⁹⁸ So, faculty are expected not only to fulfill all administrative expectations for their service, but to go beyond that.

Of course, a university may require professors to implement a variety of diversity related programs and policies. For instance, it may require a professor to undergo implicit bias training, even if the professor does not accept the premise of implicit bias. But what UC is doing is different. It is not merely requiring a professor to embrace university policy, but to be a champion of it. A professor is not allowed to do the bare minimum, but is expected to go beyond that and affirmatively embrace the university’s policies on diversity. A professor who chooses to dedicate his time to other causes that are not seen as advancing diversity may not even be considered after evaluation of his diversity statement, regardless of how valuable that service may be to the campus community or society.²⁹⁹

III. DIVERSITY STATEMENTS ARE PART OF A LARGER TREND HERALDING THE NEED FOR GREATER PROTECTION OF PROFESSORIAL FREE SPEECH RIGHTS

As the above discussion shows, mandatory diversity statements pose a unique threat to faculty diversity of thought. But diversity statements are not the only emerging threat that faculty face. In recent decades, the academic profession has undergone significant modifications, which have undermined the power of the faculty and empowered bureaucrats who prioritize concerns such as diversity far above values like free speech. Accordingly, this section seeks to place diversity statements in the context of a variety of other ongoing changes to academia, which weaken institutional academic freedom protections for individual professors.

Scholars critical of the free speech claims of individual professors have argued that academic norms and informal rules like those adopted by the American

297. *UCSC Starting Rubric to Assess Candidate Contributions to Diversity, Equity, and Inclusion*, UC SANTA CRUZ, 2 <https://apo.ucsc.edu/policy/communications/docs/ucsc-rubrics-c2deistatements.pdf>.

298. *Id.* at 3.

299. Cochrane, *supra* note 289.

Suppose you spent all your copious free time as a scientist activating for climate change, working as a drug addiction counselor, teaching in prisons, or saving endangered species. None of that counts. Of course if you spent your time as a Mormon missionary, activating for second amendment rights, or working for the Federalist society, we know that doesn’t count!

Id.

Association of University Professors (“AAUP”) are adequate to protect the free speech rights of faculty members.³⁰⁰ Whether or not that was ever the case, the argument seems increasingly outdated in light of these trends.³⁰¹

A. More and more decisions are being shifted to bureaucrats who prioritize “diversity” rather than intellectual freedom.

In the last several decades, academic institutions have increasingly become bureaucratized as administrative hires dramatically outpace the growth of faculty.³⁰² Although not an entirely new phenomenon,³⁰³ this trend has continued to accelerate.

At the same time, “diversity discourse” has become central to the operation of Universities. University officials such as deans, presidents, and chancellors are chosen to a significant degree based on willingness to promote and increase diversity focused initiatives.³⁰⁴ There have been few dissenters among the ranks of the University administration from the consensus in favor of diversity programs such as affirmative action.³⁰⁵ On the other hand, faculty has been more resistant to such efforts. For instance, one 1996 poll “found that 57 percent of professors at UC-Berkeley” did not believe that their institution should “grant preference to one applicant over another for admission on the basis of race, sex[,] or ethnicity.”³⁰⁶ By contrast, more than two-thirds of the fifteen administrators surveyed by Lipson at UC-Berkeley supported affirmative action programs.³⁰⁷ These surveys suggest significant disparity between the attitudes of faculty and administrators towards diversity issues.

Debates over the reason why administrators have so completely embraced a particular view of diversity are rampant. Some scholars argue that these pro-

300. See *supra* notes 22-23 and accompanying text; *infra* note 350 and accompanying text.

301. See Neal H. Hutchens et al., *Essay: Faculty, the Courts, and the First Amendment*, 120 PENN. ST. L. REV. 1027, 1027 (2016) (“With many faculty increasingly lacking the protections of tenure, questions and debate abound over the future prospects of faculty independence and academic freedom.”); Martins, *supra* note 160, at 690 (“The realities of today’s public colleges undermine the confidence one should place in university officials to render objective academic judgments. In many universities, school administrators, rather than academic experts in the relevant field, are the ones evaluating professor speech.”).

302. GINSBERG, *supra* note 200, at 27 (noting that while faculty only grew 50% from 1985-2005, administrators grew 85% and staff 240%).

303. See HENRY ROVOSKY, *THE UNIVERSITY: AN OWNER’S MANUAL* 13 (bemoaning that “the quality of a school is negatively correlated with the unrestrained power of administrators . . .”).

304. The selection process for Presidents and other administrators is increasingly led by corporate search firms with little faculty input. Ginsberg, *supra* note 200, at 5.

305. Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin, and UT-Madison*, 32 L. & SOC. INQUIRY 985, 997 (2007).

306. *Id.* at 998.

307. *Id.* at 999.

diversity administrators have captured the university.³⁰⁸ Other scholars push back on the “capture theory” narrative, emphasizing instead that campus administrators tend to select their profession based on a commitment to diversity and support for affirmative action and other diversity programs.³⁰⁹ University administrators face increased pressure from the media, accreditation agencies, employers, and other interested parties to increase diversity.³¹⁰ There is also a lingering debate over whether these diversity efforts are genuine or whether those proposing them do so out of cynical motivation, such as ensuring job security,³¹¹ or shifting power from the faculty to the administration.³¹² Whether or not the increasing role for “diversity” in University admissions, hiring, and student and faculty life is seen as a cynical ploy for power, it is nevertheless a striking and seemingly enduring change.

Regardless of the reason, the growth in the so called “diversity bureaucracy” is staggering: In 2018, the Economist noted that there are around 175 employees at the University of California, Berkeley who are classified as “diversity officials.”³¹³ The need to comply with regulatory mandates cannot fully account for this meteoric growth.³¹⁴ Bureaucrats now outnumber faculty 2:1 at most public universities.³¹⁵

As more and more functions of the university are shifted to bureaucrats, there is reason to be concerned as to whether these bureaucrats, many of whom have no academic background whatsoever,³¹⁶ are sufficiently concerned with the First

308. *Id.* at 1008–09.

309. *Id.*

310. *Id.* at 1016–17.

311. *Id.* at 1005. Some affirmative-action critics, such as former UC Regent Ward Connerly, have suggested that commitment of university officials to diversity is “superficial” and exists “to give constitutional protection and to justify their budget.” *Id.* at 1005–06; *See also* John Staddon, *Diversity and Inclusion of Identity Groups Often Means Uniformity and Exclusion of Ideas*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (June 13, 2018) <https://www.jamesgmartin.center/2018/06/diversity-and-inclusion-of-identity-groups-often-means-uniformity-and-exclusion-of-ideas/>. This seems unlikely in the face of decades of dedicated effort to promote diversity programs, and the ideological litmus test nature of more recent efforts, such as the mandatory diversity statement.

312. Ginsberg, *supra* note 200, at 101 (“Put simply, university administrators will often package proposals designed mainly to enhance their own power on campus as altruistic and public-spirited efforts to promote social and political goals, such as equality and diversity, that the faculty cannot oppose.”). “[U]nder the rubric of diversity, administrators are seeking and finding ways to enhance their power vis-a-vis the faculty.” *Id.* at 116.

313. *The Rise of Universities Diversity Bureaucrats*, THE ECONOMIST: THE ECONOMIST EXPLAINS (May 8, 2018), <https://www.economist.com/the-economist-explains/2018/05/08/the-rise-of-universities-diversity-bureaucrats>.

314. *Id.*

315. *Id.*

316. Dan Berrett, *The Fall of the Faculty*, INSIDE HIGHER ED. (July 14, 2011), <https://www.insidehighered.com/news/2011/07/14/fall-faculty> (interview with Benjamin Ginsberg) (discussing the shift away from part-time academic deans to full-time administrators without academic experience).

Amendment and with professorial academic freedom.³¹⁷ Indeed, these bureaucratic mandates often “make a mockery of the core academic mission.”³¹⁸ There is also reason to think that the norms and mores of the growing bureaucracy have undermined faculty support for freedom of expression.³¹⁹ The bureaucratization of the university has, therefore, led to increased prominence of individuals who value diversity far more highly than they value open inquiry and academic freedom.

B. Undermining of Tenure

A related concern is the undermining of the tenure system. For over a century, tenure has protected faculty from termination for the expression of unpopular viewpoints.³²⁰ Indeed, it can be said that “[t]enure is the chief guarantor of the intellectual freedom that makes it possible for faculty members to pursue new ideas and to teach concepts in the sciences and humanities that fly in the face of conventionally accepted wisdom.”³²¹ Those tenured professors that were fired for speech related activities were, therefore, often the Ward Churchill’s of the

317. Some scholars have argued that “[f]aculty peers . . . sometimes pose a greater threat to the academic freedom of individual professors” than a government or the university administration. David M. Rabban, *Symposium on Academic Freedom: Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1410 (1988). This, of course, may be true with instances of individual personality conflicts or other clashes. But by and large faculty has greater incentive to be protective of the rights of other faculty members than administrators. After all, faculty members may need to rely on the same protections at some point in their career. Moreover, as Greg Lukianoff has characterized in his *Unlearning Liberty*, the “[t]he actual regimes of censorship on campus are put in place primarily by the ever-growing army of administrators” who “present themselves as benign philosopher-kings.” GREG LUKIANOFF, *UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF THE AMERICAN DEBATE* (2014); See also Henry Reichman, *Academic Freedom and the Common Good: A Review Essay*, AAUP J. OF ACAD. FREEDOM, 16–18 (2016), https://www.aaup.org/sites/default/files/Reichman_1.pdf; GINSBERG, *supra* note 200 (“[M]ost professors view scholarship and teaching as ends and the university as an institutional means or instrument through which to achieve those ends. For administrators, on the other hand, it is the faculty’s research and teaching enterprise that is the means and not the end.”).

