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

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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.

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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. 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. The rubrics that are being deployed engage in blatant viewpoint discrimination as well as a viewpoint-based evaluation of the applicant’s research. 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,” 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. 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. 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.” 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. 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.
8. See infra Section I.C.1.
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, and public attention muted, although that appears to be changing. 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.


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/rnoti-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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{17} Relatedly, these same trends show why \textit{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).\textsuperscript{18}


\textsuperscript{14} See infra Section II.
\textsuperscript{15} See infra Section II.
\textsuperscript{16} See infra Sections III and IV.
\textsuperscript{17} See infra Section III.
\textsuperscript{18} See infra Section IV.
\textsuperscript{19} See infra Section IV.
careful thinking about how universities can engage in content or viewpoint-based distinctions. 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. 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 PROTECTION

A. Foundational Supreme Court Precedent

Protection for the free speech rights of teachers and professors got off to a rather inauspicious start. In Adler v. Board of Education, the Supreme Court...
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. 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.” Accordingly, the school board did no harm to the First Amendment when it forbade members of “subversive groups” from teaching. 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.”

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.” 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. 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.” Such a result is contrary to “the pursuit of truth which the First Amendment was designed to protect.”

Within just a few years, Justices Black and Douglas would find themselves in the majority. 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. One of the lines of questioning concerned Sweezy’s lecturing at the University of New Hampshire.

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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.
Hampshire. During his class, Sweezy had allegedly extolled the virtues of socialism and declared that it was “inevitable in America.” 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.” 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.”

While in *Adler* the Court found that teachers must conform to expected norms of “fitness and loyalty,” in *Sweezy* the plurality instead extoled 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.” 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.”

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.

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. 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.” 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.*


42. *Id.* at 487.
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.”

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.” Academic hiring decisions “must be based upon a comprehensive range of information” and are “a matter of fine judgment.” 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. 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. 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 peaked a few years later in *Keyishian v. Board of Regents*. 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.” Several professors either resigned, were fired, or faced imminent termination at the expiration of their contracts.

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.
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.” It then emphasized that the New York law was vague and could encompass “mere advocacy of abstract doctrine” or “mere expression of belief.” 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.” The law would therefore “stifle ‘that free play of the spirit which all teachers ought especially to cultivate and practice . . . .’”

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.” 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.’” 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.’” 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.” Under that standard, New York’s loyalty oath could not withstand scrutiny.

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

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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.*


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

61. *Id.*


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.\textsuperscript{64} Hence, in \textit{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.”\textsuperscript{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 \textit{Board of Education v. Pico}, the Supreme Court invalidated a school board’s decision to ban several books from school libraries.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{69}

\textsuperscript{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”).

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


\textsuperscript{67} Id. at 861.

\textsuperscript{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.” \textit{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.” \textit{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. \textit{Id.} at 880. Schools could not engage in “an intentional attempt to shield students from certain ideas that officials find politically distasteful.” \textit{Id.} at 882.

\textsuperscript{69} The tension between institutional and individual academic freedom has been described as “seriously incompatible and probably ultimately irreconcilable.” Walter P. Metzger, \textit{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

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⁷⁰ See supra notes 45–48 and accompanying text.
⁷² Id. at 111.
⁷³ Id. at 112–13.
⁷⁴ 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.


⁷⁵ Epperson, 393 U.S. at 116 (Stewart, J., concurring).
First Amendment.” 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.

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[,] including the selection of its student body.” 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.” 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.”

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.” The “fatal flaw” in UC’s “preferential program is its
disregard of individual rights” and individualized consideration. *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. 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

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

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. 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.” For instance, it could chose to prioritize “a program that illuminates the genius of Walt Disney” over “an amateur performance of Hamlet.” Similarly, the university could “regard some subjects as more relevant to its educational mission than others.” 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.” 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.” 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.

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

93. *Id.* at 568.
94. *Id.* at 572.
95. *Id* at 568.
96. *Id.* at 573.
97. *Id.* at 572–73.
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.”).


