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Diversity Statements, Academic Freedom, and the First Amendment

ABSTRACT

Diversity statements have become a common component of applications for faculty positions and student admission at universities across the country. They have also become politically controversial, with several states banning the use of such requirements at public universities. The use of diversity statements also raises difficult constitutional questions under the First Amendment at public universities and academic freedom questions at both public and private universities. Although there are versions of such statements that might pass constitutional muster, as commonly designed and implemented, the use of diversity statements likely violates both First Amendment and academic freedom principles. Indeed, diversity statement requirements for faculty hiring are inconsistent with multiple lines of constitutional doctrine.

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I. INTRODUCTION

Diversity statements have rapidly become an important feature of university admission and hiring decisions. The requirement that applicants for positions in the university write such statements marks a sharp departure from past practices but is quickly becoming common. Such developments have not gone unnoticed. The emergence of such requirements has generated controversy inside university campuses and has increasingly become a matter of public controversy and legislative deliberation as well.

Diversity statements typically arise from a prompt in the application process for positions within universities. The prompt asks for a statement from the applicant responding to some variation of the question of how the applicant will contribute to the diversity of the university or program. Statements are then evaluated as part of the hiring or admission process alongside other more traditional application materials. In some cases, diversity statements have been used as an initial screen to reduce the pool of candidates who can then proceed to a more robust consideration of the other components of the application. Diversity statements are the subject of controversy because they are often seen by critics as imposing a kind of political litmus test on applicants since acceptable versions of diversity statements require that applicants profess belief in a variety of controversial social and political ideas.

Applicants for faculty positions are evaluated across a range of dimensions, and diversity statements add yet one more. The substance of the applicant's ideas is central to those evaluations, and applicant files are routinely passed over for further consideration when the ideas expressed in those files are regarded as unworthy or poor fits with a university, a department, or a position. Diversity statements have been criticized as normatively undesirable, but to what degree is the use of such statements simply a matter of choice by university officials and an unproblematic extension of traditional screening criteria? If such statements are thought to provide useful information when evaluating a candidate for a faculty position, are there any constraints to universities choosing to use them?

This Article argues that the current practice surrounding the use of diversity statements in faculty hiring is contrary to both academic freedom principles and First Amendment requirements. While private universities may choose to set aside such considerations and make use of diversity statements regardless of such concerns, public universities have less freedom when it comes to making impositions on candidates for faculty positions. Current constitutional doctrine casts significant doubt on the consistency of diversity statement requirements and the First Amendment.

This Article develops the constitutional case against the use of diversity statements across several parts. Part II describes what is known about how diversity statements are designed and used in universities. Part III outlines the academic freedom principles that are applicable to the use of diversity statements. Part IV reviews the history of the controversy of the use of loyalty oaths in universities in the mid-twentieth century and draws out some lessons from that experience. Part V applies government employee speech doctrine to the diversity statement requirements for faculty positions at state universities. Part VI applies the political patronage doctrine to diversity statement requirements for such positions. Part VII applies compelled speech doctrine to the use of such diversity statements. Part VIII summarizes the argument and concludes.

The thrust of over half a century of First Amendment doctrine is that state universities are to be the home of a wide diversity of thought and that the artificial imposition of intellectual uniformity on state university faculty runs contrary to First Amendment values. When state universities take adverse employment action against scholars, including by denying them employment, on the basis of their political and social ideas, the state bears a very high constitutional burden to justify such action. To sustain such action, the state must be able to demonstrate that it is taking measures that create the least interference with constitutionally protected expression that might be necessary to advance a compelling governmental interest. At the very least, this necessitates that the state be able to demonstrate that policies that burden disfavored political ideas are essential to advancing the genuine educational and scholarly mission of the university. Such speech restrictions should be professionally justifiable and not mere matters of political convenience or preference. Policies that merely serve to reinforce political orthodoxies on college campuses are constitutionally unjustifiable. Taking such principles seriously casts a substantial constitutional shadow over the practice of using diversity statements to exclude from state university faculties individuals with disfavored beliefs and opinions about matters of political and social controversy.

II. DIVERSITY STATEMENTS IN FACULTY HIRING

In a very short span of time, diversity statements have become ubiquitous. Institutional diversity statements have been publicized by corporations.[1] Such statements are often integrated into pronouncements regarding an organization's anti-discrimination commitments, but they frequently are used more expansively to communicate claims

1. Val Singh & Sebastien Point, *(Re)Presentations of Gender and Ethnicity in Diversity Statements on European Corporate Websites*, 68 J. BUS. ETH. 363, 363 (2006).

about organizational values and aspirations.[2] Institutional diversity statements are similarly adopted in organizations alongside more concrete measures such as diversity policies and training.[3] Institutional diversity statements can be used as a recruitment tool to draw in applicants for positions.[4] Such institutional diversity statements have likewise become commonplace in higher education.[5]

Universities have gone well beyond institutional statements proclaiming their own commitment to diversity. They are increasingly requiring that individuals applying for admission or for employment at universities include in their application packet a diversity statement of their own. That is, universities are not only proclaiming through their own speech that they value diversity, but they are also requiring that prospective members of the campus community profess that they share those values. It is this application requirement for faculty employment that is the focus of this Article.

Faculty hiring at American universities typically begins with the submission of a packet of materials by the applicant to be reviewed by a faculty hiring committee. Traditionally, those packets include a curriculum vitae, transcript, and writing sample exemplifying the applicant's scholarly work. Some institutions might require a further statement of research interests, and some teaching-oriented colleges have frequently required a statement of teaching interests or philosophy and sometimes a record of teaching experience. Separately, faculty advisors are expected to send letters of recommendation. These written application materials form the basis for an initial set of evaluations that eventually lead to a small number of candidates being interviewed for a position.

In recent years, many universities have begun to require that a diversity statement (or "DEI statement") be included in this traditional portfolio of materials. A Fall 2020 survey of 999 faculty job postings across a range of institutions and academic disciplines found that 19 percent required a separate diversity statement from applicants.[6] Such statements were required by a third of the job postings at "elite"

2. *See id.* at 367–69.
3. Kathleen Buse, Ruth Sessler Bernstein, & Diana Bilimoria, *The Influence of Board Diversity, Board Diversity Policies and Practices, and Board Inclusion Behaviors on Nonprofit Governance Practices*, 133 J. BUS. ETH. 179, 180 (2016).
4. Barbara L. Rau & Maryanne M. Hyland, *Corporate Teamwork and Diversity Statements in College Recruitment Brochures: Effects on Attraction*, 33 J. APPL. SOC. PSYCH. 2465, 2466–67 (2003).
5. Jeffery L. Wilson, Katrina A. Meyer, & Larry McNeal, *Mission and Diversity Statements: What They Do and Do Not Say*, 37 INNOVATIVE HIGHER ED. 125, 132 (2011); *See* Kathleen K. Omara & Elizabeth Morish, *A Glass Half Full or Half Empty?: A Comparison of Diversity Statements among Russell Group v. U.S. Research Universities*, 10 INTERN. J. DIV. ORG., CMTYS. & NATIONS 243, 254 (2010).
6. JAMES D. PAUL & ROBERT MARANTO, OTHER THAN MERIT: THE PREVALENCE OF DIVERSITY, EQUITY, AND INCLUSION STATEMENTS IN UNIVERSITY HIRING 3 (2021).

institutions, however.[7] More than a quarter of postings in political science specified that such a statement was required with the application, other disciplines, including engineering, math, and business, were not far behind (humanities jobs were not included in the study).[8] Unsurprisingly, such statements were more likely to be required for full-time faculty positions.[9] Diversity statements were equally likely to be required by public and private universities.[10] Subsequent reports suggest as many as "half of large universities in America require that job applicants write such statements."[11] At the same time, some state governments have now banned the use of diversity statements and some private universities have retreated from their use.[12] Meanwhile, a survey of DEI officers at universities found that over 90% thought that applicants for faculty positions should be required to submit DEI statements.[13]

While applicants are rarely given much guidance regarding more traditional features of faculty job applications, including teaching and research statements, the request for diversity statements generally takes the form of a prompt to which the applicant is expected to respond. The specifics of such prompts can vary tremendously, although there is much greater convergence over what a "model" diversity statement might look like regardless of the language of the specific prompt. For example, the 2020 survey found prompts such as: "How do you think about diversity, equity, and inclusion;" "Have you been involved in activities to advance or promote a diverse, equitable, and inclusive environment or institution;" and "Please let us know how you plan to integrate DEI into your role as a faculty member."[14] A separate study provides more recent examples, all from public universities, of prompts for diversity statements. They included a request for "past and anticipated future efforts to encourage diversity, inclusion, and belonging;" a statement "defining diversity, equity and inclusion (DEI) and describing your views and actions toward advancing DEI including social

7. *Id.* at 3. Institutions were coded as "elite" if they were ranked in the top 100 national institutions or liberal arts colleges by *U.S. News & World Report*. *Id.* at 12.
8. *Id.* at 5.
9. *Id.* at 7. Applicants for adjunct positions are routinely asked to submit fewer materials and are generally hired through a more streamlined process.
10. *Id.* at 7.
11. Michael Powell, *DEI Statements Stir Debate on College Campuses*, N.Y. TIMES (Sept. 8, 2023), https://www.nytimes.com/2023/09/08/us/ucla-dei-statement.html.
12. Allen Blinder & Jennifer Schuessler, *Harvard's Largest Faculty Division Will No Longer Require Diversity Statements*, N.Y. TIMES (June 3, 2024), https://www.nytimes.com/2024/06/03/us/harvard-diversity-statements.html.
13. Sara P. Bombaci & Liba Pejchar, *Advancing Equity in Faculty Hiring with Diversity Statements*, 72 BIOSCI. 365, 366 (2022).
14. *See id.* at 366.

justice and racial equality;" information about "your understanding" of DEI, and "your future plans for supporting DEI."[15]

The proponents of the adoption of diversity statements have offered a variety of goals that they hope to accomplish through their use. For DEI officers, diversity statements for faculty hiring were essential to ensure that new members of the faculty would have a "genuine interest, awareness, and commitment to DEI" and "engender[] a commitment to DEI" in faculty candidates.[16] Proponents also hoped such diversity statements would "broaden" the "qualifications" for successful faculty applicants such that DEI activities would themselves become a basis for hiring.[17] Those officers feared, however, that requiring faculty to complete such statements might not be enough to "guarantee a genuine commitment to DEI" and thus universities should go further and require evidence that prospective members of the faculty have already taken actions to support the DEI cause.[18] Job talks and letters of recommendation, for example, should "attest to the candidate's DEI commitment" and "screening questions" should be asked to weed out candidates without a proper understanding and commitment to DEI.[19]

As a primary architect of such efforts in the University of California system has argued, DEI activities and values had to be understood as "integral" to the mission of the university on the same footing as research activities.[20] Faculty members who worried that such a requirement "compromises the integrity of the scientific process by favoring certain outcome of research over others" were evidence of "fundamental resistance"[21] to the DEI project whose hands needed to be tied by university policies and the university needed to evaluate ways to "neutralize [such] toxic individuals."[22] It is necessary that the use of diversity statements be accompanied by policies and practices to ensure that the university would "evaluate candidates successfully."[23] As one dean who had launched such initiatives proclaimed, "going forward we should only be hiring faculty with a career commitment to DEI."[24] Requiring such statements made it easier to "venture into new hiring practices that allow us to prioritize contributions to diversity."[25]

15. Linda S. Ficht & Julia Levashina, *Should DEI Statements be Included in Faculty Selection? Exploring Legal, Diversity, and Validity Issues*, 31 INTERN. J. SEL. & ASSES. 212, 214 (2023).
16. Bombaci & Pejchar, *supra* note 13, at 367.
17. *Id.* A goal of broadening the qualifications for faculty hiring go hand in hand with broadening the qualifications for promoting faculty. *Id.* at 369.
18. *Id.* at 367.
19. *Id.* at 368.
20. SUSAN CARLSON, THE ART OF DIVERSITY 13–15 (2024).
21. *Id.* at 15.
22. *Id.* at 48.
23. Bombaci & Pejchar, *supra* note 13, at 367.
24. CARLSON, *supra* note 20, at 153.
25. *Id.* at 144.

