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Who's Afraid of Diversity, Equity, and Inclusion Statements in Faculty Hiring and Promotion at California Universities?

Matthew W. Babb

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WHO'S AFRAID OF DIVERSITY, EQUITY, AND INCLUSION STATEMENTS IN FACULTY HIRING AND PROMOTION AT CALIFORNIA UNIVERSITIES?

*Matthew W. Babb**

In 1996, California banned affirmative action in both state employment and state education. This ban extends to California's universities, which are therefore prohibited from using race, sex, color, ethnicity, or national origin in faculty hiring and promotion as well as student admissions. As a result, California's universities have had to think of alternative ways to improve the diversity of their faculty and students. One solution many California universities have adopted is to ask applicants for faculty positions or promotions to submit a statement describing their approach to diversity, equity, and inclusion. However, the use of diversity, equity, and inclusion statements in faculty hiring and promotion has come under significant criticism. Critics argue that basing faculty hiring and promotion on how an applicant approaches diversity, equity, and inclusion violates academic freedom and the First Amendment.

This Note addresses these criticisms and proposes a way forward. It argues that the criticisms levelled against diversity, equity, and inclusion statements only affect some of the ways these statements are implemented and used; other implementations and uses escape unscathed. In order to avoid the criticisms—and potential legal challenges—this Note makes two proposals. First, California universities should only use diversity, equity, and inclusion statements to evaluate applicants' contributions to diversity, equity, and inclusion, and not applicants' beliefs about these matters. Second, applicants' contributions should be evaluated primarily in terms of their impacts on student post-graduation outcomes and research and scholarship.

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And so, in this great question of reconciling three vast and partially contradictory streams of thought, the one panacea of Education leaps to the lips of all:—such human training as will best use the labor of all men without enslaving or brutalizing; such training as will give us poise to encourage the prejudices that bulwark society, and to stamp out those that in sheer barbarity deafen us to the wail of prisoned souls within the Veil, and the mounting fury of shackled men.

– W.E.B. Du Bois, *The Souls of Black Folk*

INTRODUCTION

In 1996, California voters approved a state constitutional amendment that prohibits state employers, including state universities, from making hiring and promotion decisions on the basis of applicants' race, sex, color, ethnicity, or national origin.¹ It also prohibits state universities from using race, sex, color, ethnicity, or national origin in admissions decisions.² This prohibition on considering race, sex, color, ethnicity, or national origin in university hiring and admissions has forced California universities to find alternative routes to promoting diversity.³ Beginning around 2018, public universities in California began adopting the use of diversity, equity, and inclusion (“DEI”) statements in their faculty hiring and promotion decisions.⁴ A DEI statement is a statement about an applicant's contributions and commitments to diversity, equity, and inclusion on campus, in the classroom, and in the applicant's research.⁵ Some universities, such as University of California at Los Angeles, have even adopted policies making it mandatory for faculty applicants to submit a DEI statement.⁶

While the use of DEI statements does not violate California's ban on affirmative action in hiring, opponents of DEI statements have

1. CAL. CONST. art. I, § 31(a).

2. *Id.*

3. Robert Maranto & James D. Paul, *Other Than Merit: The Prevalence of Diversity, Equity, and Inclusion Statements in University Hiring*, AM. ENTER. INST. (Nov. 8, 2021), <https://www.aei.org/research-products/report/other-than-merit-the-prevalence-of-diversity-equity-and-inclusion-statements-in-university-hiring/> [<https://perma.cc/HT2J-VVVY>].

4. *Id.*

5. *See Guidelines for Writing a Statement of Contributions to Diversity, Equity, and Inclusion*, U.C. DAVIS, <https://academicaffairs.ucdavis.edu/guidelines-writing-diversity-statement> [<https://perma.cc/J4E7-QCHG>].

6. *New EDI Statement Requirement for Regular Rank Faculty Searches*, UCLA (May 24, 2018), <https://equity.ucla.edu/news-and-events/new-edi-statement-requirement-for-regular-rank-faculty-searches/> [<https://perma.cc/X2NX-U5J8>].

argued that the use of such statements, especially when they are mandatory, in faculty hiring and promotions is a violation of academic freedom and constitutional free speech.⁷ However, less examined is the relationship of DEI statements to California public universities' interests in promoting diversity, equity, and inclusion in higher education. Can the use of DEI statements in faculty hiring and promotion support these interests? How should California universities implement and use DEI statements to support these interests and to avoid infringing on the legal rights of applicants?

The foregoing and related questions are important to California educational law and policy. If the interests DEI statements can serve are not enough to overcome the legal challenges, then their use in faculty hiring and promotion may have to cease. In addition, the ramifications of placing academic freedom and free speech ahead of considerations of diversity, equity, and inclusion will have national effects, as universities in other states may also be precluded from using DEI statements in faculty hiring and promotion.

California stands at the forefront of initiatives to promote diversity, equity, and inclusion in higher education settings. While DEI statements do not guarantee a more diverse faculty or better representation in research or in the classroom, the use of these statements nevertheless holds significant promise.⁸ And, as will be discussed below, we have good reason to believe better representation within faculty and the classroom has significant educational and economic benefits for underrepresented students.⁹

7. John O. McGinnis, *The University of California's New Loyalty Oath*, LAW & LIBERTY (Oct. 30, 2018), <https://lawliberty.org/the-university-of-californias-new-loyalty-oath/> [https://perma.cc/8WGU-UBRR]; see Erica Goldberg, "Good Orthodoxy" and the Legacy of Barnette, 13 FIU L. REV. 639, 642 (2019); Abigail Thompson, Opinion, *The University's New Loyalty Oath*, WALL ST. J. (Dec. 19, 2019, 6:55 PM), <https://www.wsj.com/articles/the-universitys-new-loyalty-oath-11576799749> [https://perma.cc/6NER-MYEQ]; Brian Leiter, *The Legal Problem with Diversity Statements*, CHRON. HIGHER EDUC. (Mar. 20, 2020) [hereinafter *The Legal Problem with Diversity Statements*], <https://www.chronicle.com/article/the-legal-problem-with-diversity-statements/> [https://perma.cc/HH22-9PK5]; Daniel M. Ortner, *In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia*, 70 CATH. U. L. REV. 515 (2021); Brian Leiter, *Diversity Statements Are Still in Legal Peril*, CHRON. HIGHER EDUC. (June 1, 2022) [hereinafter *Diversity Statements Are Still in Legal Peril*], <https://www.chronicle.com/article/diversity-statements-are-still-in-legal-peril/> [https://perma.cc/3BB8-Q5RP].

8. See Colleen Flaherty, *Making Diversity Happen*, INSIDE HIGHER ED (Sept. 27, 2017), <https://www.insidehighered.com/news/2017/09/28/how-two-institutions-diversified-their-faculties-without-spending-big-or-setting> [https://perma.cc/9GVK-CAR2].

9. See discussion *infra* Section II.D.

Adding to the importance of this topic is the U.S. Supreme Court's recent decision about the constitutionality of affirmative action in student admissions at publicly funded universities.¹⁰ While the Court did not hold that affirmative action in college admissions is per se unconstitutional, the Court did hold that affirmative action is subject to strict scrutiny—and that a college's desire for diversity in its student population is not sufficient to pass strict scrutiny.¹¹ While the impact of the Court's decision is not yet clear,¹² what is clear is California banned the use of affirmative action in its public university admissions back in 1996.¹³ There is a throughline from this ban to the current use of DEI statements at California's universities. After all, the ban has meant California universities had to take alternative steps to improve the diversity of their student and faculty populations, which for years following the ban were woefully inadequate.¹⁴ Thus, given the Supreme Court's recent ban on affirmative action in university admissions, California's use of DEI statements will likely stand as one piece of a model for how to cope with the new legal reality.

This Note will proceed as follows. Part I lays out California's ban on affirmative action and how this ban helps explain the use of DEI statements by California universities in faculty hiring and promotion. Part II then focuses in on DEI statements themselves, how California universities are using them in faculty hiring and promotion, and the benefits of their use. Part III examines and responds to the legal objections that opponents have raised against the use of DEI statements, paying particular attention to objections based on academic freedom and constitutional free speech. In light of the preceding discussions, Part IV proposes placing only minimal restrictions on public

10. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

11. *Id.* at 2166–68.

12. See Nick Anderson & Susan Svrluga, *How Is Affirmative Action Used in College Admissions?*, WASH. POST (Oct. 27, 2022, 1:04 PM), <https://www.washingtonpost.com/education/2022/01/24/college-admissions-affirmative-action-race/> [<https://perma.cc/WSX3-M7NV>] (noting that colleges use race as just one of many factors in admissions decisions and that nine states have already banned affirmative action in college admissions).

13. Teresa Wantanabe, *California Banned Affirmative Action in 1996. Inside the UC Struggle for Diversity*, L.A. TIMES (Oct. 31, 2022, 9:11 AM), <https://www.latimes.com/california/story/2022-10-31/california-banned-affirmative-action-uc-struggles-for-diversity> [<https://perma.cc/S2TM-V9TC>]; CAL. CONST. art. I, § 31(a).

14. Thomas Peele & Daniel J. Willis, *Dropping Affirmative Action Had Huge Impact on California's Public Universities*, EDSOURCE (Oct. 29, 2020), <https://edsource.org/2020/dropping-affirmative-action-had-huge-impact-on-californias-public-universities/642437> [<https://perma.cc/4EMH-KBY9>]; Watanabe, *supra* note 13.

universities' use of DEI statements in faculty hiring and promotion. One restriction is that universities should not evaluate the beliefs about DEI that applicants express in their DEI statements; instead, universities should only evaluate an applicant's contributions to DEI. The other restriction is that universities should evaluate an applicant's contributions to DEI based on how well those contributions promote the core missions of a university. Finally, the Note concludes by returning to the Supreme Court's recent decision about the constitutionality of affirmative action in university admissions and argues that California universities should, to the extent that they have not already, adopt the proposed minimal restrictions on using DEI statements in faculty hiring and promotions so that their uses of these statements can serve as models for a post-affirmative action world.