101. *Connick v. Myers*, 461 U.S. 138, 147 (1983). This facet of the *Pickering-Conning* 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 *Garrett*. See discussion infra Section D.


104. *Id.* at 281–82.
in the absence of protected conduct. 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. 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.”

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.” 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.’” The Sixth Circuit has been particularly protective of the individual rights of professors in connection to classroom speech and related

105. *Id.* at 287.
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.”).
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 “retaliat[e] 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.

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).
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.\footnote{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,\footnote{118} access to laboratory space,\footnote{119} travel to countries designated as terrorist states to conduct research,\footnote{120} or the ability to be on a particular research grant project.\footnote{121} Other cases involve clear misconduct not related to First Amendment activities.\footnote{122}

The most prominent campus speech case involving academic research is \textit{Urofsky v. Gilmore}.\footnote{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.\footnote{124} The reasoning of \textit{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.”\footnote{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...
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.
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 ardent 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

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.”).
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.  

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.” Significantly, the court rejected the university’s claim that the speech in question would cause disharmony between the professor, his colleagues, and the students. The court emphasized that “[i]n the academic setting ‘dissent is expected’ and, accordingly, so is at least some disharmony.”

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. 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. 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. 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.”

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)).


143. Id. at 87–88.

144. Id. at 90.

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

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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

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158. Id. at 425.
159. Id.
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 non-disruptive 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 who make decisions based on 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

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162. *Renken v. Gregory*, 541 F.3d 769, 773, 775 (7th Cir. 2008).
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).
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. 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.” 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.” The court then emphasized that Garcia 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.” An employer must be free to “screen applicants to ensure that they actually will perform their duties with maximal diligence.” 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.”

2. Courts Refusing to Apply Garcia

In sharp contrast to the Seventh Circuit, the Ninth Circuit sharply rejected the application of Garcia 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. 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.” Because such speech is “‘a special concern of the First Amendment’ . . . Garcia would directly conflict with the important First Amendment values previously articulated by the Supreme Court.” Accordingly, the court would continue to apply the Pickering test rather than Garcia to “teaching and academic writing.”

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)).
The Fourth Circuit similarly rejected the application of *Garcetti*. 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.” 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.” 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.”

Most recently, the Sixth Circuit issued a significant decision rejecting *Garcetti* in the context of a professor’s in-class speech. Nicholas Meriwether is a philosophy professor at Shawnee State University. Because of his deeply-held religious beliefs he objected to a requirement that all professors refer to students by the students’ preferred gender pronouns. 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. The university investigated and found that Merriweather’s treatment of transgender students was discriminatory and placed a formal warning in his personnel file. The Court found that *Garcetti* did not apply to a professor “at least when

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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).
185. *Id.* at 498–99.
186. *Id.* at 500.
187. *Id.* at 501.
engaged in core academic functions, such as teaching and scholarship.”\footnote{188} In light of the Supreme Court’s declaration of the “essentiality of freedom in the community of American universities,”\footnote{189} it would be “alarming” if professors lacked free-speech protections when teaching.\footnote{190} A few additional circuits also appear to have rejected the application of \textit{Garcetti}, but without much analysis as to why.\footnote{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 \textit{Garcetti} test. In \textit{Kennedy v. Bremerton School District}, a football coach had been fired for praying on the football field before games.\footnote{192} The Ninth Circuit applied \textit{Garcetti} and affirmed the dismissal.\footnote{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.”\footnote{194} But “[t]his Court certainly has never read \textit{Garcetti} to go that far.”\footnote{195} Although this case is not about \textit{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 \textit{Garcetti}. If so, this would be a significant development since Justice Breyer, who dissented in \textit{Garcetti}, remains on the Court, while the original author of \textit{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
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. 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.” 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. 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. 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.

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


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 ACADEMIC 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:


202. Id.

203. Id.


First, 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. Comm’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. Similarly, some schools, such as UCLA, have already begun mandating consideration of contributions to diversity in tenure and advancement decisions.

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.” This document was approved by the Academic Council on January 23, 2019. 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.

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.


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.