In short, diversity statements must be accompanied by an understanding that DEI simply "IS the intellectual work of the university."[26] Faculty candidates needed to be judged accordingly.

Part and parcel with the adoption of diversity statements has been an increased degree of administrative intervention in faculty hiring. As DEI officers anticipated, existing faculty have often been uncertain about what to do with diversity statements. To address that problem, university administrators have often provided faculty hiring committees with grading rubrics for diversity statements so that the essays can be appropriately and consistently scored—as well as scored in accordance with goals and aspirations of those who advocated for the use of the statements in the first place. At Western Oregon University, for example, the human resources department directed faculty to downgrade job candidates if they did not say how they would advance racial equity and eliminate systemic racism.[27] Candidates were to be scored higher if they could name multiple examples of "inequity in higher education" and how the candidate would personally rectify them.[28] Ohio State University adopted a rubric scoring diversity statements at the bottom of the scale if the candidate merely acknowledged the significance of racism in higher education and was a "passive participant" in DEI workshops and reading groups.[29] In order to score well, job candidates must "vocalize[] that antiracism practices requires consistent and long-term growth, reflection, and engagement" and demonstrate a sophisticated grasp of and appreciation for theories of intersectionality.[30] The widely used Berkeley rubric gives faculty job candidates low scores if they indicate that they intend to "treat everyone the same."[31] Candidates could only score well if they affirmed that DEI is "a core value that every faculty member should actively contribute to" and affirmed that the candidate would be a "strong advocate" for DEI.[32]

Even without such top-down rubrics, diversity statements and associated faculty evaluation criteria have been routinely used as political

26. *Id.* at 90.
27. *WOU Diversity Statement Rubric*, W. OR. UNIV., https://wou.edu/hr/files/2021/10/DEI-Statement-Rubric.pdf [https://perma.cc/7ENW-RNMA] (cited in John Sailer, *Higher Ed's New Woke Loyalty Oaths*, TABLET (Sept. 6, 2022), https://www.tabletmag.com/sections/news/articles/higher-ed-new-woke-loyalty-oaths-dei).
28. *Id.*
29. Kyle A. Thomas & Karena H. Nguyen, *Rubric to Assess Diversity, Equity, and Inclusion (DEI) Statement*, EMORY UNIV., https://college.emory.edu/faculty/documents/faculty-hiring/tips-for-assessing-diversity-statements.pdf [https://perma.cc/TC9M-A7DW] (cited in John D. Sailer, *Ohio State Reports: The Rubrics*, NAT'L ASS'N OF SCHOLARS (Nov. 22, 2023), https://www.nas.org/blogs/article/ohio-state-reports-the-rubrics).
30. *Id.*
31. Sailer, *Woke Loyalty Oaths*, *supra* note 27.
32. *Id.*

litmus tests on whether job candidates display and embrace the correct commitment to contentious political and social controversies. The adoption of such hiring procedures dictated at Texas Tech University, for example, that the biology department elevated candidates for fields such as endocrinology based on such factors as whether they included a land acknowledgment in their job talk, understood the societal importance of microaggressions, and could accurately distinguish between the individuals in the Africa diaspora and those who were African-Americans. Candidates were downgraded for saying that "he respects his students and treats them equally," could not adequately explain the difference between equity and equality, and did not sufficiently discuss the "nuances" of DEI.[33]

Diversity statements not only need to be scored, but they also need to be weighted in the hiring process. In some cases, as in an astrophysics search, this has meant giving them "equal weight" to research.[34] In other cases, satisfactory performance on the DEI requirements would be regarded as a cut-off, a "minimum standard," for faculty hiring decisions.[35] Diversity statements have been used as an initial screening mechanism for reducing the pool of job candidates "before determining whether to evaluate the rest of the application materials."[36] Diversity statements were to be read first so as to guarantee that the short-list of applicants who would get a closer evaluation would all have "equally impressive credentials supporting diversity."[37] As one dean enthused, "[t]he game-change 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."[38] At the extreme, DEI officers can simply review the diversity statements on their own and only allow faculty committees to evaluate files that pass that initial screening. In one pilot program using this approach, administrators removed three-quarters of the applicants from the pool based on their diversity statement alone.[39] Diversity statements are most useful for their proponents when they

33. John D. Sailer, *Exclusive Documents: At Texas Tech, Job Candidates Punished for "Microaggressions," Rewarded for "Land Acknowledgement,"* NAT'L ASS'N OF SCHOLARS (Feb. 7, 2023) https://www.nas.org/blogs/article/exclusive-documents-at-texas-tech-job-candidates-punished-for-microaggressions-rewarded-for-land-acknowledgement [https://perma.cc/PPQ5-PPMS].
34. Sailer, *Ohio State Reports*, supra note 29.
35. Sailer, *Woke Loyalty Oaths*, *supra* note 27.
36. Daniel Ortner, *In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia*, 70 CATH. UNIV. L. REV. 515, 551 (2021).
37. CARLSON, *supra* note 20, at 153.
38. Ortner, *supra* note 36, at 549.
39. *Id.*

are used to avoid a holistic review of applications and allow job candidates to be excluded from the possibility of being hired on the basis of DEI considerations alone.[40]

Unsurprisingly, the new diversity statement requirement has given rise to a cottage industry to advise graduate students about how to craft a successful diversity statement. As might be expected, the advice to the bewildered job candidates is formulated by the same proponents who have designed the diversity statements themselves and their grading rubrics. The advice offered to job candidates also makes plain the political substance at the heart of the diversity statement requirement. One advice column begins, "if you do not care about diversity and equity . . . don't waste your time crafting a strong diversity statement."[41] "Some job applicants think that writing a diversity state-

40. Such a use of diversity statements also runs a risk of facilitating racial discrimination. The Court has accepted the use of student admission essays discussing "how race affected his or her life," but emphasized "universities may not simply establish through application essays or other means the regime we hold unlawful today . . . '[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'" Students for Fair Admission v. Harvard, 143 S. Ct. 2141, 2176 (2023) (quoting Cummings v. Missouri, 71 U.S. 277, 325 (1867)). DEI officers, however, see diversity statements as a tool for successfully identifying and "hiring diverse candidates." Bombaci & Pejchar, *supra* note 13, at 366. Candidates have been scored well for their potential "diversity contributions" simply for being a member of an underrepresented minority group, and have likewise been excluded for not being one. David Bass, *John Sailer: Unearthing Corruption and Illiberalism in Higher Education*, PHILANTHROPY ROUNDTABLE (Aug. 21, 2024), https://www.philanthropyroundtable.org/john-sailer-unearthing-corruption-and-illiberalism-in-higher-education/ [https://perma.cc/Y5NV-85N9]. When the University of California at Davis launched a pilot program using diversity statements as an initial filter for STEM faculty searches, 82% of the finalists and all of those hired were underrepresented minorities. A comparable search that did not use the diversity statements resulted in a final pool in which 6% were minorities and only 2% of those hired were minorities. Ortner, *supra* note 36, at 555–56. An internal audit at the University of Washington concluded that one academic department was simply taking "explicit consideration of racial identities" of job candidates and taking "different actions based on the racial identities of the candidates." Monica Reynoso and Andy Schwich, RE: Institutional Intake Report Case No. EV2023061355, UNIV. OF WASH. COMPLAINT INVESTIGATION & RESOL. OFF. 9 (Sept. 22, 2023). Internal evidence from the hiring process indicated that the "working definition of DEI focuses on a candidate's personal identity rather than on a candidate's DEI work." *Id.* at 10. In developing one National Institutes for Health program for hiring scientists with "an interest in DEI," a participant translated the goal simply as "I don't want to hire white men for sure." John D. Sailer, *UM's "Cultural Transformation,"* CITY J. (Nov. 26, 2024) (https://www.city-journal.org/article/university-of-michigans-cultural-transformation) [https://perma.cc/GS2C-56LU]. Using diversity statements as a litmus test for racial hiring poses its own set of constitutional problems.

41. Tanya Golash-Boza, *The Effective Diversity Statement*, INSIDE HIGHER ED (June 9, 2016) https://www.insidehighered.com/advice/2016/06/10/how-write-effective-diversity-statement-essay [https://perma.cc/KWS5-QCUU].

ment that shows they actually care about diversity and equity may be too political."[42] Not to worry, an effective diversity statement must be political. Only that will "show a genuine commitment to diversity and equity."[43] Strong statements must show "awareness," "activism," and "commitment to diversity and equity in higher education."[44] Applicants must focus their efforts on a "commonly recognized form of oppression" and not buck expectations.[45] Applicants are told to avoid such common pitfalls as expressing the wrong kinds of ideas. Applicants must "stay away from language that harkens to problematic matters like color-blindness, respectability politics, or diminishing the experiences of people who have been oppressed, to name a few."[46] Applicants must not obscure "the roles that all faculty play in maintaining the status quo and contributing in small and large ways to discriminatory practices and negative outcomes for faculty, staff and students of colour."[47] Applicants must avoid "perpetuating the idea that we are all equal."[48] Applicants may not make the error of "Talking about your personal identity without discussing how it intersects with your practices. Having a certain identity (or identities) does not mean you cannot be racist, sexist, homophobic, etcetera."[49] Diversity statements are the place to make a "statement of values as they relate to your understanding and commitment to diversity, inclusion, equity, and/or justice in higher education."[50] In short, job applicants are advised to use their diversity statements to affirm that they will be an antiracist voice on the faculty.

The use of diversity statements for faculty hiring is inseparable from efforts to advance specific values and commitments in higher education. They are wedded to broader social justice goals, and they are designed and implemented so as to identify and favor applicants who share the right ideological commitments—or at least are able to persuasively mimic such commitments. Job applicants who hope to be seriously considered for an academic position in a university requiring

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. Fahima Mohideen, *Dos and Don'ts of a Diversity Statement*, NEWSL.SOC'Y FOR PERSONALITY & SOC. PSYCH. (Jan. 13, 2023) https://spsp.org/news/newsletter-articles/diversity-statements [https://perma.cc/5U5Q-V8NQ].
47. Pardis Mahdavi & Scott Brooks, *Diversity Statements: What to Avoid an What to Include*, TIMES HIGHER EDUC. (Mar. 17, 2021) https://www.timeshighereducation.com/campus/diversity-statements-what-avoid-and-what-include [https://perma.cc/JS9Y-NU6A].
48. UNIV. CTR. FOR INNOVATIVE TEACHING AND LEARNING, *Diversity Statements,* IND. UNIV. BLOOMINGTON, https://citl.indiana.edu/programs/ai-support/resources/diversity-statements.html [https://perma.cc/4WNN-S8B4].
49. *Id.*
50. Sara L. Beck, *Developing and Writing a Diversity Statement*, VANDERBILT UNIV. (https://cft.vanderbilt.edu/guides-sub-pages/developing-and-writing-a-diversity-statement/ [https://perma.cc/BSH9-ZKXG].

such a statement are compelled to affirm their own understanding of and commitment to those values. As a leading promoter of such statements observed, the success of such programs was "best captured" when a vice chancellor for DEI was able to present a cohort of newly hired faculty members and vouch for the fact that each and every one had a "social justice commitment."[51]

There is little question that if Oberlin College or Sarah Lawrence College wish to hire only professors who can attest to their commitment to social justice or antiracism, they may legally do so. (Whether they could do so consistent with academic freedom principles is more dubious.) Do state universities have the same latitude, or do they face constitutional constraints that limit their ability to require such statements of faith from applicants for positions on their faculties?