I. CALIFORNIA'S BAN ON AFFIRMATIVE ACTION

As may come as a surprise to those who know California to be amongst the most progressive states in the Union, the California Constitution currently prohibits affirmative action of any kind in employment decisions at public universities: "The State shall not discriminate against, *or grant preferential treatment to*, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."¹⁵ While this provision—call it "Section 31(a)"—has been repeatedly challenged both in courts¹⁶ and at the ballot box,¹⁷ it is still the law of the land in California. Surprisingly, the proportion of Californians who voted to keep Section 31(a) in 2020 was greater than the proportion that originally voted to enact it in 1996.¹⁸

It is important to pause and examine the scope of Section 31(a), for this provides the backdrop against which California has pursued

15. CAL. CONST. art. I, § 31(a) (emphasis added).

16. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997); *Woods v. Horton*, 167 Cal. App. 4th 658 (Ct. App. 2008); *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012). *But see* *Am. C.R. Found. v. L.A. Unified Sch. Dist.*, 169 Cal. App. 4th 436 (Ct. App. 2008) (holding that the affirmative action ban is compatible with previous desegregation order).

17. Conor Friedersdorf, *Why California Rejected Racial Preferences, Again*, ATLANTIC (Nov. 10, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/why-california-rejected-affirmative-action-again/617049/> [<https://perma.cc/9S4H-G5J5>].

18. *Id.*

other means of combating underrepresentation in its universities.¹⁹ On the one hand, the provision ensures that discrimination on the basis of race, sex, color, ethnicity, or national origin does not occur in a school's admissions process.²⁰ Accordingly, no school can discount an application for one of those reasons. Moreover, Section 31(a) ensures that no one's race, sex, color, ethnicity, or national origin counts as a plus factor in a school's decision of whether to admit them.²¹ On the other hand, however, Section 31(a) does not prevent a state agency from taking other steps to improve diversity or equity. For example, government institutions are permitted to consider racial and other demographic information when formulating policies so long as they do not make any final decisions on the basis of individuals' race, gender, color, ethnicity, or origin.²² Institutions are also permitted to use broad outreach and recruitment efforts, so long as such efforts do not impermissibly target those of a particular race, gender, color, ethnicity, or origin.²³ Accordingly, while Section 31(a) limits how state agencies may decide who ultimately receives certain state benefits (including university admission), it does not prevent state agencies from taking steps to ensure that the pool of applicants from which they draw is as diverse as possible.²⁴ It also does not prevent state agencies from taking steps to ensure that their institutions are welcoming to a diverse populace.²⁵

The limited scope of Section 31(a) allows it to be reconciled with certain California education statutes. The California Education Code requires higher education institutions to provide:

Educational equity not only through a diverse and representative student body and faculty but also through educational environments in which each person, regardless of race, gender, gender identity, gender expression, sexual

19. See Stephanie Saul, *Affirmative Action Was Banned at Two Top Universities. They Say They Need It.*, N.Y. TIMES (Aug. 6, 2022), <https://www.nytimes.com/2022/08/26/us/affirmative-action-admissions-supreme-court.html> [<https://perma.cc/UX3B-ZBEZ>].

20. See *Am. C.R. Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207, 218 (Ct. App. 2009).

21. See *Brown*, 674 F.3d at 1132–33.

22. See *Berkeley Unified*, 172 Cal. App. 4th at 222.

23. *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 46 (Ct. App. 2001).

24. *Id.*

25. See *id.* at 60–61.

orientation, age, disability, or economic circumstances, has a reasonable chance to fully develop his or her potential.²⁶

In addition, “[p]articular efforts should be made with regard to those who are historically and currently underrepresented in both their graduation rates from secondary institutions and in their attendance at California higher educational institutions.”²⁷ Were Section 31(a) to prevent considerations of race, sex, color, ethnicity, or national origin to play a role in any state actions, these provisions of the Education Code would likely be unconstitutional. But since Section 31(a) has been limited to admission decisions, the door is open for California universities to adopt policies outside the admissions process that have a likelihood of indirectly increasing the diversity of those students who are ultimately admitted. Such policies are how California universities can fulfill the foregoing duties proscribed by the Education Code without running afoul of Section 31(a).

California colleges have adopted a number of policies and programs, consistent with Section 31(a), that are designed to fulfill their mandate to promote student body diversity.²⁸ They have increased outreach to and involvement in underrepresented communities,²⁹ eliminated consideration of standardized test scores in admissions decisions,³⁰ and adopted strong anti-discrimination and anti-harassment

26. CAL. EDUC. CODE § 66010.2(c) (2012).

27. *Id.* § 66010.2(a).

28. *See, e.g., Regents Policy 4400: Policy on University of California Diversity Statement*, U.C. BD. REGENTS, <https://regents.universityofcalifornia.edu/governance/policies/4400.html> [https://perma.cc/GDC8-FHQ7].

29. *Outreach and Educational Partnerships*, U.C. OFF. PRESIDENT, <https://www.ucop.edu/outreach-educational-partnerships/index.html> [https://perma.cc/X2YN-V53M].

30. Press Release, Univ. of Cal. Off. of the President, University of California Board of Regents Unanimously Approved Changes to Standardized Testing Requirement for Undergraduates (Nov. 24, 2020), <https://www.universityofcalifornia.edu/press-room/university-california-board-regents-unanimously-approved-changes-standardized-testing> [https://perma.cc/Q6ZT-BT8Q]; Press Release, Cal. State Univ., CSU Trustees Vote to Amend Title 5 to Remove SAT and ACT Tests from Undergraduate Admissions (Mar. 23, 2022, 12:00 PM), <https://www.calstate.edu/csu-system/news/Pages/trustees-vote-remove-SAT-ACT-standardized-tests-2022.aspx> [https://perma.cc/JT5P-GJD8]. Standardized tests have long been considered an admissions barrier for underrepresented students. *See* Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/the-black-white-test-score-gap-why-it-persists-and-what-can-be-done/> [https://perma.cc/6U68-253N]; Richard V. Reeves & Dimitrios Halikias, *Race Gaps in SAT Scores Highlight Inequality and Hinder Upward Mobility*, BROOKINGS (Feb. 1, 2017), <https://www.brookings.edu/articles/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/> [https://perma.cc/TWY2-SB7X]; Amy Elizabeth Schmidt & Wayne J. Camara, *Group Differences in Standardized Test Scores and Other Educational Indicators*, in RETHINKING THE SAT: THE FUTURE OF STANDARDIZED TESTING IN UNIVERSITY ADMISSIONS 189, 191 (Rebecca Zwick ed., 2004).

policies.³¹ We will return to each of these attempts to increase student body diversity below. For now, what should be noted is that outreach, community involvement, and eliminating use of standardized tests appear aimed at increasing the overall diversity of the applicant pool, whereas anti-discrimination and anti-harassment measures appear aimed at maintaining the diversity that already exists on campuses. After all, a weak approach to discrimination and harassment is a good way to lose students who come to feel uncomfortable or unwelcome at the university they have chosen to attend.

It is against the foregoing backdrop that California universities have begun requiring that applicants for faculty positions and promotions submit a statement with their application dossiers that outlines their past and future contributions to diversity, equity, and inclusion.

II. DIVERSITY, EQUITY, AND INCLUSION STATEMENTS AT CALIFORNIA UNIVERSITIES

A. The Contents of Diversity, Equity, and Inclusion Statements

To ask what are DEI statements is to ask what applicants are to write in one. In the most general—and unhelpful—terms, DEI statements are supposed to describe *something* about an applicant’s relationship to diversity, equity, and inclusion. Much of the confusion about DEI statements turns on the fact that not everyone agrees about what this something should or can be. For our purposes, it will be useful to divide the potential contents of a DEI statement along three dimensions.

First, a DEI statement could describe an applicant’s contributions to or involvement in diversity, equity, and inclusion.³² The contributions an applicant describes can be her actual prior contributions to DEI efforts, or they can be the future contributions that the applicant plans on making.³³ For example, an applicant can describe how she

31. See UNIV. OF CAL. L.A., OFF. OF THE DEAN OF STUDENTS, STUDENT CODE OF CONDUCT, § II.C.102.11, https://deanofstudents.ucla.edu/individual-student-code#c_prohibited_behavior [<https://perma.cc/8PHA-2CP3>]; see also CAL. STATE UNIV., CSU POLICY PROHIBITING DISCRIMINATION, HARASSMENT, SEXUAL MISCONDUCT, SEXUAL EXPLOITATION, DATING VIOLENCE, DOMESTIC VIOLENCE, STALKING, AND RETALIATION (Jan. 22, 2023), <https://calstate.policystat.com/policy/10926024/latest/#autoid-dg6wx> [<https://perma.cc/Q3JW-9A6P>].

32. See Karen B. Schmalting et al., *Diversity Statements: How Faculty Applicants Address Diversity*, 8 J. DIVERSITY HIGHER EDUC. 213, 214 (2015). For the purpose of this Note, I treat “contributions” and “involvement” as conceptually equivalent.