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”).


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. Accordingly, the Office of the President (UCOP) has been issuing RFPs (Requests for Proposals) for Advancing Faculty Diversity Recruitment. 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. Campuses are encouraged to develop increasingly radical diversity programs in order to qualify for up to a half million dollars of funding per proposal. 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. 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. 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.”


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.

regard to their contributions to diversity.” 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. 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.”

Relatedly, diversity statements are now the first, and perhaps the only, thing that a reviewer will see. 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.”

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.” 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. In addition, the initial review of diversity statements is increasingly being shifted away from academic faculty members and towards administrators.

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232. Id.
233. Id.
234. Id.
236. Orientation Presentation PowerPoint, supra note 231.
237. Conference Notes on file with author.
240. 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).” 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. In contrast, some other UC schools have continued to emphasize a broad and multifaceted definition of diversity.

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.”

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.


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”).


issues. 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.

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.”

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.” UC Davis is expanding this approach to “approved searches planned for the 2019–20 academic year.”

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.” Similarly, faculty members are encouraged to “require applicants to achieve a scoring cutoff to be considered.” 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. It seems only a matter of time before the innovations in the use of diversity statements from these pilot programs is

244. Berkley Rubric, supra note 242; UCSC Rubric, supra note 243; see also infra Section II.A.2 and accompanying text.
245. Berkley Rubric, supra note 242; UCSC Rubric, supra note 243.
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-05d1-4785-8f04-93b49ec8d71f.filesusr.com/ugd/257e28_3839c3707ce242de8862478af8cb414b.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 diversity. In 1996, California voters enacted Proposition 209, which banned the consideration of race and gender in higher education. 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-regents-remarks.pdf.

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

Diversity statements have been one of the more ingenious innovations of this initiative. 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. Terms like “diverse students” or “underrepresented students” are thinly veiled “euphemisms” for race and ethnicity. 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.

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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.


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.

Departments are given strong incentives to consider and hire more minority students. The racial and gender composition of every search pool is scrutinized. An applicant pool that is inadequately diverse may be rejected by administrators and a department may be required to prolong its search. 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. 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 “redefine[ ] 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/dgwnsk2376/files/inline-files/UCD%2050500.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.”

Another is even more explicit: “I am a Mexican-American” the first sentence reads. 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[.]” 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. 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. This likely reflects aggressive outreach to expand the diversity of the pool, as well as the emphasis placed in promotion of these searches on racial diversity. From total applicants to finalists, the pilot program

262. Orientation Presentation PowerPoint, supra note 231, at 19.
263. Id. at 20.
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.

pool jumped to 82.1% minority compared to a decrease to 5.7% for all other searches.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{271} Flier further declared that “[s]uch requirements risk introducing a political litmus test into faculty hiring and reviews.”\textsuperscript{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.”\textsuperscript{273}

\begin{footnotes}
\item 268. Id.
\item 269. Id.
\item 272. Flier, supra note 12.
\item 273. OR. ASS’N OF SCHOLARS, supra note 198.
\end{footnotes}
On the other hand, supporters of diversity statements have declared that those expressing these fears are “scaremongering” and that diversity statements will only ensure that faculty members are equipped to handle the growing diversity of students in their classrooms.

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.” 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. 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.” 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.”

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

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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.”).


277. Id.

278. Id.

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

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280. Flier, supra note 12.
281. Lindsey Malcom-Piqueux, supra note 256.
284. Id. at 56.
university’s research mission" 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.” These statements are squarely being employed on one side of a lingering academic debate of significant importance for the nature of the academy and the future of the country.

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.
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 on speech, or anti-communist loyalty oaths in the 1950s. Are you thinking of writing about your hibbity elegy background, your time in the military, your support for gun rights and Trump, and how this background and viewpoint would enrich a faculty and staff that likely has absolutely zero people like you? Don’t bother. We all know what “diversity” means. 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.

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

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.

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 humanities

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.


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

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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

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. Whether or not that was ever the case, the argument seems increasingly outdated in light of these trends.