III. ACADEMIC FREEDOM PRINCIPLES

Academic freedom principles in the United States are first and foremost a matter of professional norms and contractual commitments. They arose out of the organized effort of scholars, principally through the vehicle of the American Association of University Professors, to pressure and persuade university officials to adjust their own policies and practices so as to grant greater professional autonomy to scholars and instructors. The AAUP strove to correct a set of professional norms surrounding the role of the scholar in the United States, to publicize those norms, and to shame university leaders who ignored or violated them.

Beginning with the AAUP's founding document, the 1915 Declaration of Principles on Academic Freedom and Tenure, a new generation of professionally trained scholars argued that universities in the United States should not continue to operate as they had for most of their history. Universities should no longer be understood as vehicles for the transmission of the dogma or propaganda favored by the founders, donors, or trustees of those institutions, but they should instead be understood as scholarly institutions of higher education with a purpose "to advance knowledge by the unrestricted research and unfettered discussion of impartial investigators."[52] The job of professors was not to provide "echoes of the opinions" of others or to engage in the "promotion of opinions" favored by their patrons.[53] Professors served a public trust to advance the truth, and in order to fulfill that public trust they needed "independence of thought and utterance."[54] Scholars were useful to society only if they were not required to mouth orthodoxies

51. CARLSON, *supra* note 20, at 108.
52. AM. ASS'N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACAD. FREEDOM AND ACAD. TENURE 293 (11th ed. 2015).
53. *Id.* at 294, 293.
54. *Id.* at 295.

but rather if they were allowed to be impartial investigators of the truth guided only by their own scholarly judgment and their professional skills. "Scholars" who were chosen for their reliable orthodoxy, or who were constrained from pursuing the truth as best they could, might serve effective propagandistic purposes but they did not serve a valuable social function. Professors who were not allowed to ask difficult questions or reach controversial conclusions simply could not be trusted to contribute to human knowledge or provide expert judgment. Neither their students nor the general public should take them seriously.

This was a radical vision of what universities could and should be and of what role professors should play within those universities. Even if such ideas sounded good in theory, the actual practice of academic freedom could be much more difficult to sustain if professors freed to exercise independence of thought and utterance began to kill sacred cows. The pursuit of truth was easy to celebrate when it reaffirmed popular opinion or led to the discovery of useful technologies. It was much more difficult to tolerate when it challenged conventional wisdom or assaulted cherished beliefs. University presidents and trustees often thought it was their job to silence professors who caused embarrassment to their institution by advancing ideas that were unpopular with important stakeholders. The early advocates of academic freedom argued that universities should be places that not merely tolerated but welcomed and encouraged controversy. University officials frequently feared that controversy was bad for the health of the institution, if not for the health of society at large.

The AAUP won a decisive battle when it jointly issued with the Association of American Colleges its 1940 Statement of Principles on Academic Freedom. The 1940 Statement forwent the argumentation of the 1915 manifesto and reduced the principles in the Declaration to something more like a few simple policies. The policies it recommended were soon adopted by universities and colleges across the country. They were finally recognized as the professional norms of academia and effectuated through binding university policies and employment contracts that constrained the ability of university officials to punish professors merely because their ideas were unpopular or controversial.

The 1940 Statement identified three core commitments at the heart of a principled regime of academic freedom. First, scholars should enjoy "full freedom in research and in the publication of results."[55] Second, "teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject."[56] Third,

55. AM. ASS'N OF U. PROFESSORS, 1940 STATEMENT OF PRINCIPLES OF ACADEMIC FREEDOM AND TENURE 14 (1940).

56. *Id.*

professors should be able to "speak or write as citizens" without fear of university discipline for expressing in public their personal opinions on matters of public concern.[57] In order to make those commitments effective in practice, professors should enjoy the protections of tenure that allow termination "only for adequate cause."[58]

Though such policies and protections were widely adopted by universities in the postwar period, the extent to which universities bound themselves to these new professional norms remained ultimately voluntary. Universities could always choose to water down or rescind their academic freedom commitments or frame them as purely aspirational rather than as a genuine binding obligation. Promises made by university officials might be overridden by boards of trustees. In the public university context, the autonomy of universities to set their own academic policies might be constrained by government officials, whether politically appointed regents or state legislatures. At the same time, however, public universities also face the possibility that some degree of academic freedom protections are constitutionally required, limiting the extent to which those universities could simply abandon academic freedom commitments or have them overridden by political officials.

The priority of academic freedom advocates was to prevent professors from being fired for saying or writing controversial things that offended the powers that be, and thus the policies laid out in the 1940 Statement focused on insulating existing faculty from interference with how they performed their professional duties. The larger principle behind those specific policies, however, was the freedom of scholars to be judged on the performance of their professional duties in accordance with professional standards and not by political or ideological considerations. Scholars should be evaluated on the basis of their scholarly performance, not on the basis of their political conformity or other extraneous considerations.

This has obvious implications not only for the decision to terminate professors but also for the decision to hire them in the first place. The public good that academic freedom principles seek to advance can be subverted by politically motivated hiring as much as it can be subverted by politically motivated firing. "The fundamental principle," the AAUP pointed out in a 2011 report, "is that all academic personnel decisions, including new appointments and renewal of existing appointments, should rest on considerations that demonstrably pertain to the effective performance of the academic's professional responsibilities."[59] Universities committed to free scholarly inquiry must take steps to ensure that political or ideological calculations are not allowed to creep into

57. *Id.*
58. *Id.* at 15.
59. AM. ASS'N U. PROFESSORS, ENSURING ACADEMIC FREEDOM IN POLITICALLY CONTROVERSIAL ACADEMIC PERSONNEL DECISIONS 97 (Aug. 2011).

the assessment of scholars. As professors perform their duties, "neither the expression nor the attempted avoidance of value judgments can or should in itself provide a reasonable ground for assessing the professional conduct and fitness of a faculty member."[60] Universities cannot properly demand that professors suppress the expression of their disfavored values or that professors give voice to the university's own favored values. The expression of values is not in and of itself a scholarly credential and holding the right values is not a precondition for the professional fitness of a faculty member.

At the heart of academic freedom principles is the contention that universities should take action regarding professors only on the basis of their demonstrable fitness to perform their professional responsibilities. Those principles would be meaningless, however, if "professional responsibilities" were an empty vessel. Trustees of nineteenth-century American universities thought a professor's professional responsibilities included giving voice to the opinions and values favored by the university leadership and refraining from the expression of any opinions or values that were disfavored by that leadership. Politicians in the twentieth century thought a professor's professional responsibilities included professing political values that were appropriately loyal and patriotic and renouncing any opinions or values that were contrary to the interest of the nation as those politicians understood it. The work of academic freedom advocates required redefining the expected professional responsibilities of a scholar and teacher in a secular university. Professors were to be judged on their scholarly integrity and competence. Their personal opinions and values were to be regarded as entirely irrelevant to their professional fitness. Even dissident and controversial scholarly views were consistent with professional fitness, so long as those views were advanced and expressed in a scholarly fashion. Modern norms of professional fitness did not turn on adherence to orthodoxy or substantive agreement but on a commitment to a process of scholarly inquiry. Any demand for orthodoxy is necessarily incompatible with a commitment to academic freedom.

The anti-subversive laws of the mid-twentieth century led the U.S. Supreme Court to reassess whether the First Amendment placed any limits on how government institutions might patrol the political thought and activities of their employees. That question had its greatest salience in the context of the schools, where the justices became increasingly uncomfortable with the idea that politicians had a free hand to exclude from the classroom instructors who held unconventional or unpopular political or social views. Eventually, the Court would conclude that academic freedom was protected to some degree by the First Amendment.

60. *Id.* at 99.

Central to the concern with recognizing a First Amendment interest in academic freedom principles was the appreciation for the need to resist the enforcement of conformity in institutions that should be dedicated to the exploration of ideas. Former Yale Law School professor Justice William O. Douglas warned in 1952 that political litmus tests were "not the usual type of supervision which checks a teacher's competency; it is a system which searches for hidden meanings in a teacher's utterances."[61] The consequence is that the "teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipeline for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile; pursuit of knowledge is discouraged; discussion often leaves off where it should begin."[62]

Former Harvard Law professor Justice Felix Frankfurter later added that universities could only benefit society if they served as a "center for independent thought" and that they could not do so if professors could not be "exemplars of open-mindedness and free inquiry."[63] When a state attorney general sought to determine what a Marxist economist said in his guest lecture in a state university classroom, Chief Justice Earl Warren declared that "to impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."[64]

The Court's growing concern with academic freedom was not limited to policies and practices that put teachers "under constant surveillance."[65] The Court was increasingly aware that government officials used concerns over professional fitness to rationalize inquiries into the political commitments of teachers. The First Amendment required that such rationalizations be stripped away. "There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools," the Court recognized.[66] Even as the Court hesitated to delve into what exactly might qualify as evidence of competence and fitness, it insisted that the government could not use this legitimate interest to put "pressure upon a teacher to avoid any ties which might displease those who control his professional destiny."[67] When Arkansas required that its prospective teachers provide a state with a list of every organization with which they had been associated – the better to keep out civil rights activists as well as Communists – the Court balked. "Even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the

61. Adler v. Bd. of Educ., 342 U.S. 485, 510 (1952) (Douglas, J., dissenting).
62. *Id.*
63. Wieman v. Updegraff, 344 U.S. 183, 197, 196 (1952) (Frankfurter, J., concurring).
64. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
65. *Adler*, 354 U.S. 234, 510.
66. Shelton v. Tucker, 364 U.S. 479, 485 (1960).
67. *Id.* at 486.

end can be more narrowly achieved."[68] The state's demands went far beyond what could have a "possible bearing upon the teacher's occupational competence or fitness."[69]

Finally, in 1967 the Court put a capstone on what it had been building toward for more than a decade. "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. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[70] Manufactured conformity of thought was anathema to the scholarly and educational enterprise. "The Nation's future depends upon learners 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.'"[71] If professors are to be the "priests of our democracy," they must both foster and exemplify "open-mindedness and free inquiry."[72] The First Amendment demanded that the government not enforce orthodoxies.

IV. SOME LESSONS FROM LOYALTY OATHS

One of the most notorious threats to academic freedom in the postwar period was the rise of loyalty oaths. Both academic freedom advocates in universities and judges were slow and hesitant in responding to the threat. In time, however, both did. Certainly, in historical memory, loyalty oaths are held to be a canonical example of an attack on free inquiry in higher education. Understanding how and why loyalty oaths gained that reputation helps provide a context for thinking about the use of diversity statements. The Court's ultimate constitutional denunciation of loyalty oaths also indicates the constitutional difficulty for diversity statements at public universities.

