



DIVERSITY ! MANDATING ADHERENCE TO A SECULAR CREED

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INTRODUCTION

The academy is rife with contention over the conditioning of faculty appointments on an attestation to or a record of support for a secular trinity: "Diversity, Equity, Inclusion."1 These DEI policies seem to be grounded in a syllogism the

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1 For example, the Academic Freedom Alliance issued a statement in opposition to DEI on August 22, 2022, https://academicfreedom.org/wp-content/uploads/2022/08/AFA-DEI-Statement-081822.pdf. See also, e.g., George Leef, Another University Sinking into the Leftist Quicksand, NAT'L REV. (May 11, 2022), https://perma.cc/8ZTS-LDGS (the university in question is the University of Illinois); Colleen Flaherty, Where DEI Work Is Faculty Work, INSIDE HIGHER ED. (Apr. 1, 2022), https://perma.cc/WM2S-6MC7 (also about the University of Illinois); Abigail Thompson, The Uni-

major premise of which is this: The student population served by the institution includes members of historically marginalized minority groups, long ignored, slighted, or discriminated against societally and, possibly, by the institution itself. The minor premise: It should be part of the university's mission significantly to address these groups' needs and aspirations. The conclusion: Every faculty member, as a condition of appointment, must further that aspect of the institution's mission in their teaching, research, and service—in one or more.<sup>2</sup> The policy's emphasis is on the imperative.

What follows will present for study a case in point, the policy adopted at the University of Illinois, the grounding and function of which would seem to be concordant with the rationale undergirding DEI policies elsewhere.<sup>3</sup> The DEI

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*iversity's New Loyalty Oath: Required 'Diversity and Inclusion' Statements Amount to a Political Litmus Test for Hiring*, WALL ST. J. (Dec. 19, 2019) (regarding the University of California). Critics have condemned DEI policies as inimical to academic freedom; even that these policies echo the evils of the unconstitutional loyalty oaths of the 1950s. A defender of DEI's constitutionality has argued that DEI policies, if suitably fine-tuned and approved by relevant faculty bodies, can obviate the criticism. Brian Soucek, *Diversity Statements*, 55 U.C. DAVIS L. REV. 1989 (2022). But this argument, too, has been scouted. Brian Leiter, *Diversity Statements Are Still in Legal Peril*, CHRON. HIGHER ED. (June 1, 2022), <https://perma.cc/M8GP-FWWD>, following his *The Legal Problem with Diversity Statements*, CHRON. HIGHER ED. (Mar. 13, 2020), <https://perma.cc/VSJ6-6FGN>.

<sup>2</sup> A 2022 survey of institutional tenure practices devoted detailed treatment of the adoption and consideration for adoption of DEI policies, by institutional level, size, and sector. Hans-Joerge Tiede, *The 2022 AAUP Survey of Tenure Practices* (May 2022), <https://perma.cc/92Q6-FKKS>. However, the entirety of that treatment is devoted to policies attempting to identify and rectify "implicit bias" in the tenure process such as the disfavoring of scholarly journals or research designs that disproportionately affect minority segments of the professoriate. Though the report attributes the percentage of institutions that are not considering adoption of a DEI policy (over 39%) to these being viewed as "controversial," the survey does not deal with those aspects of DEI policy over which the controversy rages and in which the possibility of implicit bias is not a focus of concern. It is surely the case that some of these policy only assure that DEI activities will be given "recognition," not that they are mandatory. The University of California, Los Angeles is of that stripe. UCLA Academic Personnel Manual, APM-210-1(d) (July 26, 2022), <https://perma.cc/7SBY-LMJG>. Others are more directive.

<sup>3</sup> In 1863, the Illinois legislature accepted the Morrill Act which gave the states federal lands to make higher learning available to the larger citizenry, to underwrite a "college where the leading object will be, without excluding other scientific and clinical studies . . . to teach such branches of learning as are related to agriculture and the mechanic arts." A century later the university reflected on its past, present, and future. University of Illinois (Urbana-Champaign campus), ILLINOIS AND THE LAND-GRANT TRADITION; THE UNIVERSITY OF ILLINOIS: YESTERDAY, TODAY, AND TOMORROW

policy requires faculty to satisfy those reviewing their dossiers for tenure and promotion that in research, teaching, and service to the university and to the larger community the faculty member has compiled a satisfactory record of activity in support of diversity, equity, and inclusion. This would seem to resonate sympathetically with Justice Powell's influential opinion in the *Bakke* case<sup>4</sup> concerning the cognizance of race in the admissions process of a public sector law school. Powell opined that the university could take account of race when part of a process that took applicants whole, as individuals who present themselves in near infinite variety in capacities, experience, and interests.<sup>5</sup> But that is not what DEI is about. The policy's notion of diversity requires that the persons subject to its concern must be fit into categories identified by a group attribute and by goals attributed to the group.

As the ensuing unpacking of the policy makes no small demand on the reader, it would be well at the outset to anticipate the result. As will become clear, the wrongs wrought by the policy are three: First, by folding socio-political goals into the process for tenure and promotion the policy conflates those ends with professional qualifications. This conflation infringes academic freedom. Further, were it to become acceptable for a university to commandeer its faculty toward socio-political ends, made part of the faculty's professorial obligations, there would

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(1961). It stressed how the university had attended to the needs of the state and to students at large and how it expected to in future. Considerable space was given to extension work and other in-state services programs. A paragraph was devoted the university's program of outreach to and accommodation of physically handicapped students, one of the "few universities," it was proud to announce, "where they can get an education." *Id.* at 7. No mention was made of any analogous concern for any other discrete or insular groups.

<sup>4</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). The author was the principal draftsman of a brief *amicus curiae* on behalf of the American Association of University Professors in the *Bakke* case. It argued that, "Significant Educational Goals Are Served by Considering Diversity as a Factor in Selecting a Student Class."