318. Matthew Abraham, *Book Review: The Fall of the Faculty: The Rise of the All Administrative University*, LOGOS, <http://logosjournal.com/2016/abraham-2/> (last visited Mar. 27, 2021).

319. JONATHAN R. COLE, STEPHEN COLE & CHRISTOPHER WEISS, *Academic Freedom: a Pilot Study of Faculty Views*, in WHO’S AFRAID OF ACAD. FREEDOM 364 (Akeel Bilgrami & Jonathan R. Cole eds., 2015). The authors stated, “In fact, the unwillingness to accept the idea that speakers have a right to hurt others, feelings and offend their sensibilities may lead faculty members to think of academic freedom and free inquiry as just another value of the university without any special place among this hierarchy of values.” *Id.* at 366.

320. MICHAEL BÉRUBÉ & JENNIFER RUTH, *THE HUMANITIES, HIGHER EDUCATION, AND ACADEMIC FREEDOM* 115–16 (2015) (“With the erosion of the professionalism once institutionalized by the tenure system . . . the university community has not blossomed into a vibrant democracy but reverted to the kind of demeaning and resentful culture typical of patronage systems.”).

321. Churchill was ultimately awarded \$1 in damages by a jury for his improper termination. See GINSBERG, *supra* note 200, at 156.

academy—professors known for their especially offensive and controversial speech.³²² By and large, professors were protected. However, in recent decades, there has been a dramatic shift away from tenure and towards non-tenured adjunct or contract professors.³²³ This shift has further empowered administrators and professional staff at the expense of faculty members.³²⁴ Non-tenured faculty may also be less protective of academic freedom and freedom of expression in the academy more generally.³²⁵

C. Bypassing Faculty Governance

At most academic institutions, faculty senates have traditionally played a major role in university governance and protected faculty speech and due process rights.³²⁶ That is certainly true in the UC system, but that role is being undermined.³²⁷

As discussed above, 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. Even when the faculty is consulted, their concerns are being ignored or marginalized.³²⁸ This tendency to bypass the institutions established to protect professorial speech rights suggests that more robust legal protections for professors are needed as the institutional forces that kept conflict between academics and institutions at bay lose their legitimacy and prestige.³²⁹

322. *Id.* at 155–56.

323. Hutchens, et al., *supra* note 301, at 1029; Abraham, *supra* note 318;

That administrators conspire to marginalize the faculty voice, undermine tenure, and scuttle shared governance principles within their institutions is undoubtedly true. The move to increasingly rely upon contingent labor gives administrations yet another way to control the faculty. Since non-tenure-track faculty can be dismissed at a moment's notice, administrators do not have to be bothered with the resistance of the faculty when it comes to changing the curriculum, scuttling meritorious research, or controlling once-successful programs.

Id.

324. Ginsberg, *supra* note 200, at 115–16 (“But, while they do not produce much actual diversity administrative diversity campaigns have given university officials a tool with which to attack the autonomy of the faculty recruitment and promotion process and, perhaps, the tenure system itself.”).

325. COLE, *supra* note 319, at 364.

326. LARRY G. GERBER, *DECLINE OF FACULTY GOVERNANCE: PROFESSIONALIZATION AND THE MODERN AMERICAN UNIVERSITY* 5–10 (2014).

327. Jason Fertig, *Faculty Senate Shrugged*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Aug. 5, 2016), <https://www.jamesgmartin.center/2016/08/faculty-senate-shrugged/> (“The idea of a senate representing faculty members is an old one, but in the contemporary university full of credentialism and administrative bloat, the relevance of that body is questionable.”).

328. See *supra* notes 222–24 and accompanying text.

329. See Robert J. Tepper & Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125, 146 (2009) (“[W]here shared governance is weak, an institutional view of academic freedom may empower administrators to make decisions affecting academic matters without building a consensus among the faculty.”); Larry Hubbell, *Thankless But Vital: The Role of the Faculty Senate*

Professorial hiring is an area of particular vulnerability. While faculty members are likely to be highly protective of other current faculty members, they are less likely to have regard for those who are not yet hired and are merely potential hires, and to expend their dwindling institutional capital on preventing bureaucratic capture of the hiring process. This is perhaps why UC has been able to implement mandatory diversity statements for faculty hires with such limited pushback, but has met much more significant resistance in its efforts with current faculty members.³³⁰

D. Steps outside of the qualifications of a particular discipline.

Traditionally, professors are part of a particular discipline with academic rules and norms. These norms are ultimately protective of professorial academic freedom because a professor applying for a position, for tenure, or for advancement can rely on the application of these intra-disciplinary norms. But schools like UC Davis have begun instead to utilize open hiring for interdisciplinary positions.³³¹ This process of interdisciplinary and cluster hiring is increasingly common in universities as part of diversity hiring efforts.³³² This shift opens the door for greater subjectivity in the process. Because a single set of academic norms do not govern, there is more room for diversity bureaucrats to impose additional viewpoint-based considerations without oversight.³³³

Chair, THOUGHT & ACTION (Fall 2010),
qa16.nea.org/assets/img/PubThoughtAndAction/Hubbelshort.pdf.

A key lesson I learned is that the faculty senate chair must always be cognizant that he or she is representing the faculty. It is easy to lose sight of this obligation, given the temptations of the office. If one is an effective faculty senate chair and is acknowledged to be such by members of the administration, future benefits may follow—such as a position within the administration, if one so desires. However, one’s ambition to pursue a career in administration must not soften one’s advocacy of faculty interests, which may, at times, differ from the interests of the administration and the trustees. A heightened sense of careerism can easily lead to an overly deferential approach in dealing with administrators.

Id.

330. See *supra* notes 222–24 and accompanying text.

331. UC DAVIS, *supra* note 233 (“The searches will be college or school-wide, without specification of a specific discipline or department, provided that an applicant’s area of expertise falls within a discipline embodied in the academic unit. The goal of these broad searches is to attract the widest possible pool of candidates.”).

332. *Successful Development of a Faculty Cluster-Hiring Program at NC State University*, NC STATE UNIV., <https://facultyclusters.ncsu.edu/creating-a-culture-of-interdisciplinary-excellence/> (last visited Nov. 19, 2021) (employing an “interdisciplinary tenure committee” among other innovations); Colleen Flaherty, *Cluster Hiring and Diversity*, INSIDE HIGHER ED (May 1, 2015), <https://www.insidehighered.com/news/2015/05/01/new-report-says-cluster-hiring-can-lead-increased-faculty-diversity>.

333. Rabban, *supra* note 317, at 1410 (“Peer review helps assure that the decision rests on valid professional grounds and thus is itself a contribution to academic freedom. When people without the relevant scholarly background make these judgments, it may become difficult to avoid suspicions that inappropriate, nonprofessional considerations played a significant role.”).

Peer review has traditionally been one of the key pillars of robust academic freedom.³³⁴ By shifting evaluation from peers to inter-disciplinary committees, or even to non-academic diversity bureaucrats, one of the key safeguards for professorial academic freedom is lost.³³⁵

An Urban Universities for Health study on Faculty Cluster Hiring for Diversity and Institutional Climate shows how viewpoint bias may be more likely to infect such searches.³³⁶ Some of the searches surveyed originate from offices or committees focused on diversity issues rather than from members of the faculty.³³⁷ In one instance, “women and diversity ‘allies’ r[a]n the hiring process.”³³⁸ In other instances, these searches are organized “around specific disciplines which tend to be more diverse or diversity-related research topics.”³³⁹ Diversity training for members of the search committee is also a ubiquitous feature.³⁴⁰ All of these features make these types of interdisciplinary searches more likely to focus heavily on diversity and to be less protective of diversity of opinion. This is exactly what appears to have happened in the faculty hiring initiatives at UC Davis and Berkeley that were described above.

Similarly, a large wave of cluster hiring at UC Riverside was criticized because it led to faculty accusations of “administrators [] controlling the proposal selection process and selecting clusters arbitrarily or, worse, for their own ends. The massive cluster-hiring initiative also seemed to be overtaking

334. The classic conception of faculty autonomy “rested on the guarantee of quality provided by disciplinary bodies whose role is to establish and implement norms and standards and so to certify their members’ professional competence.” Joan W. Scott, *Knowledge, Power, and Academic Freedom*, 76 SOC. RSCH. 451, 460 (2009), <https://culturahistorica.org/wp-content/uploads/2020/02/scott-knowledge.pdf>.

335. In *FOR THE COMMON GOOD: PRINCIPLES OF ACADEMIC FREEDOM*, Finkin and Post argue that academic freedom should be primarily defended on the basis of institutional academic freedom rather than individual rights. The linchpins for their idealized system of academic freedom include “the professional norms necessary to define and generate knowledge” and the need for “those who exercise the prerogative of peer review [to] interpret disciplinary standards in a manner that maintains the internal legitimacy of these standards.” Because these norms prevail, Finkin and Post argue that academic institutions must be given the ability to “preserve sufficient social cohesion within the profession” and to “maintain a sensible and wise equilibrium between innovation and stability.” Matthew F. Finkin & Robert Post, *supra* note 137, at 60. Finkin and Post do not reckon with the extent to which such disciplinary norms have been undermined in the name of mounting institutional bureaucracy and the forced blurring of disciplinary lines. These trends suggest that institutional norms academic freedom will become increasingly inadequate to protect free speech rights without increasing judicial and constitutional intervention. *Id.*

336. *Faculty Cluster Hiring for Diversity and Institutional Climate*, URBAN UNIVS. FOR HEALTH 1, 10 (Apr. 2015), urbanuniversitiesforhealth.org/media/documents/Faculty_Cluster_Hiring_Report.pdf.

337. *Id.*

338. *Id.* at 12.