Loyalty oaths became prominent after the New York Lusk Committee's investigations into the influence of radicals and subversives in the state's schools. In 1921, New York required teachers to certify that they were "of good character" and "loyal to the institutions of the State and Nation." Across the 1920s and 1930s, several other states followed New York's lead. In the postwar period, leadership in developing loyalty oaths shifted from New York to California, with Governor Earl Warren competing to show his anti-communist *bona fides* by taking the oath himself in 1950 while in the midst of a reelection campaign. By the time of the Korean War, loyalty oaths were widespread and were required well beyond schoolteachers.

68. *Id.* at 488.
69. *Id.*
70. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
71. *Id.* (quoting United States v. Associated Press, D.C., 52 F. Supp. 362, 372 (1943)).
72. Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

The extension of loyalty oaths to university professors brought heightened controversy over this tool of internal security. In the 1940s, California state senator Jack Tenney argued that the regents of the California universities were not doing enough to tamp down on subversive activities and proposed that constitutional authority over that issue be shifted to the legislature. In an attempt to derail that proposal, the regents in 1949 imposed their own loyalty oath on university faculty, leading to a bitter confrontation between the faculty and the university leadership.[73] As the regents debated the new oath, the famed medievalist Ernst Kantorowicz urged them to refrain from imposing even what they might see as "a harmless oath formula" that would ultimately force scholars to sacrifice their "freedom of judgment" in order to retain their good standing and remain employed at the university.[74]

Loyalty oaths came in two general varieties, which posed related intellectual and constitutional challenges. "Negative" oaths generally required professors to disclaim membership in any organization that believes in or advocates the overthrow of the United States government, or more specifically in the Communist Party or other named subversive organizations.[75] Negative oaths were more widespread but raised the important constitutional question of whether the state could condition public employment on promises to refrain from constitutionally protected expressive activities or from holding constitutionally protected political beliefs. That question was fairly easily answered if such radical political activities were not actually constitutionally protected, but the Court's greater solicitude to radical political speech undercut the foundations of that answer. But even assuming that an applicant for public employment held disfavored but constitutionally protected political beliefs, the state still had substantial discretion to exclude such individuals from public employment under traditional constitutional doctrines. As the majority of the Court emphasized in a 1952 challenge to such a requirement in New York, the First Amendment prevented the government from punishing individuals who hold such radical political beliefs but it did not protect their "privilege" of working for the government.[76] Moreover, the Court thought that the state had ample discretion to investigate "matters that may prove relevant to [prospective employees'] fitness and suitability for the public service."[77] One's political beliefs, associations, and conduct were all rel-

73. EDWARD L. BARRETT, JR., THE TENNEY COMMITTEE 309–10 (1951); DAVID P. GARDNER, THE CALIFORNIA OATH CONTROVERSY 8–10 (1967).
74. GARDNER, *supra* note 73, at 129.
75. Arval A. Morris, *Academic Freedom and Loyalty Oaths*, 28 L. & CONTEMP. PROBS. 487, 498–99 (1963); Kris A. Van Thielen, *Constitutional Law—Positive Loyalty Oaths—The First Amendment and Academic Freedom*, 14 WAYNE L. REV. 635, 636–37 (1968).
76. Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952).
77. Garner v. Bd. of Pub. Works, 341 U.S. 716, 720 (1951).

evant for determining prospective instructors' "fitness to maintain the integrity of the schools as part of ordered society."[78]

"Positive" oaths, by contrast, required professors to affirm their support for the U.S. Constitution and to faithfully discharge the duties of their position.[79] Such oaths were particularly common in education.[80] Can the state condition public employment of teachers on expressions of commitment to politically favored values or disavowal of belief in politically disfavored values or ideas? While some courts worried that judges could not be expected "to determine the skill and faithfulness with which the plaintiff discharges the duties of his private position in teaching mathematics and perhaps to compare that degree with that of the best of his ability," as arose when a professor at MIT was asked to take such an oath under Massachusetts law,[81] other courts were at least comfortable with the idea that the state could expect its teachers "to support the governmental systems which shelter and nourish the institutions in which they teach."[82]

The "Regents Oath" promulgated to the faculty of the University of California system in 1949 added to a preexisting positive oath an additional proviso that pledged that professors were not members of the Communist Party.[83] If the state could exclude members of one legal political organization from the university faculty, in principle, it could extend the political test at will to exclude members of "any other party, or any unpopular group."[84] Indeed, Southern states were quite interested in extending the reach of such requirements to include civil rights groups.[85] The Arkansas Supreme Court was sweeping on this point, arguing that the state could reasonably ask about membership in any group "which might shed light upon the applicant's fitness to guide young minds in the classroom," whether the Communist Party or "a nudist colony," "drag-racing club," or "association of atheists."[86]

The oath controversy forced professors to develop an argument as to why such a political litmus test posed a threat to academic freedom, and ultimately to the First Amendment. This required a return to first principles. A group of California professors explained, "by Academic Freedom is meant merely—the freedom, within an educational institution, to teach and to be taught the truth. It is as simple as that, and

78. *Adler*, 342 U.S. at 493.
79. Morris, *supra* note 75, at 499; Van Thielen, *supra* note 75, at 636–37.
80. Morris, *supra* note 75, at 499.
81. Pedlosky v. Mass. Inst. of Tech., 352 Mass. 127, 128–29 (1967).
82. Knight v. Bd. of Regents, 269 F. Supp. 339, 341–42 (S.D.N.Y. 1967).
83. GARDNER, *supra* note 73, at 46–47, 124–25.
84. GEORGE STEWART, THE YEAR OF THE OATH 22 (1950).
85. *See* Jeff Woods, *"Designed to Harass": The Act 10 Controversy in Arkansas*, 56 ARK. HIST. Q. 443, 447–48 (1997).
86. Carr v. Young, 331 S.W.2d 701, 703 (Ark. 1960).

as important."[87] Students were entitled to receive the truth, as best it could be ascertained, from their professors. If professors feared they could be fired for teaching or writing "an unpopular truth," students would be deprived of a quality education and the scholarly project would be corrupted.[88]

Of course, advocates of the oath believed any honest professor should conclude that Communism was bad, and in any case, an American university should only want "the professors who would come out with that kind of answer."[89] Unsurprisingly, mainstream academics did not go to the public with the argument that Communism was good actually. They instead emphasized that universities would suffer if professors were obliged to come out only one way on contested issues. "The imposition of the oath . . . struck directly at Freedom by setting up a field within which thought was no longer free. Having signed the oath, a professor might think about Communism, but he necessarily had to always come out with the answer that Communism was bad."[90] There is a difference "between a professor who arrives at that conclusion by the exercise of his own freedom of thought and a professor who arrives at that conclusion because he is afraid that if he arrives at any other he will lose his job."[91] A professor should have the freedom to be "an honest man" and not "a hypocrite," to present his ideas to his students and his fellow scholars on the basis of "intellectual honesty" and not "expediency."[92] The oath might sometimes skew scholarly investigations, but it would always cast doubt on whether scholars could be trusted to provide their honest opinions.

In the 1950s, the American Association of University Professors denounced efforts to impose conformity of thought on university instructors and scholars. In 1953, the national organization endorsed a resolution that had been adopted by the Princeton University chapter regarding political investigations of universities. They decried the rise of "methods of determining fitness to teach by application of political tests, standards of conformity, and inquisitorial procedures are methods appropriate to an authoritarian society, not to a society based upon confidence in the ability of men to choose the paths of truth, reason, and justice. Such methods are alien to our national character and make war against our ideal of a free society."[93] Litmus tests that required conformity of opinion "led unfailingly to stagnation."[94] The "stifling of controversy" and "suppression of dissent" were "among the most

87. STEWART, *supra* note 84, at 14.
88. *Id.* at 15.
89. *Id.* at 26.
90. *Id.* at 25.
91. *Id.* at 26.
92. *Id.*
93. *Political Investigations of Universities*, 39 BULL. AM. ASS'N U. PROFESSORS 94 (1953).
94. *Id.*

dangerous enemies of a free society."[95] In a later report the national organization condemned the tendency to look upon professors "suspiciously and to subject their character and attitudes to special tests as a condition of employing them."[96] The trust in their ability should only be "lost" if there were individualized demonstrations of misconduct in the performance of their duties.[97] The imposition of such tests undermined the "particular need for freedom from pressures and restrictions, which is a productive requirement of the academic profession," and it was at odds with a proper standard of "professional fitness" that looked only to such factors as competence and "scholarly objectivity and integrity."[98]

The Association of American Universities (the successor to the AAC) issued its own statement in 1953 in response to the domestic security initiatives aimed at higher education. While somewhat more inclined to accommodate some security concerns than the AAUP, the university presidents put even greater emphasis on the importance of intellectual diversity in academia as a reason to resist anti-Communist pressures. What united scholars within a university was not any substantive set of opinions but the "ideal of learning" and an "individual passion for knowledge."[99] Universities benefitted not from orthodoxy but from diversity, even nonconformity. It was to be expected that universities would include scholars with "widely differing interests and outlooks."[100] If they were to succeed in their mission, universities must "be hospitable to an infinite variety of skills and viewpoints."[101] "To enjoin uniformity of outlook upon a university faculty would put a stop to learning at its source."[102] As in scholarship, so in teaching; "the university student should be exposed to competing opinions and beliefs in every field, so that he may learn to weigh them and gain maturity of judgment."[103] "To insist upon complete conformity to current beliefs and practices would do infinite harm to the principle of freedom . . . [that] made it possible for the universities of America to confer great benefits upon our society."[104]

The Court itself was tentative in its approach to loyalty oaths, as it was to other aspects of the anti-Communist domestic security regime of the mid-twentieth century. The Court's preferred approach was to take on the loyalty oath indirectly. The oath offends due process

95. *Id.* at 94–95.
96. *Id.* at 94.
97. *Id.*
98. *Id.*
99. ASS'N AM. U., *The Rights and Responsibilities of Universities and Their Faculties*, 16 ENG'G AND SCI. 11, 12 (1953).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 12.
104. *Id.* at 14.

if it indiscriminately classifies innocent with knowingly subversive activity.[105] The oath is unconstitutionally vague if it does not provide enough guidance as to what conduct is expected.[106] The oath offends freedom of association for those who join subversive organizations without specific intent to further illegal activities.[107] The oath offends due process if there is no hearing to determine whether employment is inconsistent with the real interests of the state.[108]

Finally, the Court summarized some general constitutional limits on loyalty oaths, while upholding their permissibility. Neither the "federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendment respectively. . . . Nor may employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities," such as criticizing the institutions of government.[109] Likewise, the oath cannot be so vague such that individuals "must necessarily guess at its meaning and differ as to its application" or deter them "from engaging in constitutionally protected activity conceivably within the scope of the oath."[110] The state could reasonably ask employees to take an oath not to engage in future illegal activity, but it could not require oaths that might impinge on constitutionally protected political expression or activity.[111]

Loyalty oaths were the most pervasive feature of the domestic security state over the early Cold War and placed significant pressure on the academic freedom commitments of universities. At least some versions of the oath might have been regarded as innocuous in that few academics planned to violently overthrow the government or belonged to organizations with such a goal. But far more academics recognized that the principle of requiring scholars to take political oaths could be put to far more intrusive uses. More fundamentally, the very idea of such political litmus tests for academic employment struck at the heart of the scholarly enterprise. The imposition of oaths sought to ensure political conformity in university faculty and exclude those who might challenge the powers that be. They shrank the intellectual world by excluding diverse voices from the ranks of the faculty and sent a clear message that some intellectual and political commitments were not to be questioned on a university campus. The oath avoided the need to demonstrate that a professor was unfit for the job or engaged in

105. *See* Wieman v. Updegraff, 344 U.S. 183, 189–90 (1952).
106. *See* Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 286–87 (1961).
107. Elbrandt v. Russell, 384 U.S. 11, 18–19 (1965).
108. *See* Slochower v. Bd. of Higher Educ., 350 U.S. 551, 558–59 (1956).
109. Cole v. Richardson, 405 U.S. 676, 680 (1972).
110. *Id.* at 680–81.
111. *Id.* at 686 ("Since there is not constitutionally protected right to overthrow a government by force, violence, or illegal or unconstitutional means, no constitutional right is infringed by an oath to abide by the constitutional system in the future.").

any professional misconduct. It was enough to say that a professor had troubling ideas. The lesson of the age of the loyalty oath is that such tests were anathema to the scholarly enterprise—and often to First Amendment values.

