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# Institutional Values, Academic Freedom, and the First Amendment

UC DAVIS UNIVERSITY OF CALIFORNIA

*by **Brian Soucek***

*Professor of Law and Chancellor's Fellow, University of California, Davis.*

*Chair, University Committee on Academic Freedom.*

## Abstract

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

Behind all the rhetoric, the arguments made about diversity statements are, at heart, legal claims—and serious ones at that. Critics allege that universities are engaging in unconstitutional viewpoint discrimination, violating their faculty's academic freedom, and imposing political litmus tests akin to the loyalty oaths struck down during the Cold War era. Yet evaluating these as legal claims requires grappling with complicated, often unsettled doctrine regarding the First

Amendment and higher education—something that, unsurprisingly, hasn't been done on the discussion boards, comment threads, and opinion pages where this discussion has largely played out until now. This Article does that work, fleshing out the criticisms and developing a framework to address them and guide universities on how they can require and evaluate diversity statements—should they want to— without violating either the Constitution or the academic freedom on which their mission depends.

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## INTRODUCTION

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

Consider the University of California system, where I teach. Each of our ten campuses now asks for diversity statements, whether referred to by that name, as DEI[1] or EDI[2] statements (referring in differing order to diversity, equity, and inclusion), or as statements of "inclusive excellence."[3] Some schools have recently experimented with a hiring process where search committees judge applicants' diversity statements before seeing their names, educational backgrounds, publication records, or the subject of their research. And UC faculty members going up for tenure or a salary raise are now encouraged, or in some cases required, to report on their contributions to diversity alongside their success in teaching, research, and service.[4]

Meanwhile, resistance has grown, both inside and outside the University. The faculty at UC Davis recently put dueling referenda up for university-wide vote, one favoring and one decrying diversity statements. A department chair there took on her chancellor on the pages of the Wall Street Journal. Within legal academia, Professor Richard Epstein recently called UC's diversity efforts "a regrettable form of totalitarian behavior,"[5] while Brian Leiter, the influential University of Chicago law professor,[6] faculty ranker,[7] and commentator on academia,[8] has not only characterized UC Berkeley's (and others') use of diversity statements an unconstitutional affront to academic freedom, but has used his blog to advertise for a conservative legal

[1] UNIV. COMM. ON AFFIRMATIVE ACTION, DIVERSITY AND EQUITY, SYSTEMWIDE EQUAL EMP'T/AFFIRMATIVE ACTION ADM'RS GRP., UNIV. OF CAL., THE USE OF CONTRIBUTIONS TO DIVERSITY, EQUITY, AND INCLUSION (DEI) STATEMENTS FOR ACADEMIC POSITIONS AT THE UNIVERSITY OF CALIFORNIA: JOINT RECOMMENDATIONS (2019) [JOINT RECOMMENDATIONS].

[2] *Id*.

[3] *Guidance for Writing Inclusive Excellence Activities Statement*, OFFICE OF ACAD. PERS, UNIV. OF CAL., IRVINE,., https://ap.uci.edu/faculty/guidance/ieactivities.

[4] Scott L. Waugh, Exec. V.C. & Provost, Univ. of California, Los Angeles, Memorandum on New EDI Statement Requirement for Regular Rank Faculty Searches (May 24, 2018), https://equity.ucla.edu/news-and-events/new-edistatement-requirement-for-regular-rank-faculty-searches/; JOINT RECOMMENDATIONS, supra note 1; OFFICE OF THE PRESIDENT, UNIV. OF CAL., EVALUATING CONTRIBUTIONS TO DIVERSITY FOR FACULTY APPOINTMENT AND PROMOTION UNDER APM-210 at 2 (2017), https://www.ucop.edu/facultydiversity/policies-guidelines/eval-contributions-diversity.pdf [EVALUATING CONTRIBUTIONS].

[5] Richard A. Epstein, *The Civil Rights Juggernaut*, 2000 U. ILL. L. REV. 1541, 1567 (2020).

[6] *See* Brian Leiter, UNIV. OF CHI. LAW SCH., https://www.law.uchicago.edu/faculty/leiter.

[7] *See, e.g., Faculty Quality*, BRIAN LEITER'S LAW SCHOOL RANKINGS, http://www.leiterrankings.com/faculty/index.shtml; Brian Leiter, *2019-20 Update to Philosophical Gourmet Report's 2017 Rankings for U.S. Departments (UPDATED)*, LEITER REPORTS: A PHILOSOPHY BLOG (Sept. 27, 2019, 9:15 AM), https://leiterreports.typepad.com/blog/2019/09/2019-20-update-to-the-philosophical-gourmet-reports-2017-rankings-for-us-departments.html.