33. See *id.*

has diversified the authors or topics covered in her courses, or how she has mentored underrepresented students, or how DEI has played a role in her research and scholarship, or how she has participated in DEI committees or programs.³⁴ Similarly, regarding planned future contributions, she can describe how she intends to continue her current activities or how she plans to expand on these efforts.³⁵ The central characteristic of one's contributions to DEI, whether past or planned future, is that these are the activities one has or wishes to engage in that promote DEI in the life of the university.³⁶

Second, a DEI statement could describe an applicant's beliefs about or commitments to diversity, equity, and inclusion.³⁷ For example, an applicant could describe why she believes DEI is important, what she believes DEI amounts to, or how she believes DEI is best achieved. She might also describe the beliefs and commitments motivating the DEI activities in which she has previously or plans to engage.

Finally, a DEI statement could describe an applicant's personal experiences with diversity.³⁸ In the California context, this dimension is fraught because the ban on affirmative action extends to public employment.³⁹ Of course, California universities do not automatically violate the ban if applicants, of their own accord, describe their personal backgrounds in their DEI statements. But a university will violate the ban if it treats this information as a plus factor supporting an applicant's candidacy.⁴⁰ Again, California universities shall not "grant preferential treatment to[] any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment."⁴¹ Nevertheless, a university might permit an applicant's membership in an underrepresented group to serve as a proxy for their DEI contributions. It is not clear whether allowing an applicant's underrepresented status to equate to a DEI contribution violates California's affirmative action ban. The reason it might is that an underrepresented applicant may have made no previous contributions to DEI, in

34. *See id.*

35. *See id.*

36. *See id.*

37. *See* Ching-Yune C. Sylvester et al., *The Promise of Diversity Statements: Insights and an Initial Framework Developed from a Faculty Search Process*, 1 CURRENTS 153, 153 (2019).

38. *See* Schmaling et al., *supra* note 32, at 214.

39. CAL. CONST. art. I, § 31(a).

40. *See id.*

41. *Id.*

which case their underrepresented status alone may be what advances their application.

An applicant can describe any of the foregoing—contributions, beliefs, personal experiences—in her DEI statement without describing the others. Granted, it is natural to draw certain inferences from one dimension of a DEI statement to another. For example, if an applicant has made numerous and substantive contributions to DEI over her career, then it is natural to infer that she believes contributing to DEI is good. Similarly, one might think the inference from being a member of an underrepresented group to having contributed to DEI efforts to be so natural as to automatically infer the latter from the former. Still, it is critically important to keep DEI contributions, beliefs, and personal experiences distinct. We have already seen what might happen if contributions and membership are equated: the result may be a violation of California’s affirmative action ban. The distinction between one’s contributions to DEI and one’s beliefs about DEI is of equal importance. After all, one can contribute to diversity while at the same time believe that her contributions are pointless or wrong-headed. One might even contribute to DEI and at the same time advocate for doing away with such practices. This is no different than those university professors who believe that teaching is a waste of their precious research time and yet reliably and aptly teach their classes each term.⁴² We will return to the distinction between contributions, beliefs, and personal experiences below.

B. How California Universities Are Implementing and Using Diversity, Equity, and Inclusion Statements

California universities have implemented and used DEI statements in a variety of ways. First, universities can either give applicants the option of submitting a DEI statement or require them to submit one. When California universities first introduced DEI statements into faculty hiring and promotion, they were largely optional: applicants were given the choice of whether to submit one with their dossier.⁴³ But California universities have since shifted towards making DEI statements mandatory. Most University of California campuses now

42. See Robert C. Serow et al., *Instructional Reform at Research Universities: Studying Faculty Motivation*, 22 REV. HIGHER EDUC. 411, 412–13 (1999).

43. See Schmalings et al., *supra* note 32, at 213–14.

require submission of DEI statements with applications for faculty positions or promotions.⁴⁴

Second, either university administration or a hiring department can implement the use of DEI statements. DEI statements are administration-implemented when a university's administrative staff recommends or requires their use and sets parameters for that use, including what applicants should address in their statements and how the statements will be evaluated. By contrast, DEI statements are department-implemented when it is the hiring department that determines whether and how the statements are to be used. The Academic Council of the University of California's Academic Senate unanimously adopted a policy recommendation that encourages the use of administration-implemented mandatory DEI statements in hiring and promotion across all University of California campuses.⁴⁵ As of the time of writing, administrations at nine of the ten campuses have adopted policies making submission of such statements mandatory for faculty positions and promotions.⁴⁶ By contrast, while the administration at University of California at Berkeley generally does not require applicants to submit DEI statements, many hiring departments at the university do.⁴⁷

Third, universities can use DEI statements in hiring, promotion, or both. California universities use DEI statements for both faculty hiring and promotion.⁴⁸ Applicants for faculty positions submit their DEI statement with their application dossier, which typically also includes a curriculum vitae, a statement about the applicant's past and future research, and a statement about the applicant's approach to teaching.⁴⁹ Applicants for tenure and other faculty promotions, such as to full professor, similarly include their DEI statement in their

44. UNIV. COMM. ON AFFIRMATIVE ACTION, DIVERSITY & EQUITY, UNIV. OF CAL. SYSTEMWIDE EQUAL OPPORTUNITY/AFFIRMATIVE ACTION ADM'RS GRP., THE USE OF CONTRIBUTIONS TO DIVERSITY, EQUITY, AND INCLUSION (DEI) STATEMENTS FOR ACADEMIC POSITIONS AT THE UNIVERSITY OF CALIFORNIA: JOINT RECOMMENDATIONS 2-3 (2019) [hereinafter JOINT RECOMMENDATIONS], https://senate.universityofcalifornia.edu/_files/reports/rm-mb-divchairs-use-of-dei-statements.pdf [<https://perma.cc/QB85-DJC4>].

45. *Id.* at 3.

46. *See id.* at 2. Since the University of California's Academic Senate published its policy, University of California at Santa Barbara has also made diversity statements a requirement for faculty position applications. *Statements of Inclusive Excellence*, U.C. SANTA BARBARA, <https://evc.ucsb.edu/diversity/inclusive-excellence> [<https://perma.cc/3YF4-SRU6>].

47. JOINT RECOMMENDATIONS, *supra* note 44, at 2 n.2.

48. *Id.* at 2-5.

49. *See* Schmalig et al., *supra* note 32, at 213.

application dossier, alongside other materials that can establish why the applicant deserves the promotion.⁵⁰

Fourth, universities can either use DEI statements to pre-screen applicants prior to reviewing the rest of applicants' materials or review DEI statements alongside applicants' entire dossiers. In 2018–2019, University of California at Berkeley and University of California at Davis used DEI statements to pre-screen applicants for certain faculty positions.⁵¹ These two universities required applicants to submit DEI statements.⁵² These statements were then read and evaluated prior to any other part of an applicant's dossier.⁵³ If an applicant's DEI statement failed to receive a passing score, she was removed from consideration; if the applicant received a passing score on her DEI statement, she would move on in the process and the remainder of her dossier would be reviewed.⁵⁴ Using DEI statements to pre-screen applicants is particularly controversial because some candidates with otherwise excellent scholarship or teaching experience may be ruled out prior to search committees even being aware of the applicant's scholarship or teaching.⁵⁵ The alternative to using DEI statements to pre-screen applicants is to review these statements alongside applicants' entire dossiers and treat the statements as one element among the many in deciding whether a particular applicant's candidacy should move forward. This more holistic use of DEI statements has been the approach of, for example, University of California at Los Angeles.⁵⁶

Lastly, regarding the evaluation of DEI statements, schools or departments can adopt rubrics and score DEI statements along specified metrics,⁵⁷ or they can take a more open-ended approach to evaluating DEI statements.⁵⁸ Alongside evaluating a statement's overall quality,

50. See JOINT RECOMMENDATIONS, *supra* note 44, at 4.

51. Brian Soucek, *Diversity Statements*, 55 U.C. DAVIS L. REV. 1989, 2003–04 (2022).

52. See *id.*

53. *Id.*

54. *Id.*

55. Michael Poliakoff, *How Diversity Screening at the University of California Could Degrade Faculty Quality*, FORBES (Jan. 21, 2020, 9:00 AM), <https://www.forbes.com/sites/michaelpoliakoff/2020/01/21/how-diversity-screening-at-the-university-of-california-could-degrade-faculty-quality> [<https://perma.cc/BKF5-R44T>].

56. UNIV. OF CAL. L.A., *SEARCHING FOR EXCELLENCE: EVIDENCE-BASED STRATEGIES FOR EQUITABLE AND INCLUSIVE FACULTY HIRING* 12 (2019), https://equity.ucla.edu/wp-content/uploads/2016/09/searching-for-excellence-v1_0-2016_09_29.pdf [<https://perma.cc/D2QW-RTPV>].

57. See, e.g., *Rubric for Assessing Candidate Contributions to Diversity, Equity, Inclusion, and Belonging*, U.C. BERKELEY, <https://ofew.berkeley.edu/recruitment/contributions-diversity/rubric-assessing-candidate-contributions-diversity-equity> [<https://perma.cc/6CGR-LZ3W>].

58. See, e.g., UNIV. OF CAL. L.A., *supra* note 56, at 12.

rubrics can assign scores tracking each of the dimensions discussed in Section II.A: contributions, beliefs, and personal experiences.⁵⁹ A university's rubric might be even more fined-grained, evaluating applicants for different kinds of DEI contributions (e.g., diversity in the classroom, diversity in administrative activities, diversity in scholarship) or their views on different aspects of diversity, equity, and inclusion (e.g., what counts as "diverse").