V. GOVERNMENT EMPLOYEE SPEECH AND THE "PALL OF ORTHODOXY"

The potential for loyalty oaths to interfere with the expressive activities of government employees, including state university professors, would be largely irrelevant if government employees had no particular First Amendment rights with which to be concerned. The experience of the domestic security debates of the mid-twentieth century helped prod the Court into reconsidering the traditional assumption that the government did not have to concern itself with First Amendment restrictions when regulating its own employees. Government employees are now understood to have First Amendment rights vis-à-vis their government employer, which has implications for the use of diversity statements as a screen for government employment. Those rights are particularly robust in the context of universities, making the use of diversity statements in faculty hiring especially constitutionally dubious.[112]

The conventional constitutional wisdom through much of American history was that since individuals had no right to a government job, no rights could be violated by excluding them from government jobs on the basis of their political opinions. Expressing a political belief with which a politician disagreed could not get you thrown in jail, but it could be disqualifying for holding a government job. The traditional assumption was captured in an infamous quip from Oliver Wendell Holmes, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[113] States relied on that assumption in adopting anti-subversive measures that pushed government employees with suspected radical political sensibilities out of their jobs. Justice Sherman Minton relied on it when writing to uphold New York's law for keeping radicals out of state schools. Working for the government was a "privilege" not a right, and political undesirables were "at liberty to retain their beliefs and association and go elsewhere."[114] Diversity statements would have presented no real First Amendment challenge under that constitutional regime.

The doctrinal situation is more complicated now. As the Court declared that there was a First Amendment interest in academic freedom in *Keyishian v. Board of Regents*, it dismissed the idea that public

112. *See* KEITH E. WHITTINGTON, YOU CAN'T TEACH THAT! (2024) (Discussing the rise of academic freedom principles as professional norm and First Amendment doctrine).
113. McAuliffe v. Mayor of Aldermen of New Bedford, 155 Mass. 216, 220 (1892).
114. Alder v. Bd. of Educ., 342 U.S. 485, 492 (1952).

employers could impose "any conditions, regardless of how unreasonable" was still good law.[115] "It was too late in the day to doubt that liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[116] The Court pointed to such language in *Pickering v. Board of Education* when a local school board tried to fire a public schoolteacher for writing a letter to the editor of a newspaper taking issue with the board's public policies. Teachers may not "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens" simply because they were government employees.[117] Government employees could not be fired simply for expressing political opinions disfavored by their bosses.

This has created a constitutional bind that the Court has been trying to resolve ever since the 1960s. On the one hand, there is a First Amendment interest in "that free play of the spirit which all teachers ought especially to cultivate and practice."[118] On the other hand, state university professors are government employees subject to workplace management by agents of the state. The government should not "cast a pall of orthodoxy over a classroom,"[119] but "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."[120]

The Court has provided a balancing framework for recognizing these two competing interests—the First Amendment interests of government employees and the state's interests in efficiently managing the workplace. First is a threshold question of whether a government employee has any First Amendment interest in the speech in question at all. Generally speaking, an employee must be speaking "as a citizen" about "matters of public concern."[121] Speech that "cannot be fairly considered as relating to any matter of political, social, or other concern of the community" is of no substantial First Amendment interest.[122] The judiciary should take no notice of occasions when an employee speaks "upon matters only of personal interest" or "internal office affairs."[123] Only after such a threshold test has been passed and a First Amendment interest has been established should the courts consider whether the employee's constitutional interests might outweigh the interests of the employer in the specific case.

115. Keyishian v. Bd. of Regents of Univ. of State of N.Y. 385 U.S. 589, 605–06 (1967).
116. *Id.* at 606 (quoting Sherbert v. Verner, 374 U.S. 398, 404 (1963)).
117. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
118. Wieman v. Updegraff, 344 U.S. 183, 195 (Frankfurter, J., concurring).
119. *Keyishian*, 385 U.S. at 603.
120. *Pickering*, 391 U.S. at 568.
121. *See id.*
122. Connick v. Myers, 461 U.S. 138, 146 (1983).
123. *Id.* at 147, 149.

The Court has since added a significant element to the threshold test. In *Garcetti v. Ceballos*, the Court was confronted with the workplace speech of a government lawyer involving matters of public concern.[124] As the Court noted, the subject matter focus of the threshold test in *Pickering* would encompass a great deal of ordinary professional speech of government employees.[125] But the Court in *Pickering* had emphasized not only speech on matters of public concern but also the speech of the employee acting "as a citizen," as Pickering had when he wrote a letter to the editor.[126] When a government employee was speaking "pursuant to his duties" as an employee, the employee could claim no First Amendment interest in that speech regardless of its content.[127] For ordinary government employees, speech that is "commissioned or created" by the government fails to pass the *Pickering* threshold.[128]

The Court recognized, however, that the *Garcetti* rule would effectively eliminate any First Amendment protections for teaching and scholarship by state university professors.[129] Consequently, the Court did not resolve the question of whether the *Garcetti* rule applied to such speech given the "additional constitutional interests" involved.[130] Courts have generally understood that to mean that there is an academic freedom exception to the *Garcetti* threshold test.[131]

Speech that passes these threshold considerations must still be balanced against the government's interest as an employer. "The state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest."[132] Such balancing requires "a highly fact-specific inquiry into a number of interrelated factors," including the content and context of the speech in question, the nature of the job that the employee performs, and the relationship between the speech and the ability of the employee to perform their job.[133] Significantly, university professors have long been recognized as standing at one end of the spectrum of government employees.[134] The government's legitimate interests in punishing the controversial speech of professors are particularly weak given that the very nature of the professor's job involves exploring controversial

124. Garcetti v. Ceballos, 547 U.S. 410, 413–14 (2006).
125. *Id.* at 415–16.
126. *Pickering*, 391 U.S. at 568.
127. *Garcetti*, 547 U.S. 410, 421 (2006).
128. *See id.* at 421–22.
129. *Id.* at 425.
130. *Id.* at 425.
131. *See* DAVID M. RABBAN, ACADEMIC FREEDOM 128–30 (2024) (examining the implications of the *Garcetti* exception).
132. Rankin v. McPherson, 483 U.S. 378, 388 (1987).
133. Gustafson v. Jones, 290 F.3d 895, 909 (7th Cir. 2002).
134. Jurgensen v. Fairfax Cnty, 745 F.2d 868, 880 (4th Cir. 1984).

ideas and thus controversial faculty speech is tolerated by university employers to an unusual degree compared to controversial speech by employees in other professions and employment contexts. That tolerance is not unlimited, but it is defined and circumscribed by the professional norms of academic freedom that developed across the twentieth century. The university's legitimate interest in suppressing the controversial speech of professors is narrow. The "effective functioning" of a private or public university requires tolerating diverse and controversial opinions from the faculty.[135]

A critical concern of government employee speech doctrine is to prevent government officials from suppressing the "free and open debate" that is "vital to informed decision-making by the electorate."[136] The "First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[137] The government cannot attempt to "limit the flow of ideas into the minds of men" under the guise of managing the government workplace.[138] Thus, it is imperative to distinguish legitimate governmental interests in regulating workplace speech from illegitimate interests. The latter are appropriately entitled to no weight in the *Pickering* balancing analysis, while the former must be given their due.[139]

What are legitimate university interests in professorial speech that might be weighed in the *Pickering* balance? Public universities have some legitimate interests that might justify restricting professorial speech or taking adverse employment actions against scholars or instructors who engage in such speech. If universities are to fulfill their mission of advancing knowledge and adhere to the First Amendment interests in academic freedom, those legitimate interests of university administrators to manage professorial speech must be understood to be more limited than the interest in state managers regulating the speech of other sorts of government employees. Suppressing employee speech that offends co-workers or the customers of a public agency or members of the general public might be reasonable and justifiable in the context of law enforcement officers or elementary school teachers, but such rationales for suppressing professorial speech are anathema

135. *Rankin*, 483 U.S. at 388.

136. Pickering v. Bd. of Educ., 391 U.S. 563, 571–72 (1968). *See* ROBERT C. POST, DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM (2012) (exploring the critical relationship between this First Amendment concern with informing the democratic public and academic freedom values of unfettered scholarly inquiry).

137. Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

138. Adler v. Bd. of Educ., 342 U.S. 485, 497 (1952) (Black, J., dissenting).

139. On *Pickering* balancing in situations involving political expression by university faculty, *see* Keith E. Whittington, *What Can Professors Say in Public? Extramural Speech and the First Amendment*, 73 CASE W. RES. L. REV. 1121 (2023).

to the very purpose of a scholarly institution dedicated to the exploration of controversial ideas.

In particular, there are four important university interests that might justify regulating professorial speech, two of which are fairly obvious and two perhaps less so. Most obviously, professors can be appropriately disciplined for speech that is violative of the rights of others. Faculty members have no more right to harass, defame, or threaten than any other category of government employees. Similarly, expressive activities that are inconsistent with university functioning need not be tolerated. Faculty members who ignore appropriate time, place, and manner rules on expressive activities or disrupt university operations can be properly sanctioned for their expressive conduct. Perhaps less obviously, the university has some interests it must protect regarding classroom speech by professors. While professors have a weighty First Amendment interest in the content of their classroom lectures, the university has a counterbalancing interest in maintaining quality control in university instruction. Professors who engage in professionally incompetent speech invite administrative intervention. Likewise, the university has an interest in controlling the curriculum, and as a consequence can reasonably enforce a germaneness requirement on faculty in the classroom. Professors who are empowered to lecture to a captive audience on chemistry are not thereby authorized to use their platform to deliver political messages to their students.[140] Public universities acting on such interests are well positioned to have their interests vindicated in a *Pickering* balancing test.

Other types of purported university interests are illegitimate and should be heavily discounted or ignored in a proper *Pickering* balance. In order to efficiently deliver their public service, universities have no proper interest in suppressing speech merely because it is unpopular, controversial, or offensive. Scholarly institutions dedicated to exploring controversial ideas subvert rather than advance their mission if they shut down such explorations on grounds that are not closely related to such scholarly considerations as professional competence. Similarly, universities have no proper interest in engaging in content-based discrimination against professorial speech that is not limited to germaneness. The university has an interest in making sure that a professor teaching African-American history actually teaches the subject, but no legitimate interest in making sure that the instructor avoids politically sensitive topics within the content of the class. Likewise, universities have no proper interest in engaging in viewpoint-based discrimination not limited to professional competence. Universities should intervene to keep instructors from misinforming their students, but not to keep

140. *See* WHITTINGTON, *supra* note 112, at 92–99.

instructors from exposing students to legitimate controversies within the academic discipline.[141]

Pickering, when properly informed by an appreciation of academic freedom values that are also recognized in First Amendment doctrine, provides a constitutional framework for evaluating university efforts to regulate the speech of faculty. It dictates that such speech regulations can be constitutionally justified when there is a tight nexus between the university's substantive mission in advancing and communicating knowledge, but are constitutionally dubious otherwise. Efforts to regulate scholarly speech at public universities should be particularly suspect when they seek to enforce conformity and restrict the marketplace of ideas on non-scholarly grounds.