339. *Id.*

340. *Id.*

established, department-level search procedures.”³⁴¹ A majority of the respondents to a survey related to the program said that “their own departments’ hiring strategies were inconsistent with the cluster strategy” or that “the cluster strategy interfered with their departments’ strategies.”³⁴²

As these kinds of programs become more common, prospective, or current, faculty members increasingly will not be protected by the professional norms of their academic disciplines, suggesting a greater need for constitutional protection.

E. Effort to detach considerations of diversity from overall considerations of merit.

Traditionally, the evaluation of a faculty applicant or a current faculty member seeking tenure has been a highly holistic and integrated process, and this is one of the reasons that such searches largely have been protected from judicial scrutiny.³⁴³ In contrast, universities such as UC Davis have begun considering diversity statements as an initial threshold requirement with no other facets of an application being considered.³⁴⁴ This exacerbates the risk that applicants will not be treated as individuals, but will be grouped solely based on their personal characteristics or viewpoint on the singular topic of diversity. On the other hand, the single-minded focus on diversity statements actually eliminates the risk of courts sitting as a “super-tenure” committee,³⁴⁵ since there is only a single factor that needs to be evaluated to determine if improper discrimination entered into the mix.

341. Colleen Flaherty, *Cluster-Hiring Cluster & %*#?*, INSIDE HIGHER ED (Feb. 1, 2016 3:00 AM), <https://www.insidehighered.com/news/2016/02/01/uc-riverside-faculty-survey-suggests-outrage-cluster-hiring-initiative>.

342. *Id.*

343. *Zahorik v. Cornell Univ.*, 729 F.2d 85, 92 (2d Cir. 1984) (listing “the number of factors considered in tenure decisions” as one reason for being particularly deferential to such decisions made by universities). The Second Circuit noted that while an “individual’s capacities are obviously critical”, there are many other complex factors, and indeed such decisions are often made “in the context of generations of scholarly work in the same area and always against a backdrop of current scholarship and current reputations of others.” *Id.* at 92–93. *See also* *Kobrin v. Univ. of Minn.*, 34 F.3d 698, 704 n.4 (8th Cir. 1994); *Brown v. Trs. of Bos. Univ.*, 891 F.2d 337, 346 (1st Cir. 1989) (quoting *Kumar v. Board of Trs., Univ. of Mass.*, 774 F.2d 1, 12 (1st Cir. 1985) (“Courts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge on subjective judgments regarding the applicant’s academic excellence, teaching ability, creativity, contributions to the university community, rapport with students and colleagues, and other factors that are not susceptible of quantitative measurement. Absent discrimination, a university must be given a free hand in making such tenure decisions.”); *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993) (“Therefore, unless disparities in curricula vitae are so apparent as virtually to jump off the page and slap us in the face, we judges should be reluctant to substitute our views for those of the individuals charged with the evaluation duty by virtue of their own years of experience and expertise in the field in question.”).

344. *See* discussion *supra* notes 240–45.

345. *Villanueva v. Wellesley Coll.*, 930 F.2d 124, 129 (1st Cir. 1991).

F. *The Loss of Individualized Consideration*

Classical liberal approaches to diversity are focused on a holistic evaluation of an applicant as a discreet individual.³⁴⁶ One of the “most insidious” aspects of the loyalty oaths of the 1950s, was that individuals who held to certain ideologies were screened without any further individualized consideration whatsoever.³⁴⁷ For a Marxist who refused to lie or hide his beliefs, there was no mechanism to attempt to provide nuance or to explain why one’s values were ultimately compatible with academic life.

The focus on “diversity” in the modern academia has a similar homogenizing impact.³⁴⁸ This is particularly true in the hiring context where there is no meaningful due process or opportunity to contextualize one’s position on diversity. Indeed, applicants for a faculty position will likely never know that they were denied a job because of a failing diversity statement. In the UC pilot model, search committees are not even allowed to access any other part of the applicant’s file.³⁴⁹ Even outside of the hiring context, if one is opposed to the idea of a diversity statement, there is similarly no mechanism for voicing that concern without being penalized or potentially excluded from consideration.

G. *Forced conformity of thought is self-perpetuating*

Viewpoint-based discrimination has an inherent danger of being self-reinforcing. As certain ideas are suppressed or excluded from the marketplace of ideas, those who continue to operate as gatekeepers to entry into that market

346. Avi Woolf, *A Conservative Definition of Diversity*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Nov. 29, 2019), <https://www.jamesgmartin.center/2019/11/a-conservative-definition-of-diversity/> (“A conservative who values diversity would seek to understand the individual before him—not discounting immutable parts of their person, but not considering them the whole story, either.”)

347. See *Loyalty Oaths*, 77 YALE L. J. 739, 739, 766 (1968). The article discusses how loyalty oaths violated due process by allowing the legislature:

to render a judicial judgment by isolating one group of people on the basis of their application for or receipt of a state benefit such as employment, assuming them all guilty of misconduct, and then punishing them by denying them the benefit if they fail to remove the taint by swearing to an oath.

Id. at 766.

348. Woolf, *supra* note 346.

The result of the liberal view of diversity is ironically quite homogenizing—all black and brown Americans are a hivemind, all gay men and women have (or should have) the same values, working-class people all have the same interests, and so on. Even when more subgroups of diversity are created within liberal-approved groups, they tend to be no less uniform. The old centralizing instinct of modernity, with its exact formulas and rigid boundaries, is very much in force.

Id.

349. See discussion *supra* notes 240–45.

will be more likely to see those views as illegitimate. That is certainly true in the academic marketplace of ideas.³⁵⁰

As such, academic institutions take great pains to avoid allowing ideological biases to infect the hiring or tenure review processes. As Dean Flier has noted:

During nine years as a medical-school dean, I oversaw nearly a thousand professorial reviews assessing the research, teaching, service, and reputation of senior members of the faculty. Maintaining the objectivity of these reviews is essential to the integrity of the academy, though I fully recognize the imperfections of the process. It's the responsibility of academic leaders to vigorously counter inappropriate biases and to guard reviews from ideological interference. This is a surprisingly challenging task, since what appears objective to one person may look ideological to another.³⁵¹

Unfortunately, the way that diversity statements are being evaluated in the University of California does not guard against "ideological interference"³⁵² rather, quite the opposite.³⁵³ Diversity statements in parts of the University of California are expressly being screened based on viewpoints. The use of diversity statements is designed to ensure that only those who think approvingly about diversity hiring initiatives are hired. Those hires are, therefore, by design less likely to see concerns with the process and are more likely to be blind to the ideological dimensions at work.³⁵⁴ This ideological screening effect is also being exacerbated by the fact that many search committees are now being hand selected based on sympathy with diversity statements and diversity hiring initiatives.³⁵⁵

350. Professor Bromwich persuasively argues that academic and institutional norms can often stifle the exercise of controversial or unpopular ideas, and that the protection of free speech rights is, therefore, an essential component of the development of robust academic freedom. Bromwich points to the example of a professor in Israel who spoke out in favor of boycotts for Israel and was accused of "forefeit[ing] his ability to work effectively within the academic setting." In such instances, the First Amendment provides a necessary protection where professional norms of academic freedom do not or cannot. See Bromwich, *supra* note 22, at 36–38.

351. Flier, *supra* note 12.

352. See discussion *supra* notes 240–45.

353. Those who are invited to join the ranks of the administration are often selected primarily because they are "uncontroversial" or seen as "team players," attributes that are particularly unlikely to lead to the selection of administrators willing to buck the mold and support academic freedom. Abraham, *supra* note 318.

354. Ironically, it was once progressive scholars who decried disciplinary heterodoxy when it was used to devalue the contributions of feminist or critical race scholarship. See Scott, *supra* note 334, at 462–64. Free speech protections are vital because there is a natural tendency to equate "respectability and ideological conventionalism," and to reject "an expression of dissent from the prevailing doctrines of that disciplines." *Id.* at 464 (referencing a 1986 statement by the AAUP).

355. Bromwich, *supra* note 22, at 39. In such an environment, academic freedom is "helplessly vulnerable to abuse," as "the defenders of academic freedom become the keenest inquisitors on behalf of its restrictions." *Id.* "The searches were, for the most part, open-discipline and open-rank, and Recruitment Committee members were carefully selected in consultation with the Deans,

H Greater Scrutiny of Extramural Speech

Unfortunately, there is an alarming trend towards penalizing extramural speech or expression. For instance, a professor at the University of Oregon was placed on administrative leave a few years ago for wearing blackface at a Halloween party she hosted in her home.³⁵⁶

As discussed above, there is a generalized consensus that consideration of extramural speech is generally inappropriate and poses serious First Amendment concerns.³⁵⁷ Dean Erwin Chemerinsky has noted that punishing or retaliating against faculty members for their off-campus speech is a particularly pernicious violation of academic freedom: “[o]f course, campuses must evaluate the quality of a professor’s teaching or scholarship, which inherently involves assessing their speech. But universities must not use a professor’s statements in other settings as a basis for ‘excommunicating’ an otherwise qualified professor.”³⁵⁸

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. However, there is a serious danger that, as the use of these statements continues to evolve, the process will expand to encompass extramural speech as search committees look through a professor’s social media posts or past publications attempting to parse out whether a professor is fully on board with diversity initiatives.

IV. THE NEED FOR MORE ROBUST PROTECTION FOR PROFESSORIAL SPEECH

All of these trends show an increasing need for First Amendment protections for individual professors. Evaluations have increasingly shifted away from like-minded faculty and toward bureaucrats who are less likely to be sympathetic to

with some additional members added by the Vice Provost, based on their past leadership in diversity, equity, and inclusion initiatives.” UC OFFICE OF THE PRESIDENT, FINAL REPORT ON THE 2018–2019 USE OF ONE-TIME FUNDS TO SUPPORT THE BEST PRACTICES IN EQUAL EMPLOYMENT OPPORTUNITY IN FACULTY EMPLOYMENT, *supra* note 267, at 20.