<sup>5</sup> 438 U.S. at 317:

Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.

be no principled reason why those who fund the institution—the legislatures—should not impose those socio-political ends that they hold dear.<sup>6</sup>

Second, for the DEI rules to withstand constitutional muster, the faculty member being evaluated, who is required to make a record of DEI activity, and those evaluating that record must be able to discern with clarity what sorts of activities in support of what groups with what goals and to what extent will satisfy the mandate. The clarity of guidance on the former, what groups with what goals, is questionable; on the latter, the extent of engagement, is nonexistent.

Third, and paradoxically, were clarity to be addressed what would be made even more clear is that continuance on the faculty is conditioned on support of groups to further favored political or social ends. This infringes on the scholar's political and private life; it is illegitimate from an institutional perspective and unlawful from a constitutional one.

The University of Illinois' DEI policy will be explored. The academic freedom and constitutional implications will then be examined. Because much of the public debate on both accounts has turned on an analogy to the loyalty oath controversy of sixty years ago, out of which the Supreme Court's reflections on the relationship between academic freedom and the first amendment grew, the oath will be taken up as a useful lens through which DEI can be considered.

### I. DEI AT THE U OF I

The policy is set out in Provost Communication No. 9, a directive governing faculty promotion and tenure. The Communication stresses the critical importance of promotion decisions, of the long-term institutional impact they have; and it details the multi-layered process of evaluation by department, school, and campus-wide faculty bodies with the decision ultimately vested in the Provost. The process is geared to determine the candidate's promise or attainment of "excellence" with reference to three "major domains" of professorial work: research, teaching, and service, the last drawing attention to faculty activities in the civil sphere addressing "societal problems, concerns, issues, or interests"—that is, to "public

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<sup>6</sup> That such may be in the offing. See Michelle Goldberg, *DeSantis Allies Plot the Hostile Takeover of a Liberal College*, N.Y. TIMES, at A19 (Jan. 10, 2023).

engagement,” which includes that which enhances “diversity, equity, and inclusion on our campus and in the community, state, nation, and world.”<sup>7</sup>

On the weight to be accorded the candidate’s record in each of these domains, the Communication’s direction is crisp and in keeping with the function of a major research university: the *sine qua non* for tenure and promotion is the quality and promise of the candidate’s research. In the event of a record of outstanding teaching and service—including DEI activities—the candidate might pass muster without excellence in research; but, even then, the candidate must have a strong research record.<sup>8</sup>

The University will not require a personal affirmation of support for the DEI policy; nor does the policy extend to candidates for initial appointment. What the policy mandates is faculty action, not belief; it applies to tenure or promotion decisions commencing in the 2024–2025 academic year. From that point on the candidate will be required to provide

a personal statement detailing their specific individual and/or collaborative activities aimed at supporting diversity, equity, and inclusion, as well as access (for examples of activities and guidelines for preparing the statement, see the *Guide to Diversity, Equity, and Inclusion in the Promotion and Tenure Process* in the attachments to this Communication). The candidate should include a discussion of the context, importance, and impact of their contributions along with their future plans for contributions. The candidate may choose to organize the statement by topic, activity, and domain (e.g., research, teaching, and service), or in another manner.<sup>9</sup>

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<sup>7</sup> The University of Illinois at Urbana-Champaign, Provost Communication No. 9, at 8 (Mar. 28, 2022).

<sup>8</sup> *Id.* (emphasis added):

The university is committed to excellence in research, teaching, and service but recognizes that it is rare for an individual case to achieve equal excellence in all three domains. For most faculty members, the primary basis for promotion and tenure will be the candidate’s record of research and teaching, with consideration also being given to service as well as public engagement and diversity, equity, and inclusion in research, teaching, and service. Promotion and tenure will generally be awarded only if there is evidence of excellent research accomplishments and a strong record of teaching and service. *However, it may also be that excellence in teaching and service activities will meet the requirements for promotion and tenure as long as the candidate’s research accomplishments are sufficiently strong.*

<sup>9</sup> University of Illinois at Urbana-Champaign, Provost Communication No. 9, *supra* note 7, at 16 (italics in original).

The policy does not explore how those to be the object of the candidate's DEI efforts are to be identified save by an explanatory preamble and an extensive set of illustrative examples set out in an appended *Guide*. The preamble provides that,

Diversity, equity, and inclusion (DEI) are core to the mission of the University of Illinois. The University is dedicated to providing access and opportunity for *all* students, faculty, and staff, *regardless of* race, ethnicity, gender, gender identity, sexual orientation, socioeconomic background, language, culture, national origin, religious or spiritual commitments, age, and (dis)ability status.<sup>10</sup>

Ironically, what the policy directs is the opposite of regardlessness. Faculty members are expected to engage in activities specifically directed to members of historically disfavored or marginalized groups, activities they are not required to engage in for groups the policy does not cover; but, what is set out for inclusion is a mix of generic categories—race, socioeconomic background, language, culture—that, textually, include historically non-disfavored groups as well as disfavored ones (*i.e.*, white high church Episcopal sons of corporate CEOs come within the preamble's description of providing access and opportunity regardless of race, gender, religion, and socioeconomic background). As the illustrative matrix makes clear, however, the policy's actual thrust is counter-literal: only to those historically disfavored or marginalized within these categories is supportive attention directed. Accordingly, attention turns to the matrix that lays out what affected faculty members are actually expected to do.

The matrix details a complex set of activities that map on to the domains of faculty evaluation—research, teaching, and service—that would satisfy the candidate's DEI responsibilities. These are organized into three silos of activity for each domain headed “individual,” “programmatic,” and “institutional.” “Individual” activities relate to specific research projects, courses of instruction, and cognate activities connected to them. “Programmatic” activities are leadership or organizational efforts in DEI outside the laboratory or the classroom. “Institutional” activities involve work contributing to or in DEI directed engagements and in the dissemination of the understanding of DEI policies or practices more widely. All of these would be expected to be scrutinized closely by candidates whose careers depend on satisfaction of the DEI requirement; and to be scrutinized as well by the members of the bodies at the departmental, school, and university level that pass

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<sup>10</sup> Guide to Diversity, Equity, and Inclusion (DEI) Work in the Promotion and Tenure Process, Appended to Provost Communication No. 9 (Mar. 28, 2022) (*italics added*).

on promotion and tenure and that will evaluate whether the candidate's activities satisfy the requirement.