Do diversity statements satisfy *Pickering*?[142] There are three steps to an analysis under *Pickering* and its progeny that the state must satisfy to justify the use of such a requirement for faculty employment. Is the speech elicited in diversity statements not about matters of public concern, and as a consequence, not the type of speech that is entitled to meaningful First Amendment protection in the employment context? Is the speech elicited in diversity statements covered by the *Garcetti* rule or does it fall under the academic freedom exception to *Garcetti*? Is the speech elicited in diversity statements necessary to the efficient delivery of the public services of state universities and thus properly regulated by government employers within a *Pickering* balancing? I believe all three steps lead to the conclusion that diversity statements improperly chill the constitutionally protected speech of applicants for government positions.

First, does the content of diversity statements involve "matters of public concern"[143] or is this merely speech about "matters only of personal interest"?[144] It is quite plausible that traditional statements of

141. *Id.* at 91–92.

142. There is a potential threshold question of regarding *Pickering* is properly applied to prospective government employees. Although the Court's cases regrading government employee speech all involve current employees facing adverse employment consequences for their speech, it would be anomalous to not extend the logic of those cases to prospective employees. *Pickering* arose out of the context of the First Amendment concerns associated with loyalty oaths and other domestic security measures. Those measures were often directed at excluding individuals from government employment, and the thrust of the Court's doctrine emphasizing that government employment could not be conditioned on the suppression of constitutionally protected expressive activity would apply equally to those applying for government jobs as to those already holding government jobs. A government employer could not properly evade *Pickering* by simply refusing to hire applicants who believed in, held, or expressed controversial opinions for which they could not terminate once they were employed. The First Amendment values that the Court identified would be equally violated in the case of applicants for government employment as in the case of existing government employees.

143. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

144. Connick v. Myers, 461 U.S. 138, 147 (1983).

teaching philosophy would not qualify as speaking to a matter of public concern. If applicants for teaching positions are asked about their general teaching philosophy, their preferred pedagogical approach, and how they would approach teaching students who might be less prepared for the subject matter of the class or who are less academically prepared than the type of students that the applicant might have encountered at their Ph.D. granting institution, the questions being asked and the answers being elicited do not address "any matter of political, social, or other concern of the community."[145] They are, in essence, essays about "internal office affairs."[146] By contrast, the statements being elicited from applicants by diversity requirements are by design value-laden and involve the ordinary stuff of politics. There is no public debate over whether professors should employ a "flipped classroom."[147] There is an intense public debate over how to understand the role of race in society and the principles that ought to guide race relations moving forward. Standard prompts for diversity statements are designed to elicit statements regarding matters of public concern, and they are assessed on the basis of substantive content that is the subject of ongoing political and social debate. Given the expected content of diversity statements, they pass the *Pickering* threshold of addressing matters that are of First Amendment interest.

Second, do diversity statements fall within any academic freedom exception to the *Garcetti* rule? There is little question that diversity statements as a part of an application for a government position involve "speech that owes its existence to a public employee's professional responsibilities;" speech that is "commissioned" by the employer.[148] Ordinary employees, or prospective employees, do not have a First Amendment in such speech under *Garcetti*, regardless of the content of the speech in question. Garcetti carved out an exception for "speech related to scholarship or teaching," however, and there is also little question that diversity statements fall within that exception.[149] Diversity statements directly address teaching and often scholarship as well, and as a consequence, fall within the core of any academic freedom

145. *Id.* at 146.

146. *Id.* at 149. Even if the content of traditional teaching statements were construed as implicating matters of public concern, they could reasonably be justified by state universities as being closely related to the government's interest in the efficient delivery of the university's educational services. Understanding how a prospective teacher would approach teaching is in itself a natural concern of a state employer trying to assess an applicant's professional fitness for a job.

147. "A flipped classroom is structured around the idea that lecture or direct instruction is not the best use of class time. Instead students encounter information before class, freeing class time for activities that involve higher order thinking."*Flipped Classrooms*, HARV. UNIV.: DEREK BOK CTR. FOR TEACHING & LEARNING https://bokcenter.harvard.edu/flipped-classrooms [https://perma.cc/8D3G-4H87].

148. Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

149. *Id.* at 425.

except the general *Garcetti* rule. The individual applicant retains the First Amendment interest in the content of the diversity statement, not the employer who solicited the statement.[150]

Third, is the diversity statement necessary to the efficient delivery of the public service of a state university such that the government has a legitimate and weighty interest that might outweigh the individual First Amendment interest in the speech in question? The use of diversity statements to screen applicants for faculty positions most closely reflects the illegitimate interests that universities might pursue rather than the legitimate interests noted above. Diversity statements do not inform hiring committees on whether the faculty applicant is professionally competent to teach the curriculum to students, which is the most plausible interest the university might assert in this context. Rather diversity statements facilitate efforts to screen out applicants who hold controversial but professionally competent ideas or simply hold controversial personal but professionally irrelevant political views. Diversity statements are mechanisms for enforcing viewpoint-based discrimination that is not limited to professional competence. Just as Florida's Stop WOKE Act seeks to suppress the expression of politically disfavored but germane ideas in state university classrooms, so diversity statements seek to suppress the expression of politically disfavored but germane ideas on state university campuses.[151] In the case of the Stop WOKE Act, the suppression is carried out through the mechanism of punishing those who express disfavored views in the classroom. In the case of diversity statements, as with the loyalty oaths of the 1950s, the suppression is carried out through the mechanism of excluding those who might express such views from ever setting foot in the classroom in the first place. The Stop WOKE Act would not be less troublesome for academic freedom or the First Amendment if it required that prospective state university professors submit a statement demonstrating that they do not believe in the "divisive concepts" identified in the statute or that they affirmatively do believe in a set of ideas that state politicians prefer.

Alternatively, diversity statements might be justified as a kind of prophylactic measure to implement civil rights goals. Universities

150. It should be explicitly noted that this would not be true of diversity statements required for other sorts of government employment. Outside the academic context, a diversity statement solicited from applicants for government positions would not relate to teaching or scholarship and thus not fall within any academic freedom exception to the general *Garcetti* rule.

151. Technically, the Stop WOKE Act does not bar the mere "expression" of controversial ideas in the classroom but rather the "espouses" or "promotes" such ideas. FLA. STAT. § 1000.05(4) (2023). To that extent, the Stop WOKE Act is arguably much less intrusive or sweeping than diversity statements in chilling disfavored speech. For a detailed analysis of the constitutional infirmities of the Stop WOKE Act's intervention into state university teaching, *see* WHITTINGTON, *supra* note 112, at 99–108.

have a responsibility to take action in the case of faculty speech that is harassing or threatening, and it likewise has a responsibility to act when members of the faculty engage in discriminatory conduct. Professors cannot shelter behind academic freedom principles in order to harass or discriminate against their students in unlawful ways. The fact that universities have a legal obligation to prevent racial and sexual harassment and discrimination does not mean that universities can take any measures that they might want to advance that goal. In particular, universities cannot use constitutionally protected political expression as a proxy or predictor of potential future misconduct. Universities may respond to faculty misconduct, but it cannot assume that those with disfavored political views will engage in such misconduct. Universities cannot simply assume, for example, that professors with radical political views will engage in disruptive conduct on campus, even if other professors with radical views have engaged in such misconduct on their own campuses. Similarly, universities cannot simply assume that professors with controversial views about race, for example, will therefore engage in racially discriminatory conduct. The exclusion of professors with controversial views from campus impinges on constitutionally protected expression to a degree that is far from the least restrictive means to achieving the compelling goal of preventing discriminatory conduct.[152]

Ultimately, defending diversity statements requires reconceptualizing the legitimate public service that state universities are to provide. The AAUP has argued that professors should have the freedom to engage in "the study of inequality and discrimination, methods for dismantling them, and strategies for reform and fundamental change."[153] But it has not been content to say that professors should have the freedom to engage in such research. It has further insisted that "colleges and universities and their faculties must be committed not only to eliminating discrimination but to addressing the persistent inequalities created by both past and present discriminatory practices and systems."[154] Indeed, the "academic community" must now accept "a more capacious conception of discrimination, emphasizing substantive and not simply formal equality."[155] If the "academic community" may, or indeed must, adopt such a view, then the AAUP has now further declared that universities may require that professors satisfy DEI requirements that dictate that they perform "teaching, research, and

152. *See* Brian Leiter, *The Legal Problem with Diversity Statements*, CHRON. HIGHER EDUC. (March 13, 2020) https://www.chronicle.com/article/the-legal-problem-with-diversity-statements/.

153. *On Eliminating Discrimination and Achieving Equality in Higher Education*, 110 AM. ASS'N U. PROFESSORS 52 (2024).

154. *Id.*

155. *Id.*

service that respond to the needs of a diverse global public" by advancing that view.[156]

From its very inception in the United States, academic freedom has been justified by an appeal to the ability of serious scholarly research to contribute to the "common good." The 1940 Statement of Principles on Academic Freedom began with the proposition that "the common good depends upon the free search for truth and its free exposition."[157] The AAUP's more recent effort to justify diversity statements would instead emphasize the authority of "an appropriate larger group, such as a faculty senate or a department" to determine what the content of the common good might require and to evaluate "individual faculty members' performance by reference" to it even though individual faculty members in question might "dissent" from those views.[158] It seems doubtful that the courts would understand the legitimate mission of a public university as so malleable. A professor whose scholarly work is focused on serving the needs of a diverse global public by demonstrating that theories of substantive equality are flawed operates in keeping with the free search of truth and its free expression but is to be downgraded, excluded, or fired under the more substantive logic of the DEI regime.[159] It is not enough to study inequality and discrimination. To be in good standing as members of the "academic community" one must reach the approved conclusions about inequality and discrimination, embrace the approved strategies for fundamental societal change, and build a track record of contributing to those goals. There might well be a small number of cases in which faculty positions could be reasonably justified as requiring such commitments, but attempting to redefine the nature of academic employment such that all faculty positions come with such thick political conditions would do violence to the judiciary's traditional understanding of what the "effective functioning of the public employer's enterprise" requires.[160]

The Court's decisions regarding government employee speech recognize substantial discretion on the part of government employers to regulate the professional speech of government employees. But informed by academic freedom principles and the experience of the loyalty oaths of the mid-twentieth century, the Court has sharply limited the circumstances in which government employers can regulate the professional speech of professors. Even in the university context, however,

156. *Diversity, Equity, and Inclusion Criteria for Faculty Evaluation*, AM. ASS'N U. PROFESSORS (October 2024), https://www.aaup.org/file/DEI-Faculty-Evaluation.pdf; Brian Soucek, *Diversity Statements* 55 U.C. DAVIS L. REV. 1989 (2022).

157. AM. ASS'N U. PROFESSORS, *supra* note 55. For an elaboration of those principles, see MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD (2009).