356. Eugene Volokh, *Opinion: At the University of Oregon, no more free speech for professors on subjects such as race, religion, sexual orientation*, WASH. POST: VOLOKH CONSPIRACY (Dec. 26, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/26/at-the-university-of-oregon-no-more-free-speech-for-professors-on-subjects-such-as-race-religion-sexual-orientation/>; Josh Blackman, *The University of Oregon Ducks the First Amendment*, JOSH BLACKMAN’S BLOG (Dec. 24, 2016), <http://joshblackman.com/blog/2016/12/24/the-university-of-oregon-ducks-the-first-amendment/>; Hans Bader, *University of Oregon violates free speech in Halloween costume punishment*, LIBERTY UNYIELDING (Dec. 25, 2016), <https://libertyunyielding.com/2016/12/25/university-oregon-violates-free-speech-halloween-costume-punishment/>.

357. See *supra* Section I.C.3. The AAUP has long held that when Professors “speak or write as citizens, they should be free from institutional censorship or discipline.” *1940 Statement of Principles on Academic Freedom and Tenure*, AAUP 14, <https://www.aaup.org/file/1940%20Statement.pdf> (last visited Mar. 28, 2021).

358. Howard Gillman & Erwin Chemerinsky, *Opinion: Professors are losing their freedom of expression*, WASH. POST (Nov. 15, 2017), https://www.washingtonpost.com/opinions/professors-are-losing-their-freedom-of-expression/2017/11/14/c4c7805a-c594-11e7-afe9-4f60b5a6c4a0_story.html.

free speech concerns. Institutional protections such as tenure and peer review have melted away. Extramural speech is increasingly being scrutinized under the dangerous theory that exposure to controversial ideas may offend or harm students who disagree. Review is increasingly segmented, rather than holistic, in its nature. Ideological conformity is increasingly being portrayed as a virtue and even a necessity. The requirement that applicants for a faculty position write a mandatory diversity statement is emblematic of all of these particularly dangerous trends. In this environment, it is more important than ever that the First Amendment be utilized as a robust tool to protect academic freedom and the rights of professors.³⁵⁹

For the same reasons, it should be clear that the *Garcetti* test is woefully inadequate. Under *Garcetti*, almost anything a professor does or says could be swept out of First Amendment protection. A professor is hired primarily for expressive purposes. Teaching, researching, writing, and public speaking events, such as conferences and symposia, are all part of the job responsibilities of an academic.³⁶⁰ All of this speech is under increasing scrutiny by bureaucrats much more concerned with an ideology of “diversity, equity, and inclusion” than a commitment to robust freedom of expression.

With regard to diversity statements, there are several reasons why the application of the *Garcetti* standard would be particularly inappropriate. First, to the extent that the statements are an inquiry into a professor’s inner mind, it cannot be meaningfully said to be the product of one’s employment. *Garcetti* should have no place in such an evaluation. Second, in the hiring process what is being evaluated is likely teaching and scholarly experience that was produced independently or at another institution. It seems particularly inappropriate to apply *Garcetti* to preexisting experiences or writings. Indeed, *Pickering* may not even be the right standard to apply to the evaluation of speech that predated a job application and was independently produced, and more rigorous standards of review should be applied.³⁶¹ Finally, scholars have persuasively argued that

359. Ginsberg, *supra* note 200, at 135 (“[T]he collective notion of academic freedom might have been appropriate when applied to, say, a German university, which functioned historically as a self-governing body of scholars. In the American context, though, universities are governed by boards and administrators, which may themselves pose a threat to academic freedom.”).

360. Hutchens, et al., *supra* note 301, at 1042 (“Once an institution elects to empower faculty to engage in independent speech for purposes of carrying out their professional roles, it should not, under the First Amendment, then be able to renege on that grant of professional independence based on the public employee speech cases.”).

361. See Kimberly K. Caster, Burnham v. Ianni: *The Eighth Circuit Forges Protection for the Free Speech Rights of Public University Professors Outside The Pickering-Connick-Waters Analysis*, 32 CREIGHTON L. REV. 883, 885 (1999). The Ninth Circuit has refused to apply *Pickering* to a student applying for admission to a university program that could eventually lead to a teaching opportunity. See *Oyama v. Univ. of Haw.*, 813 F.3d 850 (9th Cir. 2015). The Ninth Circuit explained that applying *Pickering* in that case would “require us to extend this doctrine to those who do not yet work for the government but may wish to do so—a move we have not yet made.” *Id.* at 866. This case is not entirely analogous, since *Oyama* was a student. However, it shows that *Pickering* may not apply in cases where its application would run contrary to the freedom “to

Garcetti cannot be the test that applies “where the adverse action is claimed to be a product of impermissible content-based or viewpoint-based discrimination.”³⁶²

V. PROPOSING A BETTER STANDARD

A. *Content v. Viewpoint Discrimination*

The Supreme Court has repeatedly recognized that two types of speech restrictions raise significant constitutional concerns. First, content-based distinctions that “single[] out specific subject matter for differential treatment.”³⁶³ Content-based distinctions are frequently suspect because such restrictions “appl[y] to particular speech because of the topic discussed or the idea or message expressed[,]” and, therefore, may be wielded “to suppress disfavored speech.”³⁶⁴ Viewpoint-based distinctions, or distinctions based on “the specific motivating ideology or the opinion or perspective of the speaker”— is a ‘more blatant’ and ‘egregious form of content discrimination.’³⁶⁵

In public forums, which are opened up for expression, content-based distinctions are treated identically to viewpoint-based distinctions.³⁶⁶ But when a forum has not been opened up for generalized expression, the government is allowed to make content-based distinctions to “reserve the forum for its intended purposes, communicative or otherwise.”³⁶⁷ However, viewpoint-based distinctions are invalid even in such non-public forums because such distinctions are “an effort to suppress expression merely because public officials oppose the speaker’s view.”³⁶⁸ This is especially important in higher education because “[o]nly when students and faculty are free to examine all options, no matter how unpopular or unorthodox, without concern that their careers will be indelibly marred by daring to think along nonconformist pathways, can we hope to insure an atmosphere in which intellectual pioneers will develop.”³⁶⁹

In academic settings, some content distinctions are inevitable and required. Indeed, some kinds of content distinction help facilitate viewpoint diversity by ensuring that limited resources are able to create a diverse academic

inquire, to study and to evaluate, to gain new maturity and understanding” that the First Amendment extends to students. *Id.* at 863 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

362. *Tepper & White*, *supra* note 329, at 165.

363. *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015).

364. *Id.* at 163, 167.

365. *Id.* at 168 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

366. *Id.* at 169.

367. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

368. *Id.*

369. *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 547 (3d Cir. 1980).

community.³⁷⁰ 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.³⁷¹ These kinds of content distinctions are compatible with academic freedom and with the First Amendment.

Even still, content-based distinctions must be evaluated to ensure that they are not being used as a smokescreen or cloak for discrimination based on viewpoint. At times, the Supreme Court has recognized that what appears to be a content-based distinction is really a view-point-based distinction in disguise.³⁷² Viewpoint distinctions must be viewed with significant suspicion for fear of the suppression of ideas.

An example might be helpful. A university may decide that it wants to hire a professor with a specialization in early American History. This is unquestionably a permissible content-based distinction. On the other hand, a public university would be on shaky constitutional ground were it to demand that anyone hired for the position must take the viewpoint that the Founding Fathers were racists who enacted the Constitution as a tool to perpetuate slavery. That would be a viewpoint-based or ideology-based classification that should be subjected to intensive scrutiny to ensure that any such classifications are strictly necessary to the academic mission of the institution. This is the same standard that is employed in non-public forums more generally, where content distinctions are generally permitted, while viewpoint distinctions are forbidden. But there is also a danger that content-based categorizations may be operated in such a fashion as to *de facto* create a viewpoint-based distinction. In this hypothetical, for instance, a history department that only allowed historians who specialized in a people's history of disenfranchised and marginal groups to the exclusion of any other types of historiography might be using content-based distinctions as a smokescreen for viewpoint discrimination.

Requiring a diversity statement to be part of an application is a type of content-based requirement that is likely permissible so long as it serves a legitimate

370. Mac Donald, *supra* note 253, at 41; Tepper & White, *supra* note 329, at 166.

371. UNIV. CHICAGO, *Coase-Sandor Institute for Law and Economics*, <https://www.law.uchicago.edu/coase-sandor> (last visited July 16, 2021); BYU L., <https://lawcorpus.byu.edu/> (last visited July 16, 2021); UCLA L., *Critical Race Studies J.D. Specialization*, <https://law.ucla.edu/academics/degrees/jd-program/specializations/critical-race-studies-jd-specialization> (last visited July 16, 2021).

372. *See Reed v. Town of Gilbert*, 576 U.S. 155, 2234 (2015) (Breyer J., concurring)

There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. . . . And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all speakers.

Justice Breyer cited to several such cases. *E.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995); *Boos v. Barry*, 485 U.S. 312, 318–19 (1988); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

pedagogical purpose.³⁷³ However, because content-based distinctions are being employed, the evaluation process should be reviewed to make sure that the process is not being utilized as a tool for viewpoint discrimination.

For instance, professors who engage in research deemed to further “economic justice” are being rewarded in the University of California.³⁷⁴ In theory, this categorization could be employed in a viewpoint neutral fashion. For instance, if a professor argues that classic free-market economics creates a surplus of wealth that could benefit all of society and bring more people out of poverty, then that could be considered promoting “economic justice.” But more likely that is not how the concept of economic justice is being employed. Likely, scholarship urging more government intervention in the lives of minorities would receive credit, while scholarship arguing the contrary position would be penalized or ignored. So this “content-based” distinction has been transformed into one that is “view-point based.”