The foregoing discussion highlights that DEI statements can be implemented and used in a large variety of ways. DEI statements might be optional, department-implemented, for hiring and promotion, not for pre-screening, and unscored. Or they might be required, administration-implemented, for hiring only, for pre-screening, and scored. Indeed, as we have seen, University of California campuses have tried several implementation and use permutations. More important for present purposes, however, is the confusion that this variability can engender. Often, objections to DEI statements are cast in general language, when in fact the objection targets only a particular kind of implementation or use. Untangling this confusion is an aim of Part III below.

C. *The Primary Goals of Diversity, Equity, and Inclusion Statements*

It is no secret that one of the goals of DEI statements is to improve diversity, equity, and inclusion within faculty populations.⁶⁰ Even at California's public universities, faculty populations have notoriously skewed white and male.⁶¹ But, as we have already seen, California prohibits an applicant's membership in an underrepresented class from being treated as a plus factor when determining whether the applicant should be hired.⁶² However, the ban on affirmative action does not extend to treating an applicant's contributions or beliefs concerning DEI as plus factors.⁶³ Moreover, data shows that using DEI statements

59. See discussion *supra* Section II.A.

60. Flaherty, *supra* note 8.

61. See UNIV. OF CAL. OFF. OF THE PRESIDENT, UNIVERSITY OF CALIFORNIA 2022-2023 ADVANCING FACULTY DIVERSITY: PRELIMINARY REPORT 2-4 (2022), https://www.ucop.edu/faculty-diversity/_files/reports/afd-2022-2023-preliminary-report.pdf [<https://perma.cc/6DG4-5QNU>]; Larry Gordon, *Whites Dominate California College Faculties While Students Are More Diverse*, *Study Shows*, EDSOURCE (Mar. 5, 2018), <https://edsource.org/2018/whites-dominate-california-college-faculties-while-students-are-more-diverse-study-shows/594268> [<https://perma.cc/42RY-ABSF>].

62. See discussion *supra* Part I.

63. See *Am. C.R. Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207, 220 (Ct. App. 2009) ("The ballot pamphlet materials reinforce our view that section 31 was not intended to

does in fact improve faculty diversity.⁶⁴ Thus, DEI statements are an alternative and viable route for California universities to improve faculty diversity, equity, and inclusion, despite the ban on affirmative action.

DEI statements can also help universities make curricula and the contents of courses more diverse, equitable, and inclusive. It would come as little surprise that an applicant who says that she contributes to DEI by diversifying the authors and topics covered in her courses would then go on to cover diverse authors and topics after being hired.

Another goal that is never far from a university's mind and that DEI statements can help achieve is diversity in student populations. California is the second most demographically diverse state in the Union,⁶⁵ yet the students who are admitted or enroll at California universities do not mirror California's demographics.⁶⁶ One possible explanation for these disparities, beyond pointing the finger at California's ban on affirmative action, is that many underrepresented students do not feel welcome at California's public universities.⁶⁷ This may be because the courses at these universities do not meaningfully cover non-white authors or topics attuned to diverse students' lives and cultures. It is no stretch to believe that hiring faculty committed to DEI efforts can improve this situation (if such it be).

One last goal that DEI statements might help California universities achieve is promoting scholarship on diverse, equitable, and inclusive topics. At present, there is not much data on the relationships between DEI statements and diversity in scholarship. Nevertheless, the connection between the two appears straightforward. If an applicant both has a track record researching diverse topics and expresses an intent to continue doing so in her DEI statement, then this can provide

preclude all consideration of race by government entities but rather was intended to prohibit only those state programs and policies that discriminate against or grant preferential treatment to any individual or group on the basis of race.”)

64. Flaherty, *supra* note 8.

65. See *Racial and Ethnic Diversity in the United States: 2010 Census and 2020 Census*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/racial-and-ethnic-diversity-in-the-united-states-2010-and-2020-census.html> [<https://perma.cc/LR2G-Q87Y>] (reporting population diversity by state).

66. See *Undergraduate Admissions Summary*, U.C. (Mar. 6, 2023), <https://www.universityofcalifornia.edu/about-us/information-center/admissions-residency-and-ethnicity> [<https://perma.cc/5KDE-KHQ6>] (reporting about diversity of applicants, admissions, and enrollments across all UC schools).

67. See RANKIN & ASSOCS., UNIVERSITY OF CALIFORNIA SYSTEM: CAMPUS CLIMATE PROJECT FINAL REPORT 47, 50, 53, 56 (2014), https://campusclimate.ucop.edu/_common/files/pdf-climate/ucsystem-full-report.pdf [<https://perma.cc/H7L9-ZPLN>].

a university with a measure of assurance that the applicant will in fact continue her endeavors should she be hired.

*D. The Downstream Benefits of
Diversity, Equity, and Inclusion Statements*

There are also noteworthy downstream benefits of using DEI statements in addition to achieving the above goals (which can also be construed as benefits in their own right). One benefit is that DEI statements can improve student learning outcomes. A substantial body of research has shown that diverse representation of authors and viewpoints in the classroom improves educational outcomes for all students, and improvements are even more pronounced for underrepresented groups.⁶⁸ DEI statements can contribute to these improvements by helping universities hire faculty that can and will teach diverse authors and perspectives. An unfortunate fact about the American higher education experience is that most disciplines have developed “canons” that expose students to a very narrow range of thinkers and viewpoints.⁶⁹ Even more unfortunate is that these thinkers and the sources of these viewpoints tend to be racially, sexually, and ethnically homogenous.⁷⁰ To be sure, such individuals have made significant contributions to their respective disciplines. However, that does not mean others outside of this group have not also made significant contributions, nor does it mean that only these thinkers and their views should be represented in the classroom. The argument is simply that there is good pedagogical reason to diversify the canons of each discipline, to the extent they are not diverse, and expose students to a racial, sexual, ethnic, and cultural variety of thinkers and viewpoints—namely, that it can lead to better learning outcomes for students.⁷¹ DEI statements are exceptionally useful here, as they can help a hiring committee determine an applicant’s capacity to realize these pedagogical benefits.

68. DEBORAH S. HOLOIEN, DO DIFFERENCES MAKE A DIFFERENCE? THE EFFECTS OF DIVERSITY ON LEARNING, INTERGROUP OUTCOMES, AND CIVIC ENGAGEMENT 4 (2013), <https://inclusive.princeton.edu/sites/g/files/toruqf1831/files/pu-report-diversity-outcomes.pdf> [<https://perma.cc/FC9K-2NP3>] (collecting and summarizing research on how diversity in classrooms impacts student outcomes).

69. See Jordan Bates, *Literary Canons Exclude Works No Matter How Selective Canon Makers Are*, DAILY NEBRASKAN (Apr. 25, 2013), https://www.dailynebraskan.com/culture/literary-canons-exclude-works-no-matter-how-selective-canon-makers-are/article_da83def2-ad43-11e2-b07a-0019bb30f31a.html [<https://perma.cc/88Y2-N78K>].

70. *Id.*

71. See Paul D. Umbach & George D. Kuh, *Student Experiences with Diversity at Liberal Arts Colleges: Another Claim for Distinctiveness*, 77 J. HIGHER EDUC. 169, 171 (2006).

The impacts of diverse representation in educational content are particularly important in a diverse state like California. Studies have shown that underrepresented students benefit from being exposed to diverse authors and viewpoints.⁷² It can improve test scores and grades and reduce attrition rates.⁷³ Reduction in attrition is especially important, as attrition rates amongst underrepresented groups are relatively high in California,⁷⁴ and a student who does not graduate will lose out on the downstream benefits of holding a college degree. To be clear, this is not to say that only underrepresented students benefit from diversity in educational content; all groups can benefit from such content. Rather, it means that diverse content can help close the well-known and long-standing educational gap between underrepresented and non-underrepresented students.⁷⁵ California has long been trying to close this gap,⁷⁶ and so the state has all the more reason to want to implement and use DEI statements, insofar as these statements can increase the diversity of authors and viewpoints being taught in its higher education classrooms.

Another benefit of California universities using DEI statements, thereby diversifying educational content, is improved student economic outcomes and preparation for work in California.⁷⁷ Improved economic outcomes in the forms of higher employment rates, better pay, and more upward mobility can, in part, be attributed to improved grades and lower attrition rates.⁷⁸ But by increasing diversity in the classroom and on campus as a whole, the use of DEI statements in hiring and promotion can also lead to graduates being better prepared

72. Thomas S. Dee & Emily K. Penner, *The Causal Effects of Cultural Relevance: Evidence from an Ethnic Studies Curriculum*, 54 AM. EDUC. RSCH. J. 127, 129–30 (2017).

73. *Id.*

74. Compare PPIC HIGHER EDUC. CTR., IMPROVING COLLEGE COMPLETION (2019), <https://www.ppic.org/wp-content/uploads/higher-education-in-california-improving-college-completion-october-2019.pdf> [<https://perma.cc/HR69-NFLB>], with Jessica Bryant, *College Dropout Rates in the U.S.*, BESTCOLLEGES (Oct. 3, 2022), <https://www.bestcolleges.com/research/college-dropout-rate/> [<https://perma.cc/U6NL-VJ3Y>].

75. See Dee & Penner, *supra* note 72, at 128.

76. Richard Cano & Joe Hong, *Mind the Achievement Gap: California's Disparities in Education, Explained*, CALMATTERS (Jan. 19, 2022), <https://calmatters.org/explainers/achievement-gap-california-explainer-schools-education-disparities-explained/> [<https://perma.cc/5E68-XHJ4>].

77. See generally Brittany Aronson & Judson Laughter, *The Theory and Practice of Culturally Relevant Education: A Synthesis of Research Across Content Areas*, 86 REV. EDUC. RSCH. 163, 196–97 (2016).