158. AM. ASS'N U. PROFESSORS, *supra* note 156, at 2.

159. *See generally* Matthew W. Finkin, *Diversity! Mandating Adherence to a Secular Creed*, 2 J. FREE SPEECH L. 451 (2023).

160. Rankin v. McPherson, 483 U.S. 378, 388 (1987).

government employers can take adverse employment actions, including refusing to hire job candidates, on the basis of speech that impedes the university's mission of advancing and communicating knowledge. State universities may not, however, take measures that cast a "pall of orthodoxy over the classroom."[161] University actions that attempt to suppress the expression of ideas because they are politically disfavored or enforce intellectual conformity for reasons that are not tightly justified by the university's scholarly mission are constitutionally infirm. In practice, diversity statement requirements are used to impose ideological conformity on the university faculty. Such a practice should not survive *Pickering* scrutiny.

VI. POLITICAL HIRING IN GOVERNMENT

Government employee speech doctrine has developed in close connection with the educational context and has been particularly focused on the circumstances in which government employers can take action against employees for engaging in disfavored speech. The Court has subsequently and separately developed a doctrine that restricts the use of politics in government hiring. This line of doctrine likewise creates constitutional problems for common requirements for diversity statements in state university hiring.

In 1972, the Court decided a case involving a state university professor who did not have his one-year teaching contract renewed, allegedly as a result of his "public criticism of the policies of the college administration."[162] In this case, the professor had no contractual right to have his appointment continued, and the university enjoyed freedom over whether it would choose to appoint him to a new term on the faculty. The government might not be able to terminate a state university professor on the basis of disfavored political speech, but could it refuse to renew a contract or re-employ a professor on the basis of disfavored political speech? The Court held that this was not a constitutionally significant distinction.

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

161. Keyishian v. Bd. of Regents 385 U.S. 589, 603 (1967).
162. Perry v. Sindermann, 408 U.S. 593, 595 (1972).

This would allow the government "to produce a result which [it] could not command directly." . . . Such interference with constitutional rights is impermissible.[163]

"Denials of public employment" cannot be conditioned on how individuals exercise their First Amendment rights.[164]

Political patronage provides the most obvious context in which government employers might screen potential employees on the basis of their political views. The Court has held that there are important First Amendment limitations to which the government might do this. The Court has admitted that "the practice of patronage dismissals clearly infringes First Amendment interests," but "the prohibition on encroachment of First Amendment protections is not absolute. Restraints are permitted for appropriate reasons."[165] Those "appropriate reasons" are sharply constrained. "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny."[166] "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest."[167] "In short, if conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights."[168] A government employer might take into account the political beliefs and values of applicants when making hiring decisions, but the Court has emphasized that if it does so it must survive the most searching constitutional scrutiny. The government's purported interest in taking such actions must be "vital," and the political screen must be the "least restrictive of freedom of belief and association" as is necessary to achieve that end.[169]

The Court subsequently reaffirmed the vitality of these First Amendment principles in *Rutan v. Republican Party of Illinois*.[170]

Almost half a century ago, this Court made clear that the government "may not enact a regulation providing that no Republican . . . shall be appointed to federal office." What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly . . . Under our sustained precedent, conditioning hiring decisions on political belief and association

163. *Id.* at 597.
164. *Id.*
165. Elrod v. Burns, 427 U.S. 347, 360 (1976).
166. *Id.* at 362. (citing Buckley v. Valeo, 424 U.S. 1, 64–65 (1976)).
167. *Id.*
168. *Id.* at 363
169. *Id.*
170. Rutan v. Republican Party of Ill., 497 U.S. 62 (1990).

plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so.[171]

Of course, state universities are unlikely to adopt an explicit political patronage policy that simply prohibits the hiring of Republicans. But state university policies that achieve the same effect indirectly are equally infirm under current constitutional doctrine.

The judiciary must nonetheless be cautious about examining faculty hiring decisions. As one circuit court observed,

Academic freedom is a "special concern of the First Amendment." "No more direct assault on academic freedom can be imagined than for the school authorities to [refuse to hire] a teacher because of his or her philosophical, political, or ideological beliefs." But this court has recognized that respect for the "singular nature of academic decision-making" is also warranted because courts "lack the expertise to evaluate tenure decisions or to pass on the merits of a candidate's scholarship." The Supreme Court has also emphasized the respect due to academic judgment. Thus, judicial review of such decisions is limited to whether the "decision was based on a prohibited factor."[172]

Courts should not be evaluating faculty hiring decisions on their merits. Judges should not attempt to substitute their own judgment for the judgment of university officials regarding the scholarly quality and fit of prospective members of the faculty. At the same time, judges cannot tolerate state universities making hiring decisions on the basis of "a prohibited factor" – whether that prohibited factor is the candidate's race, sex, religion, or political beliefs. Respect for academic judgment cannot extend to tolerating state universities refusing to hire a professor "because of his or her philosophical, political, or ideological beliefs."[173]

Are diversity statements constitutionally acceptable under *Rutan*? The question again hinges on whether diversity statements serve as a genuine job requirement or a kind of political test and whether there is an overriding government interest that justifies the use of diversity statements that filter out candidates based on their political beliefs and speech. The political patronage decisions exemplified by *Rutan* reinforce the constitutional logic of the government employee speech decisions exemplified by *Pickering*.

There are circumstances in which political values are a relevant job qualification for a government position. Political values and loyalty may be essential to a policymaking role within a government organization, for example.[174] In a university context, this might well justify taking into account political values in selecting a dean who has broad discretion

171. *Id.* at 77–78 (citation omitted).
172. Wagner v. Jones, 664 F.3d 259, 269 (8th Cir. 2011) (citations omitted).
173. Bd. of Regents v. Roth, 408 U.S. 564, 581 (1972) (Douglas, J., dissenting)
174. Elrod v. Burns, 427 U.S. 347, 368 (1976).

to make and administer university policy. Members of the faculty might reasonably hold the view that professors should not be allowed to publicly criticize university officials or policy, but holding such views can properly be disqualifying for appointment to a policymaking role within the university.[175] Even in the context of shared faculty governance, individual members of the faculty do not hold the broad scope of authority associated with policymaking roles that might justify the use of political litmus tests. In addition, to construe every faculty position as equivalent to a policymaking position that might justify the use of explicit political tests for employment would make a shambles of any constitutionally recognized academic freedom principle. Even as a professional norm, it is recognized that professors enjoy academic freedom in their scholarship and teaching, but professors who assume senior administrative positions enjoy no comparable freedom in their policymaking role as a dean, provost, or university president. A state university might well be able to assert an overriding interest in requiring diversity statements from candidates for deanships given the functions that deans perform within the university and the relevance of those political values to how those functions are performed. Asserting a similar overriding interest in applying such filters to faculty hiring, however, makes a mockery of First Amendment interests. If the political beliefs contained in diversity statements can constitutionally be used to exclude candidates from state university faculties, applicants for faculty positions could also be excluded because they held radical political opinions, were critical of state government officials or university leaders, or belonged to the wrong political party.

In the university context, there might be some specific faculty positions that are not policymaking positions but that do have politically relevant job qualifications. A professor who was being hired to direct a scholarly center focused on advancing human rights, for example, could reasonably be evaluated in part on whether the professor's own beliefs were aligned with the substantive and value-laden mission of the center. It is a *bona fide* job qualification that such a professor believes in the existence and value of human rights, for example. Some ordinary faculty positions might properly have comparable expectations. The AAUP has long held that "university is derelict in one of its most significant responsibilities if it rejects prospective appointees because of their challenge to opinions current in the society at large, or because of their attack on approaches or doctrines that constitute the current conventional wisdom of their disciplines."[176] At the same

175. *See* Keith E. Whittington, *A Harvard's Dean Assault on Faculty Speech*, CHRON. HIGHER EDUC. (June 20, 2024), https://www.chronicle.com/article/a-harvard-deans-frontal-on-faculty-speech.

176. *Some Observations on Ideology, Competence, and Faculty Selection*, 72 ACADEME 1a (1986).

time, the organization has recognized that universities must prioritize, which can put pressure on that general principle. Thus, "even where a currently debated approach to the subject does seem to be of sufficient importance to have earned time in the curriculum, the further question arises as to whether fair and objective presentation of that approach requires the presence in the department of a committed partisan."[177] This might mean, for example, that if a literature department decides that it should have a professor with expertise in postmodernism, it might make the further determination that it would be most productive to hire a "partisan" of postmodernism and not an informed critic of postmodernism. The same calculation might be true in more politically salient fields of study. A law school might determine that it wants not just an antitrust scholar but a neo-Brandeisian or a law-and-economics antitrust scholar. It might reasonably decide to search not merely for a constitutional law scholar but for an originalist constitutional law scholar. A public policy school might reasonably decide that for a particular faculty position, it needs a Republican. In such very specific cases, the tight nexus between the specific faculty position and the First Amendment-protected expression would justify taking the latter into account when making a hiring decision.

But even if a public university could make a valid scholarly decision to conduct such a specific faculty search, it could not therefore generalize such criteria to inform all faculty searches. The political considerations that might narrow the range of candidates for a specific faculty position performing a specific role in the university would have much more ominous implications if they were therefore extended to the entire faculty. A state university could reasonably conclude that it should only look for Marxists when attempting to fill a position to teach Marxist economics, but it could not reasonably conclude that every faculty position at the university must be filled by a Marxist. A state university that determined that every member of its public policy school must be a Democrat would seem indistinguishable from the type of political patronage operation that the Court has ruled out on First Amendment grounds. At some point, the government's overriding interests become too tenuous to justify such a generalized policy.[178]

177. *Id.* at 2a.

178. Where that point is might not be readily evident, and courts should no doubt be cautious about how they make such assessments. Could a state university reasonably decide that it wants to establish an economics department composed entirely of Marxists such that political ideology becomes relevant to not just one faculty position but to every faculty position within that particular discipline? If it can do so for one department, can it do so for several departments? If it can establish an economics department in which Marxism is a valid job qualification, could it extend the same criteria to all of its social science faculty positions? Such a decision would seem to stretch to the breaking point the AAUP's claims about academic freedom principles and raise doubts about whether such choices are, in fact, being made on "good faith" scholarly grounds as opposed to nakedly political

State universities could not adopt a policy of excluding members of the Republican Party or those holding conservative or libertarian beliefs from the faculty.[179] They cannot do indirectly what they cannot do directly by adopting a policy that would exclude from the faculty those who hold political beliefs that are constitutive of conservative and libertarian political ideologies. Asserting that holding such political beliefs as, for example, the belief in the color-blind Constitution, is incompatible with faculty employment at a state university does not treat constitutionally protected political beliefs with the kind of sensitivity that the Court has demanded. State universities must be able to show that there is no less restrictive alternative that would advance the university's vital governmental interests, and for an ordinary faculty position, it is implausible that any such showing could be made. Application requirements that serve as *de facto* political litmus tests for state university faculty positions are presumptively unconstitutional under the political patronage cases.

VII. COMPELLED SPEECH

Diversity statements for state university faculty hiring also risk running afoul of the constitutional prohibition on "compelled speech." Compelled speech doctrine is simultaneously celebrated and mysterious. The Court has provided relatively little guidance as to how to identify impermissible compelled speech and has tended to find compelled speech in limited circumstances. Nonetheless, diversity statements for state university faculty hiring have characteristics that bring them into conflict with the logic of the compelled speech doctrine.