Some of what the UC schools are doing is simply blatant and overt viewpoint discrimination. As discussed above, any applicant who “[d]efines diversity only in terms of different areas of study or different nationalities, but doesn’t discuss gender or ethnicity/race,” any candidate who “[m]ay discount the importance of diversity” “[m]ay provide reasons for not considering diversity in hiring, or sees it as antithetical to academic freedom or the university’s research mission,” or “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” would get a failing score.³⁷⁵ That is a clear cut example of viewpoint-based discrimination that should be subject to strict and exacting scrutiny.

B. Factors to Evaluate Content-Based Distinctions

As suggested above, careful scrutiny is often necessary to determine whether a content-based distinction being imposed by a university is viewpoint-based discrimination in disguise. Based on the prior discussion, here are factors that courts should take into account when evaluating a content-based distinction being imposed by a university.³⁷⁶

373. Erica Goldberg discusses diversity statements in the context of “compelled speech” cases such as *Barnette*. Goldberg, *supra* note 11. This is a plausible line of attack against diversity statements. But on the other hand, diversity statements are requested as part of an application process that involves other prompts for writing personal statements. It would be difficult to distinguish between diversity statements and other requests that are made during the application process if diversity statements were truly being applied in a viewpoint neutral manner.

374. UCOP Academic Personnel and Programs, *Evaluating Contributions to Diversity for Faculty Appointment and Promotion Under APM – 210*, UC SAN DIEGO 1, 4 (Feb. 2017), <https://www.ucop.edu/faculty-diversity/policies-guidelines/eval-contributions-diversity.pdf>.

Berkley Rubric, *supra* note 242 at 1; UCSC Rubric, *supra* note 243 at 1.

375. These factors could be taken into account as part of the *Pickering* analysis when weighing the employee’s speech interest against the employer’s interests. Or perhaps they suggest that a new

1. *How related are the requirements to the job description?* –

Universities may of course impose bona fide job requirements on applicants. For instance, an applicant seeking a position in a school of economics cannot be aggrieved if he is rejected because he has a degree in psychology or has not researched or published in economics. These kinds of content-based distinctions are necessary for creating a high-quality academic community.

But as the diversity statement shows, there is a grave danger when intellectual homogeneity of thought becomes seen as a universal job requirement.

Those who believe deeply in diversity discourse may argue that the embrace of diversity is simply a prerequisite for any academic position at an institution that is institutionally committed to ideas of equity and inclusion. In their mind, requiring a strong commitment to diversity is as much a prerequisite as the ability to read or write. As Professor Flier explained, “[o]f course, advocates of critical race theory and social justice don’t see the pervasive influence of these ideas as a threat to academic freedom, while those who question them often do.”³⁷⁷ But this is always so with diversity oaths of any stripes. Proponents of anti-communist loyalty oaths were just as certain that communist could not be effective teachers because of their embrace of what they considered to be a subversive and dangerous ideology. Or as John Rosenberg put it,

A good measure of how far we’ve come is that our new loyalty oaths, i.e., diversity statements, are regarded as not only acceptable but required by those who would react in horror at similar efforts to promote, say, patriotism or capitalism. Orthodoxy never seems orthodox to those intent on imposing it.³⁷⁸

Some critics of diversity statements have taken the extreme opposite stance that “diversity initiatives . . . have *nothing whatever* to do with the core mission of a university: which is intellectual excellence in the pursuit of truth via teaching and research.”³⁷⁹ A more nuanced position is certainly possible. One can acknowledge, for instance, that a university may unquestionably ensure that every faculty member is willing to treat each and every student with respect. But one can also recognize that the diversity statements at UC go far beyond that and impose a requirement that faculty members not only agree with university policy but zealously embrace the university’s perspective. This requirement is far removed from any traditional metrics of academic excellence or teaching performance and detached from any direct job responsibilities, increasing the risk of discrimination and the suppression of ideas.

test rather than *Pickering* should instead be developed to more appropriately assess the various interests in this context.

377. Flier, *supra* note 12.

378. John Rosenberg, *From Diverse Professors to Professors of Diversity*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Dec. 7, 2018), <https://www.jamesgmartin.center/2018/12/from-diverse-professors-to-professors-of-diversity/>.

379. John E.R. Staddon, *Is Diversity an Enemy of Excellence?*, INTELL. TAKEOUT (Feb. 13, 2019), <https://www.intellectualltakeout.org/article/diversity-enemy-excellence>.

Or put simply, novel requirements that are not clearly tied to job responsibilities should be approached with greater suspicion than those traditional requirements of a profession that are closely linked to job duties.³⁸⁰

2. *Is this a universal requirement for all faculty or a limited requirement for narrowly crafted faculty positions?*

As a closely related matter, there is a difference between a qualification for a specific discipline or position, and a qualification that applies to all applicants for all positions writ large. Requiring a certain kind of perspective and expertise for a narrowly crafted position in a single department would be less likely to risk suppression of ideas. On the other hand, a broad mandate that all candidates for all positions must satisfy is much more likely to result in a homogenous faculty and the suppression of ideas.

The history of loyalty oaths is instructive on this point. The loyalty oaths of the 1950s were not concerned merely with whether a professor was teaching classical or Marxian economics in his or her economics classroom. Instead, they were systematic in their nature and took the form of imputing guilt by mere association with a set of ideas.³⁸¹ A Communist was not merely barred from teaching economics, but from teaching at all.³⁸² While either of these policies would raise serious First Amendment concerns, the total ban was even more problematic because it excluded anyone who disagreed from the academy altogether.

Diversity statements at the University of California are akin to the 1950s loyalty oaths in this respect. A professor who holds classical liberal positions on diversity issues is not merely barred from teaching a course on sociology or on the Fourteenth Amendment, but from holding any position in the academy at all. This restriction applies with as much force to fields that tangentially touch on diversity policy, such as the hard sciences or engineering, as they do to the social sciences or humanities. Indeed, it is the hard sciences at UC schools that appear to be most forcefully embracing the use of diversity statements.³⁸³ The universal scope of the modern diversity statement is, therefore, one of its more egregious facets.

380. The Fifth Circuit in *Wetherbe* suggested that in the hiring context a university should be particularly free to conduct a broad inquiry and to “screen applicants to ensure that they will actually perform their duties with maximal diligence.” *Wetherbe v. Smith*, 593 F. App’x 323, 329 (5th Cir. 2014). But the Court also seemed to acknowledge that how closely related the question was “to the position that the applicant is seeking” would make a big difference in how much deference the institution is due. *Id.* at 329 n.8. Even though the Fifth Circuit panel erred perhaps too far on the side of deference in the case, I agree with it that this is a critical consideration for determining how much deference is appropriate.

381. Loyalty Oaths, *supra* note 347, at 764.

382. *Adler v. Bd. of Educ.*, 342 U.S. 485, 489, 496 (1952).

383. See *supra* note 230, at 3 and accompanying text. Note how many of the pilot programs are in the hard sciences or disciplines that are seen as more empirical like Mathematics.

Litmus tests that apply uniformly to all academic positions closely resemble the anti-communist loyalty oaths and should raise judicial alarm bells necessitating greater skepticism and scrutiny.

3. *Are privately held ideas being evaluated, or only outward conduct?*

The idea that a professor may be punished because of his personally held beliefs rather than his outward conduct is particularly pernicious. After all, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”³⁸⁴

Public universities should be squarely forbidden from considering and discriminating against privately held beliefs that are not expressed in public. University search committees are not allowed to be a thought police. Diversity statements come close to this line by requiring Professors to make an affirmative ideological pledge and by penalizing anyone not willing to make that pledge. Silence or indifference is an inadequate response as full intellectual assent is required. These kinds of requirements should be scrutinized particularly strictly.

Similarly pernicious is the effort to equate the expression of ideas with discriminatory conduct. The example of Richard Sander, a Professor at UCLA law, is instructive. Sander is a well-known critic of affirmative action programs and an advocate for the theory of mismatch (the theory that affirmative action harms minority students by placing them in schools that do not match their skills, therefore, setting them up for failure). As a result, minority students in the law program erupted at perceived slights, such as Sander’s first-year property law class printing t-shirts with his name on them for a softball competition. Some students also complained that they might not feel comfortable seeking help from Sander because they would not want to confirm his research regarding mismatch.³⁸⁵ Supporters of diversity programs might point to Sander as proof that a professor who is not personally committed to diversity outreach programs may not be capable of teaching a diverse mixture of students.

Accepting this premise is insulting to the intelligence and capability of students at schools like UCLA Law. There are no indicators that Sander ever discriminated against a single student or treated a single student in an inferior fashion as a result of race. Accordingly, those who support excluding professors like Sander must embrace one of two claims, which are both dangerous to academic freedom and the First Amendment.

First, students cannot be expected to distinguish between an empirically based theory that has received recognition from members of the Supreme Court³⁸⁶ and

384. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

385. *See Mac Donald*, *supra* note 253 at 72.

386. *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) (Thomas J., concurring in part and dissenting in part) (“The Law School tantalizes unprepared students with the promise of a

outright racism. Second, students cannot be expected to learn from a professor with whom they disagree sharply.

With regard to the first claim, equating serious academic theories with outright racism is corrosive to intellectual diversity on campus and in the public square. Students are, of course, free to disagree with Professor Sander and debate the merits of his theory. But disagreement, even heated disagreement, is not equal to racial harassment or hatred. The university, a place committed to the pursuit of truth, is precisely where such narrow-minded thinking should be confronted and rejected.

The second claim is empirically unfounded, as black students in Professor Sander's property section have actually performed better than students in other first-year sections.³⁸⁷ Moreover, it once again betrays a fundamental misunderstanding of the purpose of higher education as a place where students are exposed to a diversity of perspectives and given the opportunity to think, reason, and learn.