78. See HANS JOHNSON & MARISOL C. MEJIA, PPIC HIGHER EDUC. CTR., HIGHER EDUCATION AND ECONOMIC OPPORTUNITY IN CALIFORNIA 3–24 (2020), <https://www.ppic.org/wp-content/uploads/higher-education-and-economic-opportunity-in-california-november-2020.pdf> [<https://perma.cc/R2WL-B8U5>].

to work in a diverse workforce, which in turn may make graduates more appealing to employers.⁷⁹ Many California employers have committed themselves to increasing the diversity of their workforces and at the same time creating inclusive and welcoming environments for such workforces.⁸⁰ Unsurprisingly, these employers want to hire employees who can contribute to both of these goals.⁸¹ Using DEI statements is one step California universities can take to prepare students to do just that.

In addition to the benefits DEI statements can have for students, they can also have downstream benefits for research and scholarship. It is important to acknowledge that academic employment, and especially the path to and attainment of tenure, often serves as a de facto prerequisite to pursuing one's research and scholarship.⁸² Those who do not get a tenure-stream faculty position often lack opportunities to conduct their research, write out their results, and receive feedback to improve both.⁸³ This is one of the major issues with universities increasingly relying on adjunct faculty to teach classes: such faculty have to teach more than tenure-stream faculty and, as a result, lack the time and energy to pursue their own work.⁸⁴ Thus, not only do faculty hiring committees choose who to hire, but they also ultimately choose the kinds and areas of research and scholarship that will be pursued. This is an incredible amount of power for anyone to hold, and it is unclear how well hiring committees wield this power. In particular, academic research and scholarship have often been criticized for overfocusing on narrow and idiosyncratic topics⁸⁵ and for ignoring questions and viewpoints that concern underrepresented groups.⁸⁶ In short,

79. *Quickfacts: California; United States*, U.S. CENSUS BUREAU (2022), <https://www.census.gov/quickfacts/fact/table/CA,US/PST045222> [<https://perma.cc/X83K-WFT8>].

80. See Jennifer Sor, *Silicon Valley Pledged to Become More Diverse. A Year Later, Has Anything Changed?*, S.F. CHRON. (Aug. 29, 2021, 8:36 PM), <https://www.sfchronicle.com/tech/article/Silicon-Valley-pledged-to-become-more-diverse-A-16414178.php> [<https://perma.cc/ZH4R-4PQ3>] (documenting CEOs who have pledged to promote diversity in the workforce).

81. *We Pledge to Act on Supporting More Inclusive Workplaces*, CEO ACTION FOR DIVERSITY & INCLUSION, <https://www.ceoaction.com/pledge> [<https://perma.cc/D27B-LAX6>].

82. See AM. ASS'N OF UNIV. PROFESSORS, CONTINGENT APPOINTMENTS & THE ACADEMIC PROFESSION 175 (2014), <https://www.aaup.org/file/Contingent%20Appointment.pdf> [<https://perma.cc/674L-XQZ2>].

83. *Id.*

84. *Id.*

85. Jeffrey Funk & Gary Smith, *The Hyper-Specialization of University Researchers*, MIND MATTERS (Oct. 4, 2022), <https://mindmatters.ai/2022/10/the-hyper-specialization-of-university-researchers/> [<https://perma.cc/S9XZ-CE2L>].

86. See Bas Hofstra et al., *The Diversity-Innovation Paradox in Science*, 117 PROC. NAT'L ACAD. SCIS. U.S. 9284, 9287–88 (2020).

academic research and scholarship have often overlooked or ignored the experiences of large portions of the population. As before, this omission is particularly problematic for a diverse state like California. DEI statements can help rectify this problem and thereby improve research and scholarship by identifying applicants with more inclusive research focuses.

III. RESPONDING TO LEGAL OBJECTIONS TO DIVERSITY, EQUITY, AND INCLUSION STATEMENTS

California universities have been at the forefront of using DEI statements in faculty hiring and promotions, blazing the trail for other universities to use them as well.⁸⁷ However, with the fanfare has come criticism. We now turn to the legal challenges confronting the implementation and use of DEI statements at California's universities. Many critics have framed their challenges around DEI statements that are mandatory or administration-implemented. But, as we will see, these challenges are red herrings. Whether mandatory, administration-implemented, or otherwise, the primary issue concerns giving applicants who submit a DEI statement *and therein describe their support for DEI efforts* an advantage over applicants who either do not submit a DEI statement or do not support DEI efforts.

The major legal challenges to DEI statements center around the First Amendment and constitutional free speech. DEI statements have been accused of running afoul of constitutional free speech in three ways: by violating academic freedom, by constituting viewpoint discrimination, and by chilling free expression.⁸⁸ This part treats each of these challenges in turn. The primary concern is not only identifying how exactly DEI statements can give rise to these issues but also showing that these issues are not as serious as they may appear.

A. Academic Freedom

A common objection to DEI statements is that their use violates academic freedom by forcing applicants to learn, teach, study, or otherwise engage diverse topics and authors.⁸⁹ Academic freedom is a

87. See Maranto & Paul, *supra* note 3, at 2.

88. Ortner, *supra* note 7, at 556–61.

89. *The Legal Problem with Diversity Statements*, *supra* note 7 (arguing that mandatory DEI statements are unconstitutional because they constitute viewpoint discrimination); Ortner, *supra* note 7, at 556–61 (arguing that mandatory DEI statements constitute viewpoint discrimination and violate academic freedom); see also Colleen Flaherty, *Making a Statement on Diversity Statements*,

confusing concept. Some treat it as meaning that potential and actual university faculty should be free to pursue whatever topics and in whatever manner they so please.⁹⁰ Call this “individual academic freedom,” as it concerns the freedom of individual potential or actual faculty members.⁹¹ Of course, individual academic freedom is something of a myth. No applicant or actual faculty member at a university has such unbounded freedom. Often departments are looking to hire individuals who are researching a particular topic or in a particular area; anyone working outside of that topic or area will not get the job.⁹² Worse, if an applicant decides to pursue a line of research or a methodology that will be difficult to pass peer review, he is unlikely to get published and, as a result, has little chance of being hired as tenure-track faculty and even less chance of receiving tenure.⁹³ This last point is particularly important because it means that unless someone takes measures to hire and promote such academics, they are likely to be pushed out of academia early in their careers—in which case they will have no chance of enjoying any amount of academic freedom. In short, there is not much to be called individual academic freedom: the game is already rigged so that anyone who wants to make a career in academia *must* choose to pursue the kinds of research and scholarship that universities or departments are hiring for, that will lead to publications, and that will eventually lead to tenure. Asking applicants also to engage in DEI efforts is a drop in the bucket compared to the restrictions they are already under.

It must be a different kind of academic freedom of which DEI statements putatively run afoul. One alternative conception of academic freedom—call it “discipline academic freedom”—focuses not on what individual academics wish to research and study but rather on what disciplines, treated as autonomous collectives, wish to have researched and studied. According to discipline academic freedom, as

INSIDE HIGHER EDUC. (Nov. 12, 2018), <https://www.insidehighered.com/news/2018/11/12/former-harvard-deans-tweet-against-required-faculty-diversity-statements-sets-debate> [https://perma.cc/75U3-QPDB] (reporting on a Harvard Dean’s Tweet about mandatory DEI statements); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603–04 (1967) (recognizing a right to academic freedom under the First Amendment).

90. See Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 832 (1987).

91. Individual academic freedom is sometimes called “professorial autonomy.” *Id.* at 833.

92. See Soucek, *supra* note 51, at 2040 (“Depending on a hiring unit’s goals, in certain faculty searches, research topics or teaching skill might be a threshold test that applicants have to satisfy before receiving more holistic consideration.”).

93. See Mark de Rond & Alan N. Miller, *Publish or Perish: Bane or Boon of Academic Life?*, J. MGMT. INQUIRY 321, 322 (2005).

understood here, the standards and ultimate determinations about who should be hired and promoted and what should be studied within a given discipline should be decided by members of the discipline. Brian Leiter has argued that DEI statements violate discipline academic freedom precisely because they encroach on a discipline's freedom to choose its members and what research will be pursued.⁹⁴ According to Leiter, under the proscriptions of discipline academic freedom, "it must be genuinely optional for departments to require diversity statements: They must be free to exercise their academic judgment to the effect that such statements serve no purpose in their discipline."⁹⁵ Moreover, "it is not enough that a particular department claims that 'diversity' statements are relevant; it must really be the case that disciplinary peers concur."⁹⁶

No doubt, some uses of DEI statements can violate discipline academic freedom. For example, administration-implemented mandatory DEI statements will violate discipline academic freedom by imposing a hiring requirement upon particular academic departments. Of course, as Leiter acknowledges, such violations can be avoided if the departments approve of or consent to the administration's adoption of mandatory DEI statements.⁹⁷ But if the administration unilaterally adopts the mandatory use of DEI statements, then they will effectively be taking away some of the hiring departments' freedom to choose who will be a member of their respective disciplines and what topics will be researched.⁹⁸ But it is far less clear whether any other uses of DEI statements step on the toes of discipline academic freedom. If use of DEI statements is optional rather than mandatory, then the ultimate choice whether to use them will be left to each hiring department. And if use of DEI statements is mandatory but department-implemented, rather than administration-implemented, then again there is no infringement on discipline academic freedom because in this case it will have been the members of the discipline itself who chose to require applicants to submit a DEI statement. Thus, DEI statements will run afoul of discipline academic freedom in a very narrow range of cases, namely, when they are administration-implemented, mandatory, and imposed on hiring departments that did not agree to their use.