Because of its very texture, its density and complexity, the *Guide's* illustrative matrix is appended at the end of this Article. By way of brief explication it should be enough to note that candidates are expected to conduct research into or involving marginalized minority groups when that is or can be made relevant to their disciplines—history, economics, sociology, and law are specifically pointed to—and, when possible, to integrate the work of minority scholars and the perspectives of marginalized groups into their teaching. Whether such disciplinary integration is possible or not, candidates across the board are expected to organize, lead, or participate in a wide variety of programmatic activities—conferences, workshops, study groups, and more—that involve the groups the *Guide* identifies and that either promote these groups' ends in the community—locally, regionally, nationally, or internationally—or that educate these communities about them. Consequently, a faculty member in a discipline where research or teaching is not capable of bearing a connection to DEI will be required to have a record of sufficient participation in these “programmatic” or “institutional” activities to compensate for the absence of any significant DEI content in the other domains. Failing to present a record of satisfactory DEI activity—individual, programmatic, or institutional—a candidate will not be reappointed. Neither the policy, the *Guide*, nor the matrix inform those subject to it how substantive or extensive these DEI activities must be in effort or impact.

Thus it pays to note how DEI alters the scene. Heretofore, a faculty member whose research or teaching dealt with the situation of a marginalized group or groups and who was active in outreach to or engaged in programs with these groups would be expected to achieve tenure or promotion if her research, coupled with her teaching and service, met the institution's high expectations. That has not changed. Heretofore, a faculty member who had performed in equal superlatives but whose research, teaching, or service had nothing whatsoever to do with marginalized groups would also have achieved tenure or promotion if her work also met the university's high standards. The standard of excellence applied equally to both of them. Not so after 2025: As the policy reads, the latter would not be able to secure tenure and so would suffer the nonrenewal of her appointment, not for any want of excellence in all she had done in every respect, but for what she had failed to do with respect to the groups the policy sets out.

Actually, it is difficult to conceive of tenure being denied to, say, a geophysicist, whose brilliance is universally agreed, because of her deficiency in or absence of any DEI activity. That this might be so could find some support in the *Guide's* text which states that "DEI contributions will be more central to some faculty than to others." If this is read to allow the university to ignore a candidate's lack of a DEI record, to waive the seeming rigor of the rule, then the vagueness in alerting candidates about what is actually expected of them would become clouded to the point of impenetrability. But more importantly, such an allowance underlines the fact that the DEI mandate is not concerned at all with professional competence and promise, for any lessening of standards with regard to *that* would corrupt the tenure system, but rather that the policy embraces a non-professional socio-political end.

## II. IN CONTENTION

The debate over DEI has surfaced three areas of contention: whether the policy infringes academic freedom; whether it bears an analogy to and so is freighted with the odious consequences of the loyalty oaths of the 1950s; and, following on the latter, whether, in public universities, it passes constitutional scrutiny. Each is taken in turn.

### A. Academic Freedom

The most widely accepted document governing academic freedom in American higher education is the 1940 *Statement of Principles on Academic Freedom and Tenure*. The *Statement* was formulated jointly by the then leading national organization of university faculty, the American Association of University Professors (AAUP), and the national organization of liberal arts college administrations, the Association of American Colleges (AAC). It is currently endorsed by over two hundred and fifty learned societies and educational organizations and has been adopted by reference or in text by numerous universities including the University of Illinois.<sup>11</sup> Apart from ethical constraints and admonitions of responsibilities in teaching and political speech not relevant here, the operative portion provides:

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<sup>11</sup> The literature on the 1940 *Statement*, including its judicial reception, is rich indeed; but, fortunately for present purposes this need not be rehearsed. However, for the historical context one cannot forebear reference to Walter Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, in *FREEDOM AND TENURE IN THE ACADEMY* 3 (William Van Alstyne ed. 1993).

### Academic Freedom

1. Teachers are entitled to full freedom in research and in the publication of the results. . . .
2. Teachers are entitled to freedom in the classroom in discussing their subject . . . .
3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline. . . .

It is best to start with the search for knowledge: freedom—“full freedom”—in research. What this means was captured by the sociologist Edward Shils: it

means the freedom to choose one’s problems for research, to use the methods one thinks best, to analyze one’s data by the methods and theories one thinks best, and to publish one’s results.<sup>12</sup>

Kingman Brewster characterized the guarantee of this liberty as a reflection of the “inner direction” of scholarship, that scholars should be

guided by their own intellectual curiosity, insight, and conscience. In the development of their ideas they should not be looking over their shoulders either in hope of favor or in fear of disfavor from anyone other than the judgment of an informed and critical posterity.<sup>13</sup>

Howsoever the capacity to pursue one’s research interests have become limited by the availability of funds necessary to support it, the freedom of the individual to pursue her research passions, to pursue even seemingly “useless knowledge,”<sup>14</sup> lies at the core of the scholar’s inner direction which the 1940 *Statement* would insulate from fear of disfavor.<sup>15</sup>

Turning next to teaching, the 1940 *Statement* assures the instructor “freedom in the classroom” in discussing the subject. The fact that the adjective “full” applicable to research is absent here has not been remarked on; but the difference may lie in the fact that although a research project may require approval by an institutional review board when human subjects are concerned or be subject to the approval of

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<sup>12</sup> Edward Shils, *Do We Still Need Academic Freedom?*, 62 AM. SCHOLAR 187, 190 (1993).

<sup>13</sup> Kingman Brewster, Jr., *On Tenure*, 57 AAUP BULL. 381, 382 (1972) (reprinting the 1971–72 Report as President of Yale, the quotation borrowing the phrase from David Riesman).

<sup>14</sup> Abraham Flexner, *THE USEFULNESS OF USELESS KNOWLEDGE* (1939, reprinted 2017).