The example of Richard Sander shows that university officials may attempt to argue that certain viewpoints regarding diversity programs must be excluded because their presence in the academy will cause offense, prejudice, and lead minority students to feel unsafe or insecure. As Professor Eugene Volokh has argued, "if accepted, these arguments really will be the end of freedom of expression—both casual and more formally academic—on university professors' part[.]"³⁸⁸ Embracing this kind of thinking will create a "student's veto" akin to the "heckler's veto" that has been repeatedly rejected by the Supreme Court and lower courts.³⁸⁹ Even under the *Pickering* test, courts have

University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions."); *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 333, 133 S. Ct. 2411, 2432, 186 L. Ed. 2d 474 (2013) (Scalia J., concurring) ("Furthermore, the University's discrimination does nothing to increase the number of blacks and Hispanics who have access to a college education generally. Instead, the University's discrimination has a pervasive shifting effect. See T. Sowell, *Affirmative Action Around the World* 145–146 (2004). The University admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched. But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete. Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.")

387. *Id.* at 73–74.

388. Eugene Volokh, *Silencing professor speech to prevent students from being offended – or from fearing discrimination by the professors*, WASH. POST: VOLOKH CONSPIRACY (Dec. 30, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/30/silencing-professor-speech-to-prevent-students-from-being-offended-or-from-fearing-discrimination-by-the-professors/>.

389. See *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 142 (1992) (Rehnquist J., dissenting) (criticizing a decision for "resulting in the kind of 'heckler's veto' we have previously

held that “threatened disruption by others reacting to public employee speech simply may not be allowed to serve as justification for public employer disciplinary action directed at that speech.”³⁹⁰ That protection against a heckler’s veto is even more vital in academia, which has served as an incubator for unpopular or controversial ideas.³⁹¹

In *Rodriguez v. Maricopa County Community College District*, the Ninth Circuit rejected a racial harassment claim brought by students against a college that failed to discipline a professor who wrote emails to an employee list server extolling the virtue of white culture and critiquing multiculturalism and diversity.³⁹² The Court discussed how “[f]ree speech has been a powerful force for the spread of equality under the law” and “we must not squelch that freedom because it may also be harnessed by those who promote retrograde or unattractive ways of thought.”³⁹³ Accordingly, the Court emphasized that not only was the University not required to punish the professor, but also it could not do so, because his “speech would be singled out for suppression because of his disfavored opinions on those issues.”³⁹⁴ The Court emphasized that “listeners who are offended by the ideas being discussed certainly are not entitled to shut down an entire forum simply because they object to what some people are saying” because otherwise, “very soon no one would be able to say much of anything at all.”³⁹⁵

The Ninth Circuit’s decision in *Rodriguez* is correct. The First Amendment has always stood for the principle that the proper response to controversial ideas is counter speech rather than suppression or coercion. Academic institutions must resist the tendency to equate offensive speech with harassment or the creation of an unsafe academic environment, because this equivalency will result in the destruction of meaningful First Amendment protections. Courts must be particularly vigilant in rejecting attempts to offer this kind of false equivalency.

condemned”); *Edwards v. South Carolina*, 372 U.S. 229, 235, 237–38 (1963); *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949). See also Daniel Ortner, *The Terrorist’s Veto: Why the First Amendment Must Protect Provocative Portrayals of the Prophet Muhammad*, 12 NW. J. L. & SOC. POL’Y. 1, 31–32 (2016) (discussing how courts have protected provocative speech against a heckler’s veto in order to prevent viewpoint discrimination against those views that are controversial enough to provoke a heated response).

390. *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985). See also *Flanagan v. Munger*, 890 F. 2d 1557, 1566 (10th Cir. 1989) (“The department cannot justify disciplinary action against plaintiffs simply because some members of the public find plaintiffs’ speech offensive and for that reason may not cooperate with law enforcement officers in the future.”); *Dible v. City of Chandler*, 515 F.3d 918, 934 (9th Cir. 2008) (Canby J., concurring).

391. Blackman, *supra* note 356.

392. *Rodriguez v. Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 705–06 (9th Cir. 2010).

393. *Id.* at 709–10.

394. *Id.* at 710–11.

395. *Id.* at 711.

Policies targeting internal thought or extramural speech should be scrutinized with particular rigor. Courts must reject any encroachment of the heckler's veto into academia.

4. *Are the criterion being employed widely held and reliably applicable?*

When the criterion for evaluating scholarship are widely held and objectively applied, it reduces the risk of subjectivity and viewpoint discrimination. For instance, consider a professor who embraced the universally discredited theory that the Holocaust did not occur. An institution that would exclude such a professor would have recourse to “the disciplinary protocols of history departments”, which could be brought to bear to show why the Holocaust denial scholarship was defective or invalid.³⁹⁶ These same norms could be applied to future applicants in a consistent and verifiable fashion. Those norms would also remain subject to criticism or revision if new information came to light. Other objective measures could also be utilized, such as the placement of academic publications or the reviews that a publication has received from peers. The utilization of such objective professional norms helps insulate academic review from the risk of viewpoint discrimination.³⁹⁷ While academic norms are certainly not entirely free from the bias, they are a vital protection for academic freedom and free speech rights.

In contrast, there are no meaningful institutional norms that can be brought to bear to evaluate something like a mandatory diversity statement.³⁹⁸

As Dean Flier explained:

Most in the academic community, including myself, see efforts toward greater diversity and inclusion as essential to the core commitments of a humane and liberal society, such as eliminating inappropriate barriers, creating equal opportunity, and displaying tolerance and respect for group differences. But the key terms — diversity, equity, and inclusion — are rarely defined with specificity, and their meaning has been subtly shifting. That's a serious problem, especially if diversity efforts are to be a criterion for faculty evaluation. The term “equity,” for instance, can imply equality of opportunity or equality of outcome — two quite different things with distinct policy implications. The concept of “inclusion” might imply the welcoming of diverse groups and perspectives, or it might involve the avoidance

396. Bérubé, *supra* note 101.

397. See *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011) (explaining that universities must be allowed to use “lawful criteria” for evaluation but that this criteria “can be examined for an impermissible discriminatory use”); See also Joseph J. Martins, *supra* note 160) (analyzing *Adams*).

398. Samia E. McCall, *Thinking Outside of the Race Boxes: A Two-Pronged Approach to Further Diversity and Decrease Bias*, 2018 B.Y.U. EDUC. & L.J. 23, 58 (2018) (“The reading and scoring of a diversity statement is subject to the bias, both implicit and explicit, of the admissions committees.”).

of microaggressions and the creation of safe spaces — two controversial goals. The lack of definitional clarity of key terms creates confusion, suspicion, and disagreement.³⁹⁹

This “confusion, suspicion, and disagreement” is exacerbated by the fact that terms like “equity” or “diversity” may mean very different things in different academic disciplines. Therefore, attempting to craft a single objective and overarching definition for terms like “diversity, equity, and inclusion” is likely to be elusive. This means that there is a lot more room for subjectivity and viewpoint bias to infect the process. There is also, somewhat ironically, concern that because notions of diversity, equity, and inclusion vary between cultures that the use of mandatory diversity statements will prejudice international scholars.

When universities utilize criterion that are highly subjective and are not subject to institutional and professional norms, their determinations should be treated with greater suspicion.

5. *Is the review holistic or a threshold test?*

As already discussed, holistic review minimizes the risk that viewpoint is used as a predominant factor in consideration.⁴⁰⁰ The presence of holistic review may also be constitutionally significant.

In *Bakke*, the Supreme Court invalidated UC’s affirmative action program because of “its disregard of individual rights” and the lack of individualized holistic consideration.⁴⁰¹ Although diversity statements do not utilize quotas or caps, there is something quite similar at work when a university prioritizes a contribution to diversity to the exclusion of other factors as UC schools have done in their diversity pilot programs. No matter what else an applicant could bring to the university community, be it brilliant academic insight, award winning teaching experience, or dedicated university service, it will not be enough to outweigh the lack of a conforming diversity statement. The University of California may ignore “the next Albert Einstein or Jonas Salk” if he fails to parrot the diversity orthodoxy.⁴⁰²

Defenders of the diversity statement may argue that evaluation of the diversity statement is in and of itself holistic with a variety of factors, such as teaching and research, being considered. But that does not change the fact that a professor who prioritized academics or teaching rather than diversity efforts because she believes that the university’s diversity efforts are harmful may not be considered at all regardless of merit.

399. Flier, *supra* note 12.

400. See discussion *supra* Section III.F.

401. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978).

402. Ortner, *supra* note 12. See also Heather Mac Donald, Op-Ed: *UCLA’s Infatuation With Diversity is a Costly Diversion from its True Mission*, L.A. TIMES (Sept. 2, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-mac-donald-diversity-ucla-20180902-story.html>.

Holistic consideration of a candidate minimizes the risk that any single item will be taken as a litmus test, while a single-focused review raises concerns about an intellectual inquisition.

6. *Who is doing the evaluation, faculty, or administrators?*

In the Supreme Court's academic freedom precedent described above, many of its cases involved academic institutions being buffeted by administrative forces, such as school boards. In this context, it made sense to speak about the academic freedom rights of academic institutions. After all, it was reasonable to assume that academic institutions would be far more solicitous of academic freedom rights and of the First Amendment than faceless government bureaucrats who were largely detached from the academy.⁴⁰³ When professional academics are in charge, it is far more likely that they will impose the objective and professional standards of their profession in evaluating applicants.⁴⁰⁴

As the professionalization and bureaucratization of the academy continues apace, it may no longer make sense to think about the administration of a university as being an ally for faculty academic freedom.⁴⁰⁵ To the contrary, these diversity bureaucrats and other administrative officials more fully resemble the school board officials who were time and again rebuked by the Supreme Court in their efforts to stifle academic freedom.⁴⁰⁶

Accordingly, Courts should consider treating policies that are being primarily pushed by bureaucrats and other non-academics with far more skepticism than they traditionally have treated faculty policies and procedures.