94. *The Legal Problem with Diversity Statements*, *supra* note 7.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

Though DEI statements only infringe on discipline academic freedom in a narrow range of cases, we should still step back and ask whether discipline academic freedom should be absolute or limited. If it is absolute, then no university should use administration-implemented mandatory DEI statements. However, are there interests that can outweigh discipline academic freedom, such that when these interests are in play a university would be justified in using even administration-implemented mandatory DEI statements? While the proponents of academic freedom like to point out that diversity initiatives can be (but by no means necessarily are) in tension with a university's interest in producing knowledge and advancing inquiry,⁹⁹ they also tend to overlook that universities have another interest: educating students and preparing them for their future endeavors. To necessarily place the pursuit of knowledge and inquiry over student success is to demand that universities make student success necessarily subservient to the advancement of knowledge and inquiry, even to the point of sacrificing substantial gains in student success for marginal gains in scholarly advancement. It is also to ignore—if not contribute to—America's faltering educational system.¹⁰⁰ The argument, then, is that the benefits DEI statements have for student success¹⁰¹ can be worth the price of administrations infringing on discipline academic freedom by mandating the use of DEI statements in faculty hiring and promotion.

But perhaps discipline academic freedom is also the wrong kind of academic freedom to which universities should be aspiring. A third conception of academic freedom is university or institutional academic freedom, according to which it is universities themselves that have the freedom to choose who should be hired and what research topics are worthy of pursuit.¹⁰² While individual and discipline academic freedom both have their proponents, university academic freedom is the only kind that the U.S. Supreme Court has explicitly

99. Linda S. Ficht & Julia Levashina, *Should DEI Statements Be Included in Faculty Selection? Exploring Legal, Diversity, and Validity Issues*, 31 INT'L J. SELECTION & ASSESSMENT 212, 219 (2023).

100. See Dorothy Gambrell, *America's Broken Education System: How We're Failing Schools*, BLOOMBERG (Sept. 2, 2022, 5:00 AM), <https://www.bloomberg.com/features/2022-us-broken-education-system/> [<https://perma.cc/7FK4-7TJY>].

101. See discussion *supra* Section II.D.

102. Yudof, *supra* note 90, at 832.

endorsed.¹⁰³ Moreover, university academic freedom is compatible with virtually any implementation and use of DEI statements. For example, a university would be free to decide that DEI statements must be used in hiring and promotion decisions, and it could even require that applicants meet criteria in their DEI statements that have little or no relation to their individual teaching or research, so long as the criteria have some relation to the goals of the university. But it is also consistent with university academic freedom for a university to decide to leave the implementation and use of DEI statements to hiring departments. Thus, if university academic freedom is the only legally recognized kind of academic freedom, then universities have little to worry about.

B. Viewpoint Discrimination

Another objection to DEI statements is that their use in faculty hiring and promotion constitutes viewpoint discrimination by giving preference to pro-DEI candidates.¹⁰⁴ Put more dramatically, DEI statements are disguised “political tests” designed to suss out who sufficiently supports diversity, equity, and inclusion efforts, and who does not.¹⁰⁵ The Supreme Court introduced the viewpoint discrimination doctrine relatively recently and grounded it in the First Amendment.¹⁰⁶ At its core, the doctrine states that “[t]he First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects,”¹⁰⁷ nor does it permit the government to grant preferential treatment to those who express views on favored subjects.¹⁰⁸ The charge, then, is that DEI statements do just that—they impose prohibitions on speakers who hold adverse or indifferent views about DEI. Insofar as such views place an applicant at a disadvantage compared to applicants who express pro-

103. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (“The freedom of a university to make its own judgments as to education includes the selection of its student body.” (emphasis added)).

104. Goldberg, *supra* note 7, at 653 (arguing that mandatory DEI statements constitute viewpoint discrimination); Thompson, *supra* note 7 (arguing that DEI statements constitute “political tests”); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that states cannot mandate “unification of opinion”); *Wagner v. Jones*, 664 F.3d 259 (8th Cir. 2011) (discussing and relevantly applying the First Amendment doctrine of “viewpoint discrimination”).

105. Thompson, *supra* note 7; *The Legal Problem with Diversity Statements*, *supra* note 7.

106. Lackland H. Bloom, *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. REV. F. 20, 20 (2019).

107. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

108. *Id.* at 396.

DEI viewpoints, the use of DEI statements amounts to unconstitutional viewpoint discrimination.¹⁰⁹

Two points in response to this objection. First, the objection applies only to the extent that universities evaluate DEI statements for the beliefs expressed therein. Opponents of DEI statements often conflate two of the dimensions along which these statements might be evaluated: the applicant's *contributions* to DEI and her *beliefs* about DEI. While it is natural to infer that someone who actively contributes to DEI also believes that DEI efforts are good or praiseworthy, it is a fallacy to think that one who contributes to something *must* believe the thing is praiseworthy. Just because I play tennis does not mean I believe playing tennis is right, good, or otherwise praiseworthy. I might, after all, have other reasons for playing tennis, including keeping a promise to a friend to play or earning a paycheck. I might even play for one of these reasons despite also believing that in and of itself tennis is a pointless activity. Similarly, many people work jobs that make them unhappy.¹¹⁰ Call the assumption that just because someone does some activity—even does it well—they must also believe the activity is good “the action-belief fallacy.”

It is fairly easy to find instances of the action-belief fallacy in the debate about DEI statements:

In academia, diversity statements have speech-like elements, in that they are written statements by academics, describing their teaching, and, at some schools, their scholarship. *The required statement commits a professor to a particular view and approach to scholarship and teaching.*¹¹¹

It is not merely requiring a professor to embrace university policy, but to be a champion of it. A professor is not allowed to do the bare minimum, *but is expected to go beyond that*

109. Sometimes this objection is put in terms of DEI statements being unconstitutional political tests. According to the U.S. Supreme Court, a university cannot condition a faculty member's employment on not holding (or holding) certain political views, not even a belief in communism during the Cold War. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967). Insofar as pro-DEI views are political in the sense defined by the Court, the argument goes, the use of DEI statements again violates the First Amendment.

110. Leah Collins, *Job Unhappiness Is at a Staggering All-Time High, According to Gallup*, CNBC: WORKFORCE WIRE (Aug. 12, 2022, 9:55 AM), <https://www.cnbc.com/2022/08/12/job-unhappiness-is-at-a-staggering-all-time-high-according-to-gallup.html> [<https://perma.cc/NL7G-W92B>].

111. Goldberg, *supra* note 7, at 663 (emphasis added).

*and affirmatively embrace the university's policies on diversity.*¹¹²

It is hard to see at first, but once the unquestioned inference from contributions to a belief (or commitment or embrace) about DEI is made apparent, it is hard to unsee.

If a university's use of DEI statements is to constitute viewpoint discrimination, it can only be because the university penalizes applicants for the beliefs about DEI that applicants express in their statements (or for the lack of expressed beliefs). However, that does not mean that universities cannot ask and evaluate applicants for their *contributions* to DEI. That is, while a university likely cannot penalize a faculty applicant for writing that she believes DEI efforts are pointless, that should not bar the university for penalizing the applicant for having made no or minimal contributions to DEI. There is a direct analogy to teaching here: universities should not penalize faculty applicants who believe teaching is a distraction from their research and should be done by someone else, but universities can penalize applicants who have never taught or who refuse to teach.¹¹³ In short, the U.S. Supreme Court's viewpoint discrimination doctrine should only, if at all, restrict universities from evaluating faculty applicants' beliefs about DEI. It should not restrict them from evaluating applicants' DEI contributions. To be sure, this does not mean applicants should be prohibited from expressing their beliefs about DEI in their DEI statements. Rather, it just means that universities should avoid evaluating these beliefs when making hiring or promotion decisions.

Second, setting aside the foregoing, it is far from clear how the U.S. Supreme Court's viewpoint discrimination doctrine operates in the context of public university faculty employment—which is at issue here. In general, the price a person has to pay to be a government employee is giving up some First Amendment protections.¹¹⁴ Under certain conditions, a government agency may engage in viewpoint discrimination when its employees, including public university faculty, are speaking in their official capacities.¹¹⁵ However, less clear is what the conditions are for determining when a public university may engage in viewpoint discrimination, especially as regards faculty speech

112. Ortner, *supra* note 7, at 562 (emphasis added).

113. *See, e.g.*, JOINT RECOMMENDATIONS, *supra* note 44, at 4.

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

115. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

in teaching and scholarship. In *Garcetti v. Ceballos*,¹¹⁶ the Court explicitly avoided this question: “We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”¹¹⁷ This has resulted in a split amongst the circuit courts, with some circuits holding that the standard set out in *Garcetti* applies to the teaching and scholarship of university faculty¹¹⁸ and other circuits instead holding that some other non-*Garcetti* standard applies.¹¹⁹ Brian Soucek has aptly described the *Garcetti* standard, the competing standards proposed by some circuit courts, and how each of these standards apply to university faculty speech—so we do not need to retread those grounds here.¹²⁰ The important point for present purposes is that no matter which standard ultimately wins out, universities will have the ability to engage in viewpoint discrimination as regards the expressed opinions of their faculty.¹²¹ Given that hiring and promoting faculty who are committed to diversity, equity, and inclusion can support a university’s goals and provide important downstream benefits to students,¹²² there is little reason to believe that the use of DEI statements in faculty hiring and promotion necessarily constitutes a prohibited form of viewpoint discrimination. Rather, a university will have to ensure that the beliefs about DEI that the university prefers are adequately grounded in the university’s legitimate goals and missions.

C. Chilled Speech

The last objection to DEI statements that one might come across is that DEI statements violate the First Amendment by chilling speech.¹²³ This objection is related to the previous one concerning

116. 547 U.S. 410 (2006).