<sup>15</sup> Walter Metzger, *Academic Freedom and Scientific Freedom*, 107 DAEDALUS 93, 104 (1978) (on the 1940 *Statement*’s “full freedom in research”).

an external funding body, of the proposal's purpose and methods, the content of courses of instruction may be subject to departmental or school peer review—to assure its connection to degree requirements, to the progression of courses within a degree program, or even to assure the coherence and quality of what an instructor would have the course do. However, within the parameters of course approval the instructor's "freedom in the classroom"

means the freedom to teach in ways which the teacher regards as effective as long as respect is shown for the rules of reasonable discourse, for the dignity of the student, and for general rules of propriety.<sup>16</sup>

This includes decisions on what bodies of thought, theories, authors or investigators to emphasize, what texts to use—or not.<sup>17</sup> These are matters of individual judgment exercised within the confines of disciplinary acceptability.<sup>18</sup>

At one end of the spectrum, the probationer's research and teaching may center on the DEI-favored subjects or groups: An assistant professor of education might be interested in science instruction in the inner city; an assistant professor of law might be interested on how bankruptcy bears on low-income Hispanic debtors. In such a case, the faculty member can join her DEI obligation to her subject and secure credit for both.

At the other end of the spectrum, the discipline may have no conceivable connection to DEI. As the geophysics of plate tectonics has nothing to say about marginalized minorities there would not be anything the instructor could do respecting DEI in it. Consequently, the probationary professor caught in this situation would be under the express pressure of the DEI policy to make a satisfactory record of compensatory DEI service activities in order to qualify for tenure.

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<sup>16</sup> Shils, *Do We Still Need Academic Freedom?*, *supra* note 12, at 190.

<sup>17</sup> In 1879, President Noah Porter of Yale forbade Professor William Graham Sumner to use Herbert Spencer's *Study of Sociology* as a textbook. Sumner refused. Richard Hofstadter & Walter Metzger, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 335–36 (1955).

<sup>18</sup> The critical role of professionalism as a foundation for academic freedom has been explored with considerable insight by Thomas Haskell, *Justifying the Rights of Academic Freedom in the Era of "Power/Knowledge"*, in *THE FUTURE OF ACADEMIC FREEDOM* ch. 3 (Louis Menand ed. 1996). See also Matthew Finkin, *Academic Freedom and Professional Standards: A Case Study*, in *ACADEMIC FREEDOM IN CONFLICT* 65 (James Turk ed. 2014) (on an alleged antinomy between freedom and professional constraint).

In between these two situations are probationers in fields where a DEI connection could conceivably be made, but whose scholarly interests or passions lie elsewhere. Start with research. An assistant professor of musicology, much taken with Ralph Vaughn Williams' idea that music "might have a special message for [the composer's] own people,"<sup>19</sup> could choose to pursue in depth what Williams meant by the study of his work instead of, say, William Grant Still. Not that Still would be unworthy of study, but he is not the composer of her intense and singular interest. Unless she alters her research design to satisfy her DEI obligation she would be required to compile a satisfactory compensatory dossier of DEI service in order to secure tenure.

So, too, an assistant professor of comparative literature might be consumed by a desire to explore the efforts of Yiddish poets of the early twentieth century, overwhelmingly male, to have Yiddish achieve a respected place in European *belles-lettres*.<sup>20</sup> There should be little doubt that at the time these writers were a marginal group in European literary culture by reason of which the scholar's work might satisfy the DEI obligation. "Might" if marginalization were not time sensitive and, if not, were the scholar's interest not eclipsed by a subject of study deemed more worthy of DEI credit; that is, the even more neglected Jewish women writers of fiction at the time.<sup>21</sup> The assistant professor of comparative literature's lack of attention to female writers of fiction while attending to male writers of poetry might be taken to disqualify his work for DEI credit by some committee member or members at some level of the probationer's dossier review. As the DEI policy's vagueness puts the probationer in a quandry of not knowing whether his work would or would not be given DEI credit. He, too, would be under pressure to either change his research subject from one that fires his passions to one that does not, or compile a compensatory record of DEI service.

The same applies to the teaching of subjects that might but do not necessarily include a DEI component. Assume that in teaching a course in the metaphysical

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<sup>19</sup> David Allen, *Complicated, Yes. Conservative, No: A Fresh Assessment for the Composer Vaughn Williams*, N.Y. TIMES, at AR 10 (Oct. 16, 2022) (quoting Vaughn Williams).

<sup>20</sup> Cf. Kenneth Moss, JEWISH RENAISSANCE IN THE RUSSIAN REVOLUTION 105 (2009).

<sup>21</sup> Jordan Finkin & Allison Schachter, *Introduction*, in FRADL SHTOK, FROM THE JEWISH PROVINCES: SELECTED STORIES xi (Jordan Finkin & Allison Schachter trans. 2022) ("We know little about the women who participated in the renaissance of Yiddish literature in the late nineteenth and early twentieth centuries.").

poets the instructor might see pedagogically useful resonance in the work of Langston Hughes, in which case she would incorporate his work into her course. Alternatively, she may see no such connection and decline any inclusion or reference. Similarly, a teacher of electrical engineering might find it useful to devote time to the contributions of Charles Proteus Steinmetz, perhaps with mention of his physical disability, if she thought it relevant, or she might not. These are choices they have the freedom to make; they are matters of individual professional judgment. Starting in 2025, however, the probationary professor of English Literature or Electrical Engineering under a mandate to document a record of DEI in teaching would labor under pressure to make those connections and to document in detail the fact that they had referred to or, better, dwelt on a black poet or a physically disabled engineer in compiling their dossiers for tenure.<sup>22</sup>

The argument in defense of the DEI policy in response would seem to run much along this line: There is nothing amiss in an institution's striving to provide heightened access to and to support historically marginalized groups, including the provision of emotional support, better to integrate members of these groups into the life of the institution, to enrich their experience, to strengthen their self-respect, and to further their careers. African-American students might well be heartened to see a black poet and a black composer to be taken seriously in university classes; physically disabled students might take heart to see one so challenged rise to scientific greatness and to have his scientific stature recognized in class; female Jewish students might be made to feel more welcome by seeing the literary work of their great-grandmothers taken as worthy of respect. Consequently, there could be nothing amiss in requiring, or, less dogmatically, in persuading faculty members to support the institution's goals in these ways. After all, academic departments make

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<sup>22</sup> As the DEI policy places the teacher under institutional pressure to conform to a political dictate in what she says in the classroom, doing so would be obvious enough to incite a measure of student cynicism. The 1915 *Declaration* ruminated on the consequences of instructional fidelity to regental or donor dictates in teaching thusly,

The average student is a discerning observer who soon takes the measure of his instructor. It is not only the character of the instruction but also the character of the instructor that counts; and, if the student has reason to believe that the instructor is not true to himself, the virtue of the instruction as an educative force is incalculably diminished. There must be in the mind of the teacher no mental reservation. He must give the student the best of what he has and what he is.