403. See *Pomona Coll. v. Superior Ct.*, 53 Cal. Rptr. 2d 662, 667–68 (Cal. Ct. App. 1996).

Only one group of people is suited to undertake the responsibility of making these decisions: the candidate's academic peers who are knowledgeable about the candidate's chosen field of study and about the particular needs of the institution. These peers, unlike non-academics, are equipped to evaluate the candidate's teaching and research according to their conformity with methodological principles agreed upon by the entire academic community. They also have the knowledge to meaningfully evaluate the candidate's contributions within his or her particular field of study as well as the relevance of those contributions to the goals of the particular institution. Moreover, because their individual academic reputations are intertwined with that of the university, the candidate's peers have the greatest stake in choosing people whose future work will reflect favorably on the institution.

404. See *supra* Sections III.C & III.D.

405. Ginsberg, *supra* note 200, at 135 (“[T]he collective notion of academic freedom might have been appropriate when applied to, say, a German university, which functioned historically as a self-governing body of scholars. In the American context, though, universities are governed by boards and administrators, which may themselves pose a threat to academic freedom.”).

406. Richard H. Hiers, *Academic Freedom in Public Colleges and Universities: O Say, Does That Star-Spangled First Amendment Banner Yet Wave?*, 40 WAYNE L. REV. 1, 17–18 (1993) (criticizing the tendency to take the Court's language regarding academic freedom “out of context . . . to imply that universities themselves, or their administrative officials, have a right to ‘academic freedom’ that courts should respect even when such officials’ authority is exercised to the detriment of the interests of mere ‘faculty,’ including faculty interests in academic freedom.”).

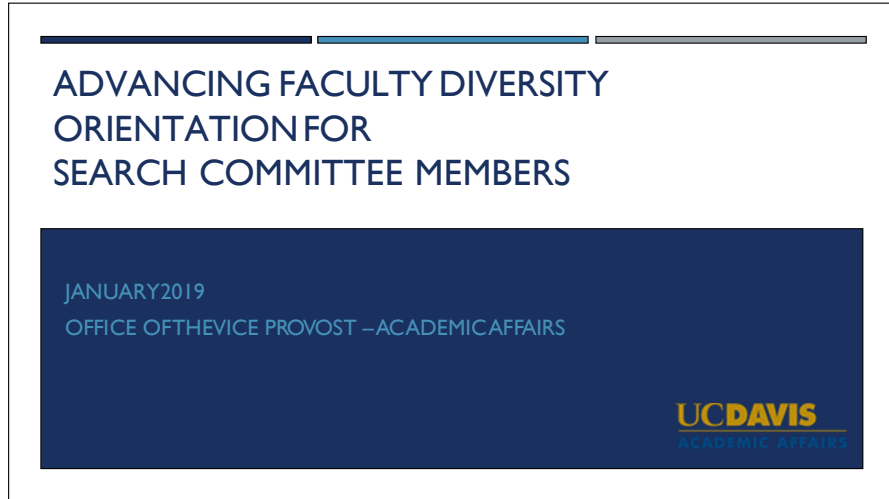
7. *Is the application of the standard likely to stifle or suppress the diversity of thought on the faculty and on campus?*

All of the aforementioned factors point to this overarching question: is the application of a particular content or viewpoint-based standard likely to stifle or suppress diversity of thought on the faculty and on campus? Stifling diversity of thought is particularly likely when viewpoint discrimination is involved. It is also more likely when review is based on factors far removed from core job performance requirements, is applied to all positions indiscriminately, involves the evaluation of thought and ideas rather than conduct, is not based on objective disciplinary norms, is singularly focused rather than holistic in nature, and is applied by bureaucrats who are especially unlikely to be protective of freedom of thought and expression.

All of these factors are present in the case of how the University of California is utilizing mandatory diversity statements. Accordingly, these statements are particularly dangerous to diversity of thought and freedom of expression in the academy. Accordingly, Courts should closely scrutinize these diversity statements and require universities to offer a compelling and narrowly tailored justification for requiring applicants to complete such statements.⁴⁰⁷

407. It is highly unlikely that a university will succeed in providing adequate support for justifying such programs. Diversity in higher education has been deemed a compelling interest, but the Court has rejected that rationale in other contexts such as in secondary education. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).724–725, 730 (plurality opinion). While the university clearly has an interest in ensuring that diverse students are welcomed, it can likely achieve that goal in more rights protective ways, such as punishing professors who discriminate against students based on protected characteristics. An overarching system of content and viewpoint discrimination is not even close to a narrowly tailored solution.

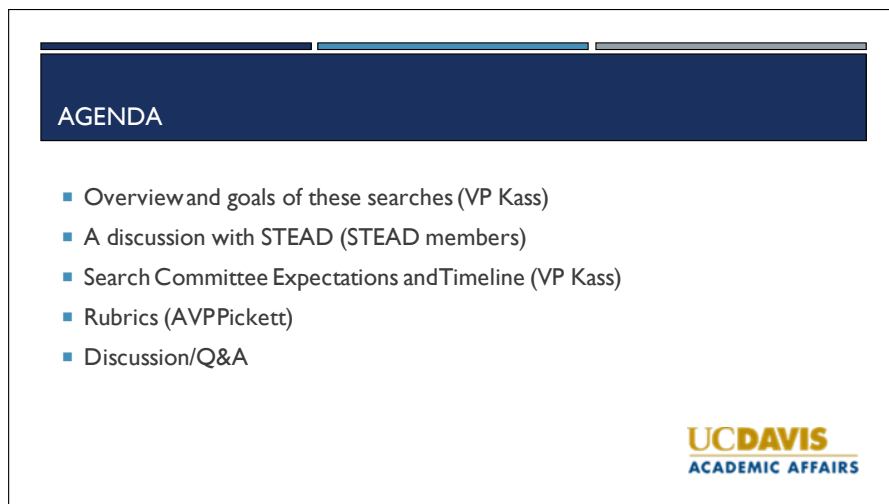
APPENDIX A: UNIVERSITY OF CALIFORNIA, DAVIS, OFFICE OF THE VICE
PROVOST – ACADEMIC AFFAIRS, ORIENTATION PRESENTATION POWERPOINT
(JAN. 2019)⁴⁰⁸



ADVANCING FACULTY DIVERSITY
ORIENTATION FOR
SEARCH COMMITTEE MEMBERS

JANUARY 2019
OFFICE OF THE VICE PROVOST – ACADEMIC AFFAIRS

UC DAVIS
ACADEMIC AFFAIRS



AGENDA


- Overview and goals of these searches (VP Kass)
- A discussion with STEAD (STEAD members)
- Search Committee Expectations and Timeline (VP Kass)
- Rubrics (AVP Pickett)
- Discussion/Q&A

UC DAVIS
ACADEMIC AFFAIRS

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OVERVIEW AND GOALS

- The call from UCOP – a URM initiative
- Goals of this search process
- Funds are from the State Legislature
- Constraints (time and otherwise)
- Use of Contributions to Diversity Statements first
- The publicity received so far (example next slide)
- UCR's success (example in two slides)




INSIDE HIGHER ED

Open Searches and Diversity

Hoping to increase faculty diversity, UC Davis is holding eight open searches focused on candidates' contributions to diversity, instead of narrow disciplinary expertise.

By Colleen Flaherty / November 5, 2018 37 COMMENTS



“So now they are literally saying that research and scholarship is less important to the mission of a university than “diversity” is.”

“In essence this program is a racial quota program and so illegal under California law. The main criteria for selection is your race.”

“Requiring such statements in applications for appointments and promotions is an affront to academic freedom, and diminishes the true value of diversity/equity of inclusion by trivializing it.”

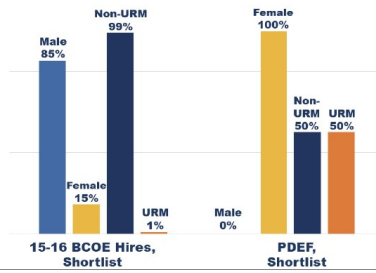
“As part of coming to your view that diversity statements trivialize diversity, did you listen to STEM PoC, women, LGBTQ voices? Because they don't seem to agree with you.”

“... how does a statement describing ones efforts towards diversity affect academic freedom? I also had to make statements about my teaching philosophy and research approach for tenure and my freedom survived.”

The University of California, Davis, is launching a pilot hiring program that eliminates the requirement – typical in department searches – that candidates have a specific disciplinary specialty. Davis says the research-backed approach will help it increase faculty diversity.

UC RIVERSIDE: EXPERIENCE WITH THEIR COLLEGE OF ENGINEERING

The shortlists aggregated across all of BCOE's 2015-16 searches still mirrors BCOE's current faculty composition. However, the PDEF shortlist was entirely comprised of women, of whom half are underrepresented minorities, which shows the success of avid use of the diversity statement and valuing contributions to diversity in the selection criteria.



A DISCUSSION WITH STEAD

EXPECTATIONS OF SEARCH COMMITTEE MEMBERS

- Doing more than the usual
 - Right now – need to nail down our advertising priorities
 - Need members to use their free listserves to get the word out
 - Need members to develop lists of names of URM individuals and contact them
- Serve as ambassadors for this process
 - Renaming excellence
 - Valuing contributions to diversity, why this matters
 - Legally consistent with Proposition 209



TIMELINE & PROCESS

- Plan to post these positions by January 15, open through Feb 15.
- Between now and Feb. 15, Committees can work on finalizing their rubrics for evaluating the Contributions to Diversity Statements (CDS).
- Starting February 16, Committees will initially only be provided with all candidates' CDS for review. Committees should be meeting by the end of February.
- Following this review, Committees will meet in person to consider who is on the "Seriously Consider" list, possible Skype interviews, come up with a Shortlist.
- Interviews should occur in March, by mid-March.
- Deans should be working on a list of who should be meeting the candidates during the campus visit.