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. Although not an entirely new phenomenon, 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. There have been few dissenters among the ranks of the University administration from the consensus in favor of diversity programs such as affirmative action. 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." By contrast, more than two-thirds of the fifteen administrators surveyed by Lipson at UC-Berkley supported affirmative action programs. 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 Rosovsky, 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.
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.jamesmartincenter.org/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.
314. Id.
315. Id.
Amendment and with professorial academic freedom. Indeed, these bureaucratic mandates often “make a mockery of the core academic mission.” There is also reason to think that the norms and mores of the growing bureaucracy have undermined faculty support for freedom of expression. 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. 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.” 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.”).


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.\textsuperscript{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.\textsuperscript{323} This shift has further empowered administrators and professional staff at the expense of faculty members.\textsuperscript{324} Non-tenured faculty may also be less protective of academic freedom and freedom of expression in the academy more generally.\textsuperscript{325}

\textbf{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.\textsuperscript{326} That is certainly true in the UC system, but that role is being undermined.\textsuperscript{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.\textsuperscript{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.\textsuperscript{329}

\begin{itemize}
  \item \textsuperscript{322} Id. at 155–56.
  \item \textsuperscript{323} Hutchens, et al., \textit{supra} note 301, at 1029; Abraham, \textit{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.
  \item \textsuperscript{324} Ginsberg, \textit{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.”).
  \item \textsuperscript{325} COLE, \textit{supra} note 319, at 364.
  \item \textsuperscript{326} LARRY G. GERBER, DECLINE OF FACULTY GOVERNANCE: PROFESSIONALIZATION AND THE MODERN AMERICAN UNIVERSITY 5–10 (2014).
  \item \textsuperscript{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.”).
  \item \textsuperscript{328} See \textit{supra} notes 222–24 and accompanying text.
  \item \textsuperscript{329} See Robert J. Tepper & Craig G. White, \textit{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, \textit{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.\footnote{See supra notes 222–24 and accompanying text.}

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.\footnote{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.”).} This process of interdisciplinary and cluster hiring is increasingly common in universities as part of diversity hiring efforts.\footnote{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.} 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.\footnote{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’ ran 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


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.”⁴³¹ 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.”⁴³²

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.⁴³³ 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.⁴³⁴ 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,⁴³⁵ since there is only a single factor that needs to be evaluated to determine if improper discrimination entered into the mix.

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⁴³² Id.
⁴³³ 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.”).
⁴³⁴ See discussion supra notes 240–45.
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.  

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.

Unfortunately, the way that diversity statements are being evaluated in the University of California does not guard against “ideological interference” rather, quite the opposite. 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. 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.

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.


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).

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.”

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.”

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.”

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.’

In public forums, which are opened up for expression, content-based distinctions are treated identically to viewpoint-based distinctions. 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.” 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.”

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.”

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

362. Tepper & White, supra note 329, at 165.
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.
368. Id.
Universities should be able to develop specialized initiatives or areas of study such as the University of Chicago’s focus on law and economics, BYU’s focus on law and corpus linguistics, or UCLA Law’s specialization in critical race studies. These kinds of content distinctions are compatible with 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 viewpoint-based distinction in disguise. 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

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

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.

pedagogical purpose. 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. 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 “[m]ay 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. 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.

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.


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

376. 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.

377. Flier, supra note 12.
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.  

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. A Communist was not merely barred from teaching economics, but from teaching at all. 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. 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.


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 to 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 Court\(^{386}\) and


\(^{385}\) See Mac Donald, supra note 253 at 72.

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. 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[.]” 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. 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.
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.

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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.


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. 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. 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. 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).
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.
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. 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.

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. 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.

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.


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. 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.

ADVANCING FACULTY DIVERSITY ORIENTATION FOR SEARCH COMMITTEE MEMBERS

JANUARY 2019
OFFICE OF THE VICE PROVOST – 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

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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)

“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 and equity of inclusion by trivializing it.”

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

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

Examples: 0 = EXCELLENT 1 = STATEMENT ONLY

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### 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.
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.
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