*Report of the Committee of 1915, reprinted in 18 AAUP BULL. 378, 384 (1932).*

judgments all the time about what work is worth doing: It does not infringe academic freedom for a department of art to value scholarship on the art of the Pacific Islands more than scholarship on French Post-Impressionism on the ground that the former draws attention to art forms worthy of study but heretofore neglected; nor for a school of music to favor a scholar who studies African ethnomusicology over one who studies Italian opera, based on the same ground. These instances are consistent with the sorts of examples the *Guide*'s matrix sets out: A law school could attach greater value to a professor of bankruptcy whose focus is on the law's bite on minority consumers over one who studies the law's impact on big investors; a department of sociology could prefer a candidate whose research is on the preclusion of minority lawyers from careers with large corporate firms over one who studies the power struggles within them. As these departmental preferences, in law and sociology, in music and art, do not infringe academic freedom, neither does the university's decision to privilege research and teaching connected to DEI across all the disciplines.

The argument conflates a university's effectuation of its conception of what serves the larger public good with a disciplinary judgment of work worth doing. It is one thing for a department or school to decide what research and teaching best comports with the discipline's display of what it thinks important. Academic units are expected to do just that.<sup>23</sup> Consequently, decisions of this kind can be expected to and do change over time as the discipline's focus changes or as the taste in ideas within the community of discourse shifts,<sup>24</sup> both of which would be the product of

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<sup>23</sup> It is a nice question whether a radical change in direction—for a history department's decision to value work on the social consequences of Reconstruction over the political history of the period—can or should be applied to a probationer who had devoted her efforts to the latter. The decision would not violate her academic freedom; but it would be unjust.

<sup>24</sup> Sanford Kadish, then President of the Association of American Law Schools (AALS) and former President of the AAUP, addressed AALS' relationship to church related law schools. He distinguished the voluntary acceptance of credal conformity by the faculties of such institutions from the institutional imposition of it:

So long as the faculty, true believers though they be, avow adherence to the principle of academic freedom, voluntary acceptance can turn to voluntary rejection or qualification; imposed acceptance precludes that possibility. Indeed, it has been the natural history of schools and departments that have become identified with particular doctrines or precepts that in time they cease to be so identified; and this happens, I submit, because the commitment to the principle of intellectual challenge and dissent continues.

intramural deliberation and debate. It is quite another thing for the university to mandate a political dimension in teaching and research.

A university can, should, and often does identify economic and social issues that call for remediation—climate change, gun violence, even the wrenching individual and collective impact of the abolition of abortion. To the extent these issues have intramural consequences for the institution—to its infrastructure (climate), to its security (gun control), or to the medical wellbeing, physical and mental, of its students and its staff (birth control and abortion)—it would be expected to fashion meliorative institutional responses, responses that have nothing to do with the individual faculty member's freedom of research and teaching. To the extent these matters implicate issues of larger economic, social, or political dimension that call on institutional address, the university might respond by creating programs of remedial communal outreach or by creating transdisciplinary institutes, or the like, to sponsor research, to hold workshops and conferences, to produce working papers about them; in other words, to provide a forum for the presentation and debate on socially important matters and to the discussion of political or legal measures of remediation. These would be in keeping with the role of the university, envisioned by the drafters of the foundational 1915 *Declaration of Principles on Academic Freedom and Tenure*, on which rationale the 1940 *Statement* rests, as

an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the accepted intellectual food of the nation or of the world.<sup>25</sup>

That is, the university is to act as an arena for intellectual exploration and contestation, even combat. Under this conception, however, the university is a neutral forum, it does not become a combatant; even less may it conscript its entire faculty into the lists on behalf of institutionally favored social causes and condition their careers on satisfaction of that obligation.

At this point, the DEI defense would shift: A professor's declination to incorporate DEI into her teaching and research need not be fatal to her career. The candidate can compensate for the paucity or absence of DEI in those domains by a

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Sanford Kadish, *Church-Related Law Schools: Academic Values and Deference to Religion*, 32 J. LEGAL EDUC. 161, 167–68 (1982).

<sup>25</sup> *Report of the Committee of 1915, supra* note 22.

satisfactory record in the domain of service. As faculty are expected to engage in service—to the university and to the external community—with that engagement being part of the assessment for tenure and promotion, there is no reason why the university could not attach a heightened value to DEI activity in assessing the candidate's record.