117. *Id.* at 425.

118. *Renken v. Gregory*, 541 F.3d 769, 774–75 (7th Cir. 2008).

119. *Meriwether v. Hartop*, 992 F.3d 492, 504–05 (6th Cir. 2021); *Demers v. Austin*, 746 F.3d 402, 406, 412 (9th Cir. 2014); *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 562–64 (4th Cir. 2011).

120. Soucek, *supra* note 51, at 2023–35.

121. *See id.*

122. *See* discussion *supra* Sections II.C–D.

123. *See* Eugene Volokh, *Do University Diversity Statement Requirements Violate the Constitution?*, VOLOKH CONSPIRACY (Aug. 30, 2022, 2:54 PM), <https://reason.com/volokh/2022/08/30/do-university-diversity-statement-requirements-violate-the-constitution/> [<https://perma.cc/N9EQ-FZVA>] (briefly describing and linking to video of a debate between Eugene Volokh and Brian Soucek).

viewpoint discrimination. But instead of focusing on what the university is in effect doing in using DEI statements, this objection focuses on the effects DEI statements have on applicants. Applicants adverse or indifferent to DEI efforts may feel compelled to keep their views to themselves both in their DEI statements and in general.¹²⁴ First Amendment standards “must give the benefit of any doubt to protecting rather than stifling speech.”¹²⁵

Despite chilled speech being the least discussed objection to DEI statements, it appears to be the most compelling. If a university’s use of DEI statements pressures some applicants to say (or not to say) things that they otherwise would not say (or would say), then these applicants may have a workable First Amendment claim.¹²⁶ This is all the more reason for public universities, including California’s universities, to focus DEI statements on applicants’ contributions to DEI and not on applicants’ beliefs about DEI.

IV. MINIMAL LIMITATIONS FOR DIVERSITY, EQUITY, AND INCLUSION STATEMENTS

Some have urged placing substantial restrictions on the implementation and use of DEI statements.¹²⁷ Most of these proposed restrictions are justified by some combination of concerns about academic freedom, viewpoint discrimination, and chilled speech.¹²⁸ For example, several commentators have proposed that decisions about whether or how to use DEI statements should be left solely to individual academics, because otherwise individual or department academic freedom will be violated.¹²⁹ Others take concerns about academic freedom and free speech even further and maintain that DEI statements should be done away with altogether.¹³⁰ As argued above, however,

124. See Goldberg, *supra* note 7, at 642, 655.

125. Fed. Election Comm’n v. Wis. Right to Life, Inc., 551 U.S. 449, 451 (2007).

126. Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 556–57 (1963) (“While . . . all legitimate organizations are the beneficiaries of these protections, they are all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their neighbors and the deterrent and ‘chilling’ effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial.”). *But see* Sunéal Bedi, *The Myth of the Chilling Effect*, 35 HARV. J. L. & TECH. 267, 294–302 (1987) (“Rather than deterring the speech that is intended, the study showed that respondents could still communicate exactly what they want to but instead express it in a more circuitous way.”).

127. See Soucek, *supra* note 51, at 2048–61.

128. *Id.*

129. *Id.* at 2051–52; Ortner, *supra* note 7, at 572–73; *Diversity Statements Are Still in Legal Peril*, *supra* note 7.

130. Thompson, *supra* note 7; *Diversity Statements Are Still in Legal Peril*, *supra* note 7.

concerns over academic freedom and viewpoint discrimination are likely overstated.¹³¹

In this part, I propose that there need only be two restrictions on the use of DEI statements in faculty hiring and promotion. To be clear at the outset, a university or department may opt to impose more restrictions than what I propose here. My claim is only that there are two restrictions that should be imposed. The first is needed to respect applicants' free speech rights. The second is needed to ensure DEI statements support the missions of the university.

*A. Diversity, Equity, and Inclusion Statements
Should Only Be Evaluated for Contributions*

Given the legal risks involved in evaluating the beliefs expressed in DEI statements, universities should only evaluate DEI statements for applicants' substantive contributions to DEI. Universities risk viewpoint discrimination if they give preference to certain sets of beliefs about DEI over other sets of beliefs.¹³² Similarly, universities risk chilling constitutionally protected speech if they use and evaluate DEI statements in certain ways, such as by signaling in job advertisements that they want applicants to express certain pro-diversity beliefs.¹³³ Evaluating only an applicant's contributions to DEI efforts avoids these risks and still enables a university to achieve the goals and benefits for which DEI statements are used. As long as an applicant is willing and able to teach diverse authors and topics in the classroom, the applicant can still promote a diversified curriculum and provide students with the academic and economic benefits that come with such a curriculum.¹³⁴ And as long as the applicant is willing and able to research and publish on diverse topics and issues, the applicant can promote diversity in research and the representation of viewpoints that have historically been overlooked.¹³⁵

Since not all applicants have had significant opportunities to contribute to DEI efforts, it is also important that universities evaluate DEI statements for both the past and the planned contributions described therein. While there should be no requirement that planned contributions are given equal weight to past contributions, how the differences

131. See discussion *supra* Sections III.A–B.

132. See discussion *supra* Section III.B.

133. See discussion *supra* Section III.C.

134. See discussion *supra* Sections II.C–D.

135. See discussion *supra* Section II.D.

between past and planned contributions are weighed exactly is best left to hiring departments. Depending on a department's specific needs, it may want to weigh past contributions more heavily than planned ones, or the department's needs may lead it to weigh the two equally. At the very least, there is good reason to give planned contributions *some* weight. In particular, not doing so would place less experienced applicants at an insurmountable disadvantage as compared to applicants who have more years of experience.

In sum, universities should only evaluate DEI statements for applicants' substantive past and planned contributions to DEI. We will unpack what makes a contribution "substantive" in the next section. The critical point here is that DEI statements should be permitted to be optional or mandatory, administration- or department-implemented, for hiring or promotion, and for pre-screening or not. The only restriction that should be placed on the use of DEI statements is in terms of how these statements are evaluated.

B. Diversity, Equity, and Inclusion Statements Should Promote the Goals of the University

As a non-legal normative matter, it is not enough that the requirements and evaluation of DEI statements be restricted, in general, to contributions to DEI efforts. There must also be some way of distinguishing the meritoriousness or importance of different contributions. Since the meritoriousness of a contribution should not be evaluated in terms of it promoting some particular conception of DEI (as that would risk viewpoint discrimination or chilling protected speech), we need other metrics for evaluating contributions to DEI efforts. I propose two metrics, both related to the primary goals of all universities. The first metric is the effects of an applicant's DEI contributions on student post-graduation outcomes. The second metric is the effects of an applicant's DEI contributions on research and scholarship.

1. Student Post-Graduation Outcomes

DEI statements should be in part evaluated in terms of how the contributions described therein promote positive post-graduation outcomes for students. A positive post-graduation outcome should not merely mean getting a well-paying job, as there are other worthwhile things one can do with a university education besides entering the workforce. One might, for example, volunteer for a nonprofit, become an entrepreneur, a community activist, or an independent artist, write

a book, pursue post-graduate studies, experience more of the world, or join a monastery. In short, students themselves should determine what counts as a “positive” post-graduation outcome. The value of students’ outcomes should not be determined by university administrators, let alone politicians.

Although students should be the ones to say whether their post-graduation outcomes are meaningful or not, that of course does not mean employers, communities, grant providers, venture capitalists, or anyone else that could support a student’s post-graduation endeavors are unimportant. Whether a university graduate can sustain herself as an independent artist will depend on whether people buy her work. Similarly, whether a university graduate can succeed as a community activist will depend on whether her community accepts her for that role. Accordingly, whether certain kinds of DEI contributions promote positive post-graduation outcomes will depend on how well those contributions are attuned to the world outside the university.

Some might accuse me of putting the chicken before the egg. I am proposing that DEI statements be evaluated in terms of effects on post-graduation outcomes, but, the accusation might go, DEI statements need to be implemented and used *before* we can measure their effects on post-graduation outcomes. Thinking about an objection like this is useful for highlighting a potential misconception about my proposal. The proposal is not that a DEI statement should be evaluated in terms of how the DEI statement itself might promote positive student outcomes. A proposal like that is borderline nonsensical. Rather, the proposal is that DEI statements should be evaluated in terms of the likelihood that the contributions described therein will promote positive student outcomes. What is required to make such an evaluation is data relating contributions of that type to positive student outcomes. This in turn means that a university should have some data about DEI contributions and student outcomes before it implements and uses DEI statements in faculty hiring and promotion decisions. This presents the practical problem of gathering the relevant data. Fortunately, university faculty have been making a variety of contributions to DEI for decades, and data about how these contributions promote positive student outcomes already exists.¹³⁶ So the real challenge for universities is collecting and synthesizing the existing and future data and then

136. See KUH ET AL., WHAT MATTERS TO STUDENT SUCCESS: A REVIEW OF THE LITERATURE 51–75 (2006).

communicating it to departments and hiring committees in a useful form.

But what if the data is not yet available for certain kinds of DEI contributions? If an applicant engages in such contributions, should they have no weight in a hiring committee's decision-making process? Two points are important here. First, the bar for a kind of contribution promoting positive post-graduation outcomes should not be high. The contribution should not have to ensure or guarantee such outcomes. Rather, it should only have to raise the likelihood of positive post-graduation outcomes to carry deliberative weight. A contribution helping even one student achieve a positive postgraduation outcome suffices to show that the contribution makes such an outcome more likely. How much weight that raised likelihood carries, however, is a hard question and one that may have to be left to hiring committees to decide.