[8] *See* BRIAN LEITER'S LAW SCHOOL REPORTS, https://leiterlawschool.typepad.com/; LEITER REPORTS: A PHILOSOPHY BLOG, https://leiterreports.typepad.com/blog/.

organization that is publicly recruiting plaintiffs to sue the University of California.[9] That organization, the Pacific Legal Foundation,[10] is not alone: FIRE, a leading campus free speech advocacy group, has also advertised their willingness to help faculty pressure universities to abandon their reliance on diversity statements,[11] as they have successfully done in the past.[12] And in March 2021, faculty across the political spectrum, from Cornel West and Janet Halley to Michael McConnell and Robert George, launched a new group, the Academic Freedom Alliance, with Floyd Abrams and Paul Clement among its legal advisors; one of its core stated purposes: defending academics' "right to be unburdened by ideological tests, affirmations, and oaths"[13]—a barely veiled reference to diversity statements.[14]

The attacks on campus diversity statements are serious, but discourse on the issue, so far, largely is not. Objections to diversity statements have percolated up from blog posts and op-eds to campus petitions and complaints filed with academic freedom committees. Soon these objections may find their way to federal

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

[10] *See, e.g.*, Daniel Ortner, *The Hill: What is UC Davis Hiding About Its Use of Diversity Statements?*, PAC. LEGAL FOUND. (Feb. 3, 2020), https://pacificlegal.org/the-hill-what-is-uc-davis-hiding-about-its-use-of-diversity-statements/; Daniel Ortner, *The Daily Caller: Don't Expect Diversity of Thought at University of California*, PAC. LEGAL FOUND. (Feb 3, 2020), https://pacificlegal.org/the-daily-caller-dont-expect-diversity-of-thought-at-university-of-california/.

[11] *FIRE Faculty Network Survey: Hiring, Promotion, and Diversity,* FIRE FACULTY NETWORK, https://fire-dkzwf.formstack.com/forms/fire_faculty_network_dei_form; E-mail from Peter Bonilla, Vice President of Programs, FIRE Faculty Network (Dec. 3, 2020, 4:34 PM) (on file with author).

[12] Letter from Thor Halvorssen, Exec. Dir., Found. For Individual Rights in Educ. (FIRE), to Dr. James J. Linksz, President, Bucks Cty. Cmty. Coll. (Feb. 22, 2001), https://www.thefire.org/letter-to-bucks-county-community-college/; Letter from Adam Kissel, Dir., Individual Rights Def. Program, Found. For Individual Rights in Educ. (FIRE), to John R. Lawson II, Rector, Bd. of Visitors, Virginia Polytechnic Inst. and State Univ. (Sept. 14, 2009), https://www.thefire.org/fire-letter-to-virginia-polytechnic-institute-and-state-university-president-charles-w-steger/.

[13] ACADEMIC FREEDOM ALLIANCE, https://academicfreedom.org/.

[14] On the day the group was announced, the group's founder, Keith Whittington, acknowledged its concern about "a growing movement today to use a new set of required affirmations to filter out potential faculty . . . who might not share certain orthodoxies regarding social justice or inclusivity." Princetonians for Free Speech, *Academic Freedom Alliance: Q&A with Keith Whittington*, https://princetoniansforfreespeech.com/academic-freedom-alliance-qa-keith-whittington.

court. But the editorializing, institutional in-fighting, and legal threats haven't been matched by any serious legal scholarship actually analyzing the grave allegations that have been levied.[15]

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

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

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

Collectively, and in several cases individually, the ten campuses that make up the University of California stand out not just for their prominence within American higher education,[16] but for the self-consciousness of their

[15] Legal scholarship on this subject has been surprisingly sparse. *See Erica Goldberg, Good Orthodoxy and the Legacy of Barnette*, 13 FIU L. REV. 639 (2019); Daniel Ortner, *In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia*, 70 CATH. U. L. REV. (forthcoming 2021) (on file with author); Epstein, supra note 5. Diversity statements are just one of several examples Epstein's and Goldberg's articles use to make larger points. Ortner's article, meanwhile, is a mix of advocacy and scholarship, written by a litigator looking for plaintiffs to sue the University of California over its diversity statement policies.