Service is customarily an obligation of professorial office, but the zones of service should be disaggregated. Commonly it refers to service on instruments of faculty governance: Faculty members are expected to serve on a variety of department, school, or university bodies, committees dealing with admissions, curriculum, student discipline, faculty appointment, and a good deal more. Refusal to serve is usually not an option and the quality of service, how much thought and effort a faculty member brought to the task, would be assessed. However, to the extent aspects of DEI would come before these bodies—admissions decisions, grading standards, curriculum—it is not at all clear whether faculty members subject to review on satisfaction of the DEI mandate would have the positions they advanced or the way they voted in these bodies judged by the degree to which they conformed the faculty's conception of what furthers DEI's ends.<sup>26</sup>

The basic thrust of the matrix's many examples center on a different aspect of service: participation in non-official sodalities in the academic or civic community in which the policy lists a multiplicity of group or associational activities as venues for the satisfaction of the mandate. The 1940 *Statement* makes clear that in the civic forum institutional censorship may not be exercised despite regental, administrative, or collegial distaste, even offense, for what the professor says or does, so long as what she says or does is not unlawful or does not render her professionally unfit. In a nutshell, the university cannot forbid faculty from civic

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<sup>26</sup> In one instance at a university not in Illinois, communicated privately to the author, an instructor in art history sought approval for a course on "Women Painters of the Eighteenth Century." A member of the school's curriculum committee, a distinguished female art historian, asked the instructor if women painted differently than men; if a connoisseur, looking at a sample of work done by men and women of the period, could detect a difference. The instructor replied that there were no discernable differences. The interlocutor said that in whatever other unit the course might be welcome for listing—Women and Gender Studies, for example—it had no ground of listing in the school of art. Were the interlocutor to be subject to the DEI mandate her service on the school curriculum committee might well be taken negatively by some member or members conducting the review of her record as being hostile to inclusivity even as her statement would have been an exercise of academic freedom.

engagements that it disfavors.<sup>27</sup> The obverse follows: A professor cannot be compelled to engage in institutionally favored civic associations. To mandate support of, or even passive attendance at<sup>28</sup> one or more ideologically approved organizations or activities as a condition of retention infringes the academic's freedom as a citizen to choose what causes, if any, to support or what associations, if any, to have. The institution's capacity to do so as a constitutional matter will be treated below.

### B. The Oath

As the Introduction noted, much of the debate on DEI policies has drawn on an analogy to the loyalty oath required of professors a half century ago. Because of the prominence of the analogy in the controversy, and the role of the oath in the generation of law concerning academic freedom, it is taken up here.

The mandate of an oath—faithful performance, political loyalty, personal obedience, or religious fidelity has a long history,<sup>29</sup> universities not excluded.<sup>30</sup> Even today, express profession of faith or belief has been required of faculty in some

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<sup>27</sup> *E.g.*, *Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004) (the University of Illinois cannot require approval by its Director of Athletics before faculty members may contact prospective student athletes to ward them off accepting an offer from an institution whose totemic figure they thought to be racist); *Austin v. Univ. of Fla. Bd. of Trustees*, 580 F. Supp. 3d 1137 (N.D. Fla. 2022) (state university professors cannot be forbidden to testify as expert witnesses against the state).

<sup>28</sup> Compulsory passive audition is not without difficulty. Charles Black, Jr., *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 33 COLUM. L. REV. 960 (1953). Its vexing nature has more recently been acknowledged. *Hill v. Colorado*, 530 U.S. 703 (2000). Faculty members of public universities are bound by state ethics and conflict of interest laws as well as laws governing sexual harassment as are their private sector counterparts. There is nothing amiss in requiring faculty to attend lectures or workshops to educate them about their responsibilities in these matters. DEI is different. It requires attendance not to educate in legal obligations but in support of institutionally favored social or political ends.

<sup>29</sup> The craftsmen's oath forswearing the abandonment of work was a feature in Neo- and Late-Babylonian times. DAVID WEISBERG, GUILD STRUCTURES AND POLITICAL ALLEGIANCE IN EARLY ACHAEMENID MESOPOTAMIA 5 (1967). The English historical background is canvassed in HAROLD HYMAN, TO TRY MEN'S SOULS: LOYALTY TEST IN AMERICAN HISTORY ch. 1 (1959).

<sup>30</sup> Rashdall finds a "reckless multiplication of oaths" to characterize medieval university legislation. 1 HASTINGS RASHDALL, THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES 446 (F.M. Powicke & A.B. Emden eds. 1997 ed.). In the University of Paris alone in 1366, forty oaths were required for inceptors. *Id.*

American church-related institutions.<sup>31</sup> As part of the loyalty-security measures adopted during the Red Scare of the immediate post-War period faculty members in public universities were required, on oath, variously to disclaim: membership in seditious organizations, particularly, the Communist Party; the holding of subversive beliefs, particularly the propriety of the overthrow of the government by force or violence; or, any “advocacy” of the necessity or propriety of such action.<sup>32</sup> After considerable storm and stress, in which careers were truncated and lives upended, these disclaimer affidavits were held unconstitutional.<sup>33</sup> That body of law will be taken up presently; but, because of the odium attached to the oath, the required execution of DEI statements has drawn attention to its closeness of fit with what faculty members found objectionable in the oath.

At least at the University of Illinois, DEI differs from a disclaimer affidavit as the latter requires a sworn statement of belief—actually, of non-belief—and DEI requires a report of activity. But this is a distinction without a difference.<sup>34</sup> If conditioning reappointment on engagement in DEI in research, teaching, and service is impermissible, the fact the reporter is not required to affirm a belief in the propriety of what she is required to do does not mitigate the wrong, it operationalizes it. Wherefore the comparison.

A survey of the faculty of the University of California at the time of the oath indicated a variety of objections to the oath apart from concern for the termination

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<sup>31</sup> See e.g., *Academic Freedom and Tenure: Concordia Seminary (Missouri)*, 61 AAUP BULL. 49 (1975); *Academic Freedom and Tenure: Brigham Young University*, 83 ACADEME 52 (1997).

<sup>32</sup> See generally, THE STATES AND SUBVERSION (Walter Gellhorn ed. 1952), and RALPH S. BROWN, JR., LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES (1958).

<sup>33</sup> A mid-course account was provided by Arval Morris, *Academic Freedom and Loyalty Oaths*, in ACADEMIC FREEDOM: THE SCHOLAR’S PLACE IN MODERN SOCIETY 57 (Hans Baade & Robinson Everett eds. 1964). A full account is provided by William Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, in FREEDOM AND TENURE IN THE ACADEMY 79 (William Van Alstyne ed. 1993).