TIMELINE & PROCESS (CONTINUED)

- Confidential advisors (2) – completely separate from the process, and available to all candidates who are invited to campus. One from sciences (for CAES, CBS, ENG, VET), one from social sciences/humanities (for GSM, SOE, LAW).
- After final interviews, we will build in time for faculty to provide feedback to the Committee. Committee provides their feedback to the dean. (For those schools/colleges with departments, the dean will work with departments to consider placement. Dean and selected department/chair need to be strong advocates.)
- April – Dean begins negotiations with the top candidate.
- Academic Affairs will assist with admin support and working closely with deans offices.

ASSESSING CONTRIBUTIONS TO DIVERSITY STATEMENTS



HOW DOES THE UNIVERSITY OF CALIFORNIA DEFINE "DIVERSITY?"

- The Academic Senate adopted in 2009 the following broad definition of diversity:
Diversity - features of California past, present and future refers to a variety of personal experiences, values, and worldviews that arise from differences of culture and circumstance. Such differences include race, ethnicity, gender, age, religion, language, abilities/disabilities, sexual orientation, socioeconomic status, geographic region and more.



PURPOSE OF THE DIVERSITY STATEMENT:

- Underscores campus role as a public land grant research university serving residents of the state.
- Aligns with academic personnel policy to encourage and recognize faculty contributions to diversity.
- Reinforces campus strategic goal of increasing faculty participation in diversity, equity, and inclusion activities.
- Communicates inclusive excellence as a faculty expectation for all applicants.
- Complements research and teaching interests of applicants and augments skills and competencies.



IS THE DIVERSITY STATEMENT CONSISTENT WITH UNIVERSITY OF CALIFORNIA POLICY?

- Yes.

APM 210.1-d which governs appointment, appraisal and promotion, recommends that faculty be both encouraged and rewarded for activity that promotes inclusive excellence:

*"The University of California is committed to excellence and equity in every facet of its mission. Teaching, research, professional and public service contributions that promote diversity and equal opportunity are to be encouraged and given recognition in the evaluation of the candidate's qualifications. **These contributions to diversity and equal opportunity can take a variety of forms including efforts to advance equitable access to education, public service that addresses the needs of California's diverse population, or research in a scholar's area of expertise that highlights inequities.**"*

WHAT SHOULD A DIVERSITY STATEMENT ACCOMPLISH?

- **Indicate awareness** of inequities and challenges in education faced by historically underrepresented or economically disadvantaged groups, and the negative consequences of underutilization
- **Demonstrate a track record** and measure of success in activities (such as mentoring, teaching or outreach) that aim to reduce barriers in education or research for underrepresented or economically disadvantaged groups
- **Describe specific plans to contribute** through campus programs, new activities, or through national or off-campus organizations



STRONG VS. WEAK STATEMENTS

Strong statements:

- Tend to be substantial in length (e.g., 2 - 3 pages)
- Clearly address all three criteria: Understanding, track record, and plans
- Demonstrate sophisticated thinking about the underrepresentation of groups in academia and structural barriers to success (e.g., racism, sexism, homophobia, etc.)
- Provide detailed information about activities, including their specific role in the activity and the outcomes
- Typically contain descriptions of multiple efforts rather than only one or two
- Have an established track record going back many years
- Provide clear and convincing evidence of how they would contribute at UC Davis
- Reference activities or programs currently taking place at UC Davis and how they would become involved or fill other needs

Weak statements:

- Tend to be brief in length
- Are often vague (e.g., "diversity is important for the success of science")
- Describe participating in few activities
- Participated only peripherally in activities
- Show only a simplistic understanding of equity and inclusion issues
- Describe efforts to be undertaken that are generally already expected of faculty (e.g., being welcoming to all students, making the classroom a positive environment, having women among advisees, etc)
- Expecting UC Davis to provide opportunities for the candidate to get involved rather than proposing activities or programs

TIPS FOR SEARCH COMMITTEES

- Make sure you have considered how much weight your committee wants to assign to a candidate's knowledge of, experience with, and/or commitment to diversity, equity, and inclusion in relation to other areas.
- When reviewing statements, notice candidates' level of **reliance on generalities, platitudes, and clichés**. Are their statements generic and perfunctory or more detailed and specific to the individual?
- Notice whether candidates describe **concrete experiences**—working in a specific outreach program in a specific community, serving as a TA or instructor in a specific course, tutoring diverse students in a particular summer program, conducting field research in a particular community and so on.
- Also notice the **level of candidates' commitments**—how often have they been involved in these types of opportunities, and/or how long have they worked in particular areas?
- If candidates have not had many opportunities to work in these areas in the past, can they describe their potential for **future contributions** to diversity and inclusion in concrete and specific detail?
- **Return to your assessment rubric**—how well do candidates' experiences, aspirations, and potential match up with your required or preferred qualities?

A SAMPLE RUBRIC: UC IRVINE

Diversity Statement Evaluation Grid

Component	Scoring System 0 - 5	Candidate 1	Candidate 2	Candidate 3	Candidate 4	Candidate 5
Indicates awareness of inequities and challenges in education faced by historically underrepresented or economically disadvantaged groups, and the negative consequences of underutilization	0 - 1					
Demonstrates a track record and measure of success in activities (such as mentoring, teaching or outreach) that aim to reduce barriers in education or research for underrepresented or economically disadvantaged groups	0 - 2					
Specific plans to contribute through campus programs, new activities, or through national or off-campus organizations	0 - 1					

Examples: (5 = EXCELLENT) (1 = STATEMENT ONLY)

SAMPLE STATEMENT#1

While I have always been alert to the variety of student learning styles, and the need to accommodate a diverse population of students, it was only after being tenured that I felt it was safe to commit primary effort to issues of pedagogy in the Chemistry lecture hall. As part of a collaboration with colleagues in the School of Education, I currently have an NSF award to measure learning outcomes in introduction to Chemistry courses, with special attention to students from underrepresented groups. Post docs in my Chemistry Education Lab are using national datasets from the ACS Exams Institute along with data we are generating in our own Chem I courses to study the effect of various interventions on student learning. We posit that by understanding and responding to the variety of learning styles of introductory students, we can create a more effective learning environment for all students, including students from diverse backgrounds, in our courses.

SAMPLE STATEMENT#2

I left India at 18 years old to attend school in England. I can speak three languages and have lived in seven different countries. My experience with many cultures will provide unique insights into problem solving in a scientific setting. I will apply a different outlook to scientific questions that hopefully lead to insights that are less obvious than my American-born counterparts. Understanding a variety of views and their contexts is essential to working in education, particularly as the world becomes more global in perspective. Currently, I have 3 UR students in my lab.

SAMPLE STATEMENT#3

I am a Mexican-American. My mother was born in Mexico and her whole family continues to live there and none of them went to college. My father is also Mexican-American, but is what some call a Chicano. A few people in his family went to college; however, none of them earned a professional degree. My family history and personal experiences over the years will enable me to contribute more effectively at UCSD and make me a better professor. I am an active volunteer with the Society of Mexican American Engineers and Scientists (MAES) which promotes the professional and personal development of Mexican Americans pursuing degrees in engineering and science. I bring a distinct perspective to the classroom and am proud to be a role-model to students of all ethnic backgrounds.

USING STATEMENTS AS PART OF OVERALL EVALUATION

- Consider creating a cut-off score for advancing equity and inclusion, below which a candidate would not move forward in the search process (would be considered “below the bar”), regardless of their scores in other areas, similar to what would be done for research quality or plans.
- Set a high bar.



Research			Teaching		Service		Contributions to Diversity, Equity, and Inclusion (DEI)*		
Curricular Fit	Productivity	Plans	Teaching Area	Mentoring	Engagement with the campus	Engagement with the professional community	Knowledge and understanding	Track Record	Plans
1-5	1-5	1-5	1-5	1-5	1-5	1-5	1-5	1-5	1-5
Example areas for assessing research quality and potential: <ul style="list-style-type: none"> • Past research accomplishments (publication record—emphasize quality not number or journal, impact/novelty of research, presentations, grants/fellowships etc.) • Research plan. Potential for sustained impact? Creative, doable, exciting? Long term and short term vision? Also consider info from rec letters. • How well does the proposed research mesh with current research in the department? Would they find research colleagues here? Synergy can come from techniques, systems, etc. • Potential for interdisciplinary collaboration • Interest and ability to develop a new research area 			Example areas for assessing teaching quality and potential: <ul style="list-style-type: none"> • Potential to or demonstrated ability to teach undergrad and graduate courses (specify which areas) • Interest in teaching and record of teaching accomplishments • Ability to attract and successfully mentor excellent graduate students 		Example areas for assessing service: <ul style="list-style-type: none"> • Potential or track record of department engagement • Potential to make a positive contribution to the department climate • Potential to be a conscientious community member • Potential to make positive contributions to the professional community 		Go to the OFEW contributions to diversity webpage for guidance. Example areas: <ul style="list-style-type: none"> • 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. • Familiarity with challenges faced by underrepresented individuals and the need to identify and eliminate barriers to their full and equitable participation and advancement. • Experiences or participation in activities designed to remove barriers and increase participation of underrepresented students, staff, and/or faculty. • Specific ideas for programs, initiatives, or activities to initiate at Berkeley if hired 		

ADDITIONAL RESOURCES

These are included in your packet:

- Guidance from UCOP on evaluating Contributions to Diversity Statements:
http://facultydiversity.ucsd.edu/recruitment/C2D%20Guidelines_UCOP.pdf
- UC Irvine Evaluation Grid:
<http://archive.advance.uci.edu/Advance/ADVANCE%20PDFs/DiversityEval.xlsx>
- UC Berkeley Rubric:
https://ofew.berkeley.edu/sites/default/files/rubric_to_assess_candidate_contributions_to_diversity_equity_and_inclusion.pdf
- UC Davis Academic Affairs:
<https://academicaffairs.ucdavis.edu/faculty-equity-and-inclusion>

DISCUSSION/QUESTIONS