[16] U.S. News, for example, currently ranks six of UC's campuses among the top eleven public universities in the country, and it includes UCSF among the country's top medical, nursing, and dental schools. *See 2021 Top Public Colleges & Universities*, U.S. NEWS & WORLD REP., https://www.usnews.com/best-colleges/rankings/national-universities/top-public; *Best Medical Schools (Research) Ranked*, U.S. NEWS & WORLD REP., https://www.usnews.com/best-graduate-schools/top-medical-schools/research-rankings; *Best Medical Schools (Primary Care) Ranked in 2021*, U.S. NEWS & WORLD REP., https://www.usnews.com/best-graduate-schools/top-medical-schools/primary-care-rankings; *Best Nursing Schools (Master's Program)*, U.S. NEWS & WORLD REP., https://www.usnews.com/best-graduate-schools/top-nursing-schools/nur-rankings.

aim to be leader on issues of diversity.[17] At the same time, its campuses vary so widely in their reputation, size, surroundings, and specialties, that dissent to centralized institutional aims is inevitable, and bound to come from multiple directions. Unlike private universities, the University of California has to respect both the academic freedom *and* the First Amendment rights of those who dissent from within. And as the primary battleground of the loyalty oath controversy of the mid-twentieth century,[18] UC is additionally vulnerable, or at least attractive, to those trying to cast its institutional values as imposed orthodoxies.

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

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

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

Part III then develops a framework for applying the law to the facts. It draws out the variables that make mandated diversity statements more or less vulnerable to their critics. And in doing so, it offers lessons on how universities can require and evaluate diversity statements in ways that further their institutional goals without violating either the constitution or the academic autonomy of their faculty.

To clarify before going on: this Article is not another contribution to the important scholarly literatures on diversity as a compelling governmental interest;[19] on the effectiveness of diversity in producing a more

[17] *See* Aimée Dorr, Exec. Vice President for Acad. Affairs, Univ. of Cal., Letter on Issuance of Revised Section 210-1-d of the Academic Personnel Manual (APM – 210-1-d) (June 29, 2015), https://www.ucop.edu/academic-personnelprograms/_files/apm/apm-210-1-d-issuance/apm-210-1-d-issuance-ltr.pdf (describing UC's diversity policies as "a national model").

[18] *See infra notes 237-255 and accompanying text.*

[19] *See, e.g.*, Guido Calabresi, *Bakke As Pseudo-Tragedy*, 28 CATH. U. L. REV. 427 (1979); Devon Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117 (2019); Lani Guinier, *Admissions Rituals*

equitable or inclusive student experience;[20] or on the bureaucratization of equality efforts more generally.[21] This Article, though not its author, remains agnostic on whether diversity statements are a useful means towards a noble end. The focus here is on what universities *can* choose to do, not what they should choose.

Ought implies can, as philosophers like to say.[22] But the existing literature on diversity statements, necessary as so much of it is, has focused on the former without asking—or defending— what's possible. To debate the value and effectiveness of required diversity statements, we first need to know whether and when they can be required. This Article develops a framework for showing universities who *want* to use diversity statements—perhaps to make a statement of their own—how they *can* do so, without violating either the First Amendment or the academic freedom on which their mission depends.

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*as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003); Ian F. Haney Lopez, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007); Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60 (2004); Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573 (2000); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998); Rachel F. Moran, *Bakke's Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 U.C. DAVIS L. REV. 2569 (2019) (considering diversity especially in relation to academic freedom); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); *see also* Grutter v. Bollinger, 539 U.S. 306 (2003) (Thomas, J., concurring in part); Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The* Grutter v. Bollinger *Opinion*, 7 U. Pa. J. Const. L. 787 (2005).

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

[21] FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY (2011); LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (2016); NANCY LEONG, IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY (2021); Soohan Kim, Alexandra Kalev & Frank Dobbin, *Progressive Corporations at Work: The Case of Diversity Programs*, 36 N.Y.U. REV. L. & SOC. CHANGE 171 (2012); Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin, and UW-Madison*, 32 LAW & SOC. INQUIRY 985 (2007); Brent K. Nakamura & Lauren B. Edelman, Bakke at 40: How Diversity Matters in the Employment Context, 52 U.C. DAVIS L. REV. 2627 (2019); Patrick S. Shin & Mitu Gulati, Showcasing Diversity, 89 N.C. L. REV. 1017 (2011).

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