<sup>34</sup> Professor Soucek thinks this difference to be significant, that “Diversity statements are on firmest [constitutional] ground when they ask about actions and plans rather than viewpoints.” Soucek, *Diversity Statements*, *supra* note 1, at 2045. This ignores two facts. First, the oaths held unconstitutional primarily were concerned with action, not belief, *i.e.*, membership, advocacy, counseling, advising, teaching, abetting toward prohibited ends. Second, compelling political or social membership or action in which one does not believe is as constitutionally abhorrent as false swearing. See *infra* note 57.

of tenure: (1) that it violated academic freedom; (2) that it was so ambiguous that the affiant could not be certain about what she was swearing to; (3) that it was a political test; (4) that it would not be an effective means toward its end as Communists would not scruple to sign; (5) that it imposed guilt by association; (6) that it worked a personal affront; and, (7) that it was inimical to the welfare of the university.<sup>35</sup> Some of these objections have no purchase here: DEI is not intended to root seditious teachers out of the academy (though it would root out probationers who act out of conscientious opposition to the dictate) and so dubiety about its effectiveness in rooting out Communists and the resulting imputation of guilt by association are inapt. Not so the others. The perceived threat to academic freedom is no less nor is the claim of the imposition of a political or ideological test; but as the objection to the oath's ambiguity was conjoined tightly to these they will be taken up when the question of constitutional compatibility is considered. Which leaves open for consideration the impact on institutional welfare, of the effect of the dictate, *Obey the DEI Mandate or Leave!*, on the university.

As the DEI policy awaits implementation there is as yet no evidence of its impact. But history might be instructive. A survey was undertaken of the University of Washington faculty on the eve of that state's oath's enforcement.<sup>36</sup> Of the 1,200 members of the voting faculty surveyed, 541 replied: Of these, 260 replied that the oath should be eliminated, 126 replied that they would sign immediately; 10 said they were seeking positions elsewhere; 7 said they would resign. If this is any sort of guide, it would seem to be the case that many of the faculty would approve the policy, some wholeheartedly; some would not approve, but would conform with, perhaps, varying degrees of irritation or cynicism; but a few might object to the university's so weaving racial or other identity group consciousness into its institutional fabric, at points perpetuating racial or minority preferences under what they conceive to be a fraudulent flag of equality,<sup>37</sup> as to refuse to be a part of

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<sup>35</sup> GEORGE STEWART, *THE YEAR OF THE OATH: THE FIGHT FOR ACADEMIC FREEDOM AT THE UNIVERSITY OF CALIFORNIA* 22–24 (1950).

<sup>36</sup> JANE SANDERS, *COLD WAR ON THE CAMPUS: ACADEMIC FREEDOM AT THE UNIVERSITY OF WASHINGTON, 1946–64*, at 166 (1979).

<sup>37</sup> Paul Carrington, *Diversity!*, *supra* note \*, at 1106 (“[T]he current [Diversity] movement is, not to mince words, a fraud.”) Recall the stated goal of DEI is to provide access and opportunity “regardless” of the characteristics—race, ethnicity, gender, etc.—but then specially directs the faculty member to give heightened solicitude to such groups.

it. Thus a few incumbent faculty might seek to move to institutions that do not impose a DEI mandate<sup>38</sup> while some potential appointees might decline to apply for appointment in one that does.<sup>39</sup> If the latter proves to be so, a consequence would be a campus whose faculty, howsoever DEI compliant, would also be a little less vibrant<sup>40</sup> and, ironically, a little less diverse.<sup>41</sup> This apart from the impact of an inevitable amount of student cynicism.<sup>42</sup>

### C. Constitutionality

Eventually, the oath appeared before the U.S. Supreme Court. In 1952, the Court took up an affidavit required of the faculty of Oklahoma A&M University disclaiming membership in or affiliation with communist or other subversive organizations. Because the oath's proscription did not require any knowledge on the affiant's part of the organization's unlawful ends it violated the fourteenth amendment.<sup>43</sup> The oath also infringed on the right of association, acting "to stifle the flow of democratic expression and controversy at one of its chief sources."<sup>44</sup> In

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<sup>38</sup> See *supra* note 1 on the number of institutions disinclined to pursue mandatory DEI.

<sup>39</sup> The impact of the oath on the University of California faculty members was discussed by GEORGE STEWART, *THE YEAR OF THE OATH*, *supra* note 35, at ch. 7.

<sup>40</sup> William of Ockham's theology, known as "nominalism," entailed "a moral order that was the arbitrary enactment of the divine will, unconstrained by any inherent rationality, and therefore discernable only by revelation." ANTHONY LEVI, *RENAISSANCE AND REFORMATION: THE INTELLECTUAL GENESIS* 8 (2002). Adherence to it was prohibited in some institutions, notably at the University of Paris; but the presence of advocates of nominalism became an index of intellectual vitality, not because of nominalism's superior methodology, but "simply because opposition to an established philosophy, whatever be its character, is a sign of intellectual vigour." 1 RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES*, *supra* note 30, at 564–65.

<sup>41</sup> In 1996, Brigham Young University adopted a policy requiring its church-member faculty members to be certified annually by the Church as meeting religious requirements. *Academic Freedom and Tenure: Brigham Young University*, 83 *ACADEME* 62 (1997). Professor Steven Epperson, an assistant professor of history at BYU, was denied Church certification because *inter alia* he was not attending Sunday School. He sought exception explaining that due to his wife's disaffection with the Church they agreed that they and their children would volunteer in a food program for the homeless on Sundays instead of attending Sunday School. This explanation proved unavailing. Professor Epperson was not reappointed. As a result, BYU is doubtless a more pious institution; and, ironically, less Christian.

<sup>42</sup> See *supra* note 22.

<sup>43</sup> *Wieman v. Updegraff*, 344 U.S. 183 (1952).