Second, while universities and hiring committees should rely on data collected through formal empirical studies, universities and hiring committees should also be given some latitude to rely on their own observations as well as self-reporting by former students. Such observations and self-reports will be especially important for positive student outcomes for which formal studies have not yet collected data. For example, it is hard to find reliable data on students who become volunteers or community activists.¹³⁷ But members of a hiring committee may know of a student who went into volunteer work after graduation, who is happy in that role, and who attributes it to certain DEI activities at the university. The point is that universities should accept a range of methods and channels for determining whether a given kind of DEI activity promotes positive student outcomes.

2. Research and Scholarship

DEI statements should also be evaluated in terms of how the contributions described therein advance and promote future research and scholarship. In many cases, DEI contributions will advance research and scholarship by the contributions themselves being instances of research and scholarship. For example, prior research and publications about the effects of DEI efforts on student outcomes can promote

137. See, e.g., *Student Placement*, MASS. INST. TECH., <https://ir.mit.edu/student-placement> [<https://perma.cc/2QB5-9HHJ>] (reporting students entering non-profits and membership organizations but not volunteer or community service).

further inquiries into related topics.¹³⁸ But that is not the only way for DEI contributions to advance research and scholarship. Universities should also consider indirect routes to advancement of research and scholarship. For example, some DEI efforts may lead to underrepresented graduate students feeling more welcome in their chosen fields—thereby staying in those fields and contributing their own unique work.¹³⁹ Other DEI contributions may lead to the development of new ideas, topics, or research paths.¹⁴⁰ And yet others may lead to more collegiality and collaboration amongst fellow researchers.¹⁴¹

A not uncommon criticism of DEI statements is that they will *reduce* the quality of research and scholarship because they distract hiring committees from paying attention to the quality of an applicant's existing and potential future scholarly achievements.¹⁴² This sort of criticism rests on two questionable assumptions. First, it assumes that DEI contributions and quality research are somehow exclusive activities—that universities do not get applicants that both make substantial contributions to DEI and produce excellent scholarship. This is of course suspect. Just as an applicant can have excellent records of teaching and scholarship, so too can they have excellent records of DEI contributions and scholarship.¹⁴³ There is nothing inherent to DEI efforts that can allow one to conclude that they preclude or inhibit great scholarship. Second, the criticism assumes that hiring committees, or universities more generally, will hire applicants with stellar DEI contributions and decent records of scholarship over candidates with more substantial records of scholarship. On the one hand, so what? If those DEI contributions promote positive student outcomes

138. See, e.g., KUH ET AL., *supra* note 136, at 51–75.

139. See Bas Hofstra et al., *supra* note 86, at 9284 (“[D]emographically underrepresented students innovate at higher rates than majority students, but their novel contributions are discounted and less likely to earn them academic positions.”).

140. *Id.*

141. John Estafanous, *How to Measure and Promote Inclusion and Collaboration in the Workplace*, FORBES (Feb. 22, 2023, 7:15 AM), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2023/02/22/how-to-measure-and-promote-inclusion-and-collaboration-in-the-workplace/> [<https://perma.cc/VU6D-CWZM>] (“Collaboration improves when teams are aligned with one another on goals and commitments.”).

142. Poliakoff, *supra* note 55; Ortnier, *supra* note 7, at 569.

143. Cf. Adi Gaskell, *Diversity Doesn't Have to Come with Productivity Trade-Offs*, FORBES (May 13, 2019, 8:51 AM), <https://www.forbes.com/sites/adigaskell/2019/05/13/diversity-doesnt-have-to-come-with-productivity-trade-offs/> [<https://perma.cc/4X4V-7MX>] (“The study, which suggested that 95% of executives thought continuous innovation important, revealed that equality was more important than practically any other factor, be that industry, country or other forms of workforce demographics.”).

or have downstream effects that promote the scholarship of others, then it may be in the university's best interest to hire that candidate over candidates with more scholarship of their own. Again, the same goes for teaching: it can be in a university's best interest to hire a candidate with greater teaching potential over candidates with more research potential.¹⁴⁴ On the other hand, this assumption takes an unnecessarily cynical view of hiring committees and universities. Granted, most of the pushback against DEI statements appears grounded in distrust of those with hiring power. In those instances where a hiring committee does use DEI statements to abuse its power, of course something should be done to prevent such abuses from happening again. But such hypotheticals are a weak reason to believe that using DEI statements in faculty hiring will erode research and scholarship.

CONCLUSION

On January 24, 2022, the U.S. Supreme Court granted certiorari to hear a pair of cases requesting that the Court overturn *Grutter v. Bollinger*¹⁴⁵ and hold that using affirmative action in admissions to publicly-funded universities is unconstitutional.¹⁴⁶ The petitioners in these cases argued that affirmative action in college admissions is no longer necessary, does more harm than good, and violates the Fourteenth Amendment.¹⁴⁷ On June 29, 2023, the Court agreed with the petitioners and overruled *Grutter*.¹⁴⁸ As a result, public universities across the nation now have to abandon the use of affirmative action in admissions decisions and pursue other means of ensuring diversity in their student populations. Since affirmative action has been banned in California for over twenty-five years, and since California universities have been trying to increase student diversity despite this ban, other public universities should look to California for how to move forward

144. See Ashley N. Harlow et al., *Stakeholder Perspectives on Hiring Teaching-Focused Faculty at Research-Intensive Universities*, INT'L J. STEM EDUC., Aug. 2022, at 1.

145. 539 U.S. 306 (2003).

146. Dan Schweitzer, *Cases Granted Review: Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 20-1199; *Students for Fair Admissions, Inc. v. University of North Carolina*, 21-707, NAT'L ASS'N ATT'YS GEN. (Feb. 14, 2022), <https://www.naag.org/attorney-general-journal/supreme-court-report-students-for-fair-admissions-inc-v-president-students-for-fair-admissions-inc-v-university-of-north-carolina-21-707/> [<https://perma.cc/9G4W-D39J>].

147. *Id.*

148. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

in a post-affirmative action world. One thing they will find is the use of DEI statements in faculty hiring and promotion.

However, if California universities' uses of DEI statements are to stand as models for the new, post-affirmative action world, these universities will have to make sure that the models they provide are acceptable both inside and outside of California. I believe they will be acceptable only if they follow my proposed requirements of only evaluating applicants' contributions to DEI and doing so in terms of student success and research advancement. As things currently stand, many California universities fall short. For example, some University of California schools evaluate DEI statements not only for applicants' contributions to DEI but also for their "[a]wareness of inequities and challenges faced by underrepresented minority students and faculty."¹⁴⁹ While there is nothing wrong with permitting applicants to describe their awareness of inequities and the challenges others face, applicants should not be evaluated based on their expressions of such awareness. The problem, of course, is that awareness entails belief. I am not aware of the turtle in front of me unless I believe that there is a turtle in front of me. University of California at Riverside does better here, as it only asks applicants to describe their contributions to DEI and avoids telling applicants to discuss their beliefs, awareness, or recognition of DEI.¹⁵⁰

Some California universities also fall short when it comes to tying DEI contributions to student success and research and scholarship advancement. University of California at Riverside is on this list because it fails to specify any particular contribution that would improve an applicant's chances of being hired or promoted. Other University of California schools, by contrast, do better by describing types of DEI contributions that have apparent connections to student success and

149. *Guidelines for Writing a Statement of Contributions to Diversity, Equity, and Inclusion*, *supra* note 5; see also *Demonstrating Interest in and Ability to Advance Diversity, Equity, Inclusion, and Belonging*, U.C. BERKELEY, <https://ofew.berkeley.edu/recruitment/contributions-deib/support-faculty-candidates> [<https://perma.cc/L5YN-JTE9>] ("We evaluate faculty candidates in three main areas," including "[a]wareness of and ability to articulate understanding regarding diversity broadly conceived, and historical, social, and economic factors that influence the underrepresentation of particular groups in academia. Life experience may be an important aspect of this understanding.").

150. *Commitment to Diversity*, U.C. RIVERSIDE, <https://diversity.ucr.edu/faculty-resources> [<https://perma.cc/7X2G-5D96>] ("[W]e ask applicants to describe their past and/or potential future contributions to promoting a diverse, equitable, and inclusive environment, which is a key requirement of the role of every faculty member and administrator at UCR.").

research advancement. For example, University of California at Irvine provides the following as desirable DEI contributions:

- Recruitment, retention, and/or mentoring of underrepresented students, faculty, or staff at the university or to the professoriate more generally.
- Presentations or performances for underrepresented communities.
- Participation in programs aimed at increasing the pipeline of underrepresented groups entering higher education.
- Public service activities and invitations to give talks within the field that address the needs of culturally diverse groups.
- Awards and other forms of special recognition such as commendations from local or national groups or societies representing underserved communities.
- Development of particularly effective strategies for the educational advancement of students in various under-represented groups.
- Studying programs to understand and enhance patterns of participation and advancement of underrepresented groups.¹⁵¹

These types of contributions are laudable because it is not hard to see how each can promote positive student outcomes or advance research and scholarship. (I leave this as an exercise for the reader.)

Despite the existing shortcomings, the gap between where California universities should be and where they are is not large. So, it is possible for them to close the gap quickly and in preparation for the fallout of the U.S. Supreme Court holding that affirmative action in college admissions is unconstitutional. DEI statements are here to stay in one form or another and will likely play an increasingly important role at universities across the country.

151. *Guidance for Writing Inclusive Excellence Activities Statement*, U.C. IRVINE, <https://ap.uci.edu/faculty/guidance/ieactivities/> [<https://perma.cc/FS3J-6F6E>].