Compelled speech doctrine arose in the context of public schools, but with students rather than their teachers. When some states required that public school children recite the Pledge of Allegiance as part of their school duties, the Court was confronted with the question of whether individuals could be compelled to make such pronouncements. Since the objection to such requirements was advanced by adherents of the Jehovah's Witness faith, the Court initially treated the question as primarily one of religious free exercise and applied the conventional doctrine of the day, which held that religious conscience did not relieve "the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[180] No religious accommodation for those who objected to saluting the American flag was constitutionally necessary.

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grounds. *Id.* It would seem to stretch to the breaking point the constitutional principle that First Amendment protected expression should only be relevant to government employment in very limited circumstances.

179. Publ. Workers v. Mitchell, 330 U.S. 75, 100 (1947).

180. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940) (overruled by W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

The Court soon reversed course on the flag salute controversy and in doing so it reframed the issue as one of free speech rather than religious free exercise. When hearing the issue again, Justice Robert Jackson famously opined:

> If there is any fixed star in our constitutional constellation, it is that not 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. If there are any circumstances which permit an exception, they do not now occur to us.[181]

Students in West Virginia "are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means."[182] They are compelled "to declare a belief."[183] The mandate "requires the individual to communicate by word and sign his acceptance of the political ideas" laid down by government officials.[184] By being made to salute the flag and recite the Pledge, students are required to adopt an "affirmation of a belief and an attitude of mind," to "become unwilling converts to the prescribed ceremony."[185] The First Amendment, the Court held, not only "guards the individual's right to speak his own mind" but also prohibits public authorities from "compel[ling] him to utter what is not in his mind."[186]

The difficulty with *Barnette* is that the government can in fact sometimes compel citizens to say things and even to say things that they do not believe. This is specifically true within some institutional contexts. Although *Barnette* was a triumph for student speech rights, it had to be cabined in order to preserve the educational enterprise. Students in government schools are compelled to speak all the time. Properly speaking, *Barnette* did not establish a constitutional ban on compelled speech but a constitutional ban on compelled expressions of belief. Students may be made to say things that they do not actually believe, but they may not be made to affirm their belief in things that they do not actually believe.[187] Students may be compelled to memorize and dictate the words of the Pledge of Allegiance, but they may be made to *pledge allegiance* to any political faith. How to tell the difference? As a circuit court suggested, "So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere."[188] If

181. *Barnette*, 319 U.S. at 642.
182. *Id.* at 631.
183. *Id.*
184. *Id.* at 633.
185. *Id.*
186. *Id.* at 634.
187. *See* WHITTINGTON, *supra* note 112, at 143–47.
188. Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995).

compelled student speech serves a legitimate educational purpose, it does not run afoul of First Amendment limitations.[189]

Similar issues can arise in the context of a government workplace. Government employee speech doctrine and government speech doctrine help navigate the constitutional concerns of compelled speech in that context. As we have seen, *Garcetti* recognizes that employees may be made to engage in speech pursuant to their official duties.[190] The employee enjoys no First Amendment protection for such speech because it is not the employee's own. Like an actor hired to deliver lines in a play, the ideas being expressed by the employee in such circumstances are "commissioned" by the government employer.[191] Likewise, government speech doctrine takes note of the fact that the government can only speak through such commissioned speech. The government must have the capacity to direct employees to speak its messages if it is to speak at all. As Justice Alito concludes,

Governments are not natural persons and can only communicate through human agents who have been given the power to speak for the government. When individuals charged with speaking on behalf of the government act within the scope of their power to do so, they are "not speaking as citizens for First Amendment purposes."[192]

When a government employee is compelled to express a message favored by his supervisor, no First Amendment rights are violated because the employee has no First Amendment interest in the speech made in that context.

Essential to the case of both the student and the government employee is that individuals compelled to express messages in those contexts are readily understood to be play-acting. They are understood not to be expressing sincerely held beliefs but rather to be engaging in the speech that is professionally appropriate in that context. When the communications officer of a government agency speaks to the media, it is understood that the communications officer is expressing the agency's message and not necessarily her own. The speech that is being compelled in that context does not, in *Barnette*'s words, force anyone to "confess by word or act their faith."[193] It does not require "the individual to communicate by word and sign his acceptance of the political ideas."[194] Individuals are compelled to recite ideas but not to affirm their belief in them.

Diversity statements require affirmations of belief and not merely recitation of ideas. Students may be required to show that

189. Once again, the principle only works if legitimate educational purposes are understood to exclude efforts to secure political orthodoxies.
190. Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).
191. *Id.* at 422.
192. Shurtleff v. City of Bos., 142 S. Ct. 1583, 1598 (2022) (Alito, J., concurring).
193. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
194. *Id.* at 633.

they understand Justice Clarence Thomas's ideas. They may even be required to show that understanding by faithfully reciting his ideas or expressing a message in his voice. What they may not be required to do is pledge allegiance to his ideas or affirm their belief in those ideas. Similarly, an applicant for a faculty position can be expected to understand, explain, and articulate all sorts of ideas that the scholar might not personally accept. A constitutional law professor might be expected to understand Thomas's jurisprudence and be able to faithfully and successfully present it, but a constitutional law professor should not be required to affirm his agreement with Justice Thomas. Academic freedom principles allow universities to test scholars for facility with and competence in relevant ideas, but not to compel them to embrace those ideas. Likewise, the First Amendment allows state university officials to test scholars for facility with and competence in relevant ideas but generally does not allow them to compel scholars to affirm their personal belief in those ideas.[195]

It is this difference between competence with ideas and personal affirmance of belief in ideas that distinguishes diversity statements from more routine features of academic life and raises compelled speech problems for diversity statements. If universities were to make a judgment that every faculty member it employs should be familiar with a set of ideas associated with diversity, equity, and inclusion initiatives, there might be other objections to such a mandate but there would not be a compelled speech objection. Government employees, including members of a state university faculty, can be expected to take training in the requirements of civil rights law and university policy and be able to correctly express their understanding of their legal and

195. It is unclear how expansive the scope of "relevant ideas" might be in this context. If a university were to require that every professor it hired pass a test demonstrating their facility with the jurisprudence of Justice Clarence Thomas, even if it did not require that they agree with his jurisprudence, it would be hard-pressed to show that such knowledge is professionally relevant. Indeed, if university law schools only showed an interest in whether their prospective constitutional law professors were competent in their knowledge of Justice Thomas's jurisprudence but had no similar interest in whether they were competent in their knowledge of Justice Sonia Sotomayor's jurisprudence, one might well suspect that assessing professional competence was not the goal of the exercise.

Compelling job applicants to recite politically freighted information for no professionally justifiable reason would suggest that such compelled speech is just a pretext for pursuing impermissible ends. It is presumably a closer call whether requiring applicants for positions teaching molecular biology to demonstrate their understanding of the difference between equality of opportunity and equality of outcome than with requiring such applicants to demonstrate their understanding of Justice Thomas's jurisprudence, but not by much. If the political valence of diversity statement rubrics were reversed such that aspirants for university faculty positions would need to take a crash course on the ideas of Thomas Sowell before applying for jobs at state universities, it seems unlikely that such mandatory statements would be regarded as innocuous tests of professional fitness.

workplace responsibilities. Universities could not take the further step and demand that members of the faculty personally affirm their own commitment to those laws and policies.

Diversity statements do not take the form of competency tests. They take the form of personal affirmations. Since it is well understood that there is only one correct response to a diversity statement requirement, they require that anyone who seeks employment from a state university with such an application component profess the appropriate values and commitments. They require what *Barnette* says that government officials may not require – a confession of faith in a political orthodoxy. It does not matter that such professions of faith may be insincere. It might well be true that job candidates will go through the motions of saying what must be said in order to obtain a job without any genuine belief in what they are saying. They may mouth what they do not believe. What the Constitution prohibits is a demand by the government that individuals make "appropriate gestures of acceptance or respect"—"a bended knee"— to government-preferred dogma.[196] Requiring individuals to "simulate assent by words without belief" is as constitutionally objectionable as requiring them to "forego any contrary convictions of their own and become unwilling converts."[197]

The compelled speech doctrine is a narrow one, more narrow than its nomenclature suggests. There is no violation of the compelled speech doctrine for a university to require applicants to fill out an application form or submit a statement of their research interests or indicate what classes they would like to teach. A university might even require its applicants for faculty positions to be able to name the school mascot or recite the school fight song. What a state university may not do is require applicants or employees to profess their faith in a political or social orthodoxy. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox."[198] It is inconsistent with the core values and mission of an institution of higher learning to attempt to promulgate dogmas, no matter how deeply cherished those dogmas might be to the university community. It is unconstitutional for a state university to compel employees or would-be employees to profess their faith in those dogmas.

VIII. CONCLUSION

The fight for academic freedom in the United States was a fight to free university faculty from the demands of conformity to orthodoxies. The particulars of the orthodoxy varied, but American university

196. *Barnette*, 319 U.S., at 632–33.
197. *Id.* at 633.
198. *Id.* at 642.

professors had long been required to conform themselves to the values and opinions of powerful stakeholders in universities, whether wealthy donors, government officials, or the general public. The demand for academic freedom was the demand for allowing individual professors to be heterodox, nonconformists, and dissenters. When American universities embraced their modern mission of advancing the frontiers of human knowledge, they also embraced the understanding that universities were to be places where every idea could be held up to critical scrutiny and professors pledged loyalty only to the spirit of free inquiry.

The experience with loyalty oaths and other anti-subversive measures in the mid-twentieth century not only reinforced these lessons but also helped constitutionalize them. The justices drew on academic freedom advocates in contemplating what First Amendment values meant in a period in which government officials were demanding the exclusion of scholars with radical political opinions from institutions of higher education. Universities, professors, and increasingly judges were united in arguing that "to enjoin uniformity of outlook upon a university faculty would put a stop to learning at its source."[199] The First Amendment could not tolerate government officials casting a "pall of orthodoxy over the classroom."[200]

In the early twentieth century, it was accepted that the First Amendment had no application in governmental institutions like schools and workplaces. By the end of the twentieth century, the situation was radically different. The Court had recognized that both students and government employees had constitutional rights that the government must respect. Governmental institutions like state universities could no longer condition government benefits like admission and employment on the relinquishment of rights of political expression. Doctrines relating to government employee speech, government hiring, and compelled speech all imposed constitutional limits on the authority of government officials to require individuals to conform themselves to favored political and social views. The government could not punish or exclude nonconformists without substantial justification.

In *Barnette*, Justice Jackson warned, "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men."[201] Diversity statement requirements may have been adopted out of good motives, but they are still efforts to coerce uniformity of sentiment in university faculty. They seek to force dissidents to genuflect to the preferred orthodoxies of incumbent forces and to exclude from faculty positions those who will not bend the knee. If state universities can require scholars to profess belief in preferred social and political

199. Ass'n Am. U., *supra* note 99, at 3.
200. Keyishian v. Bd. of Regents 385 U.S. 589, 603 (1967).
201. *Barnette*, 319 U.S. at 640.

orthodoxies, there is no reason why those orthodoxies need to be limited to the ones favored by any particular faction of society. Professors at state universities in California may be obliged to pledge allegiance to some controversial political values while professors at state universities in Florida are obliged to say similar pledges to a completely different set of values. The Court has construed the First Amendment to prohibit such a possibility. It is not within the constitutional authority of state officials in either California or Florida to require such conformity of political views among its university professors. Loyalty oaths and political litmus tests were once thought relegated to the past, but the temptation to suppress disagreement is a constant. The lessons drawn from abuses of the past have provided greater constitutional security against those abuses being repeated in the present.