<sup>44</sup> *Id.* at 191.

a concurring opinion, Justice Frankfurter joined by Justice Douglas laid stress on the particular effect of the law on faculty members.<sup>45</sup>

Nine years later, the Court addressed Florida's oath which required of all state employees including the faculties in state institutions of higher education to affirm that they had never lent "aid, support, advice, counsel, or influence to the Communist Party."<sup>46</sup> The Court held the law "void for vagueness" as "the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all"; such a law has a "potentially inhibiting effect on speech," as the would-be speaker, not knowing where the line is to be drawn, would tend to steer clear of the forbidden zone.<sup>47</sup>

Three years later, the Court struck down the oath applicable to the faculty of the University of Washington, an oath thought to have been more narrowly tailored than in Florida. The affiant had to swear that she was not a knowing member of a subversive organization and included "advocacy, abetting, advising, or teaching" to achieve its prohibited ends.<sup>48</sup> It, too, was held unconstitutionally vague, save that here the Court expanded on how the unknowability of precisely what was abjured affected the professoriate in particular:

Is it subversive activity, for example, to attend and participate in international conventions of mathematicians and exchange views with scholars from Communist countries? What about the editor of a scholarly journal who analyzes and criticizes the manuscripts of Communist scholars submitted for publication? Is selecting outstanding scholars from Communist countries as visiting professors and advising,

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<sup>45</sup> *Id.* at 196 (Frankfurter, J. concurring). "To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied them. They must have the freedom of responsible inquiry, by thought and action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma."

<sup>46</sup> *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961).

<sup>47</sup> *Id.* at 287–88.

<sup>48</sup> *Baggett v. Bullitt*, 377 U.S. 360, 382 (1964).

teaching, or consulting with them at the University of Washington a subversive activity if such scholars are known to be Communists . . . ?<sup>49</sup>

Two years later, the Court struck down an affidavit of non-membership in a subversive organization for want of a requirement that the affiant know and also support the organization's unlawful ends as well as of vagueness and the cognate doctrine to overbreadth, where the achievement of legitimate goals "broadly stifle fundamental personal liberties when the end can be more narrowly achieved."<sup>50</sup>

Three years later the Court handed down *Keyishian v. Board of Regents*,<sup>51</sup> which has come to be regarded as a landmark case connecting the significance of the void for vagueness doctrine for the exercise of academic freedom. The instruments in the case were intricate and had grown in the course of time to attempt to accommodate the knowledge and intent elements of what could be prohibited. The Court dwelt at length on the conundrums the law posed for faculty signatories.

[U]nder Penal Law 161, one commits the felony of advocating criminal anarchy if he ". . . publicly displays any book . . . containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means." Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy? It is no answer to say that the statute would not be applied in such a case. We cannot gainsay the potential effect of this obscure wording on "those with a conscientious and scrupulous regard for such undertakings" . . .

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[A]nd in [§ 105(1)(a) prohibiting willful and deliberate advocacy of the doctrine of forceful overthrow,] . . . [d]oes the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition? <sup>52</sup>

It then placed the role of vagueness in context:

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. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of

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<sup>49</sup> *Id.* at 369.

<sup>50</sup> *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966) (citation omitted).

<sup>51</sup> 385 U.S. 589 (1967).

<sup>52</sup> *Id.* at 599–600.

authoritative selection.” . . . *We emphasize once again that “(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”*<sup>53</sup>

The Supreme Court did not establish academic freedom as a standalone right protected by the First Amendment; but, at a minimum, it proclaimed it a critical value, a “*special concern of the First Amendment*,” the immediate protection of which rested in regulatory precision. The role of regulatory precision was put in larger perspective five years later:

First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.<sup>54</sup>

The latter bears special emphasis where discretion “threatens to inhibit the exercise of constitutionally protected rights,” especially “the right of free speech or of association.”<sup>55</sup> As will appear below, the emphasis placed on the latter has critical salience when the DEI policy is considered from the perspective of academic freedom as of special First Amendment concern: The mandate is grounded as a revision of the institutional mission that operates irrespective of disciplinary interests, even to negate them, when those interests—in freedom of research and publication—are the grounding of the first amendment’s reach; so, too, of the mandate’s infringements of freedom of expressive association.

DEI does not subject the appointee to job loss or prosecution for false swearing about what the affiant will not do. Instead, it imposes an obligation for the faculty to engage in DEI-supportive activities and to document in detail their execution of the mandate, or else face job loss. Accordingly, the policy is subject to constitutional scrutiny as to whether it has sufficient “precision of regulation” in telling those subject to it and those reviewing the candidates’ dossiers just what it is that they are

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<sup>53</sup> *Id.* at 603 (references omitted) (emphasis added). The Court reiterated the added force of the setting in the last of the disclaimer affidavit cases. *Whitehill v. Elkins*, 389 U.S. 54, 59–60 (1967) (“We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom.”). The author assisted Professor Robert M. O’Neil in drafting the brief *amicus curiae* of the American Association of University Professors in the *Whitehill* case.

<sup>54</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (references omitted).

<sup>55</sup> *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

expected to say and do and just what the reviewers are to look for in three specific regards related to the policy's subject and purpose: who the persons or groups to be "supported" are; in what specific activities; and to what extent.<sup>56</sup>

*Subject.* The Provostial *Communication* directs the probationer to detail her activities "aimed at supporting diversity, equity, and inclusion, as well as access." It then points to the accompanying *Guide*; but, the *Guide* only sets out generic categories—race, gender, ethnicity—without more. It is the *Guide*'s matrix that does the directive work. Some categories of subjects are identified in ways that give discernable direction: "blacks," "Latinx," "evangelical Christian," "LGBTQ+," "women," the "transgendered," "rural areas," the "autistic," the "disabled," "farming communities," "underdeveloped countries," "small urban communities," "tribal groups," "hard to reach communities," "refugees," the "incarcerated." Others less so: "local neighborhoods facing challenges," "different religious and non-religious groups," "socioeconomic status," "minority cultures," "children impacted by violence," "small urban communities." But many merely echo the policy's generality: "historically marginalized and/or underrepresented groups" is mentioned eight times, "inclusive and equitable" is mentioned twice, "diversity and equity" twice, and "DEI" twice, along with "serve as diversity advocate," "representative of diverse perspectives," and "various backgrounds." Apart from the few stated with reasonable knowability in the first cluster, which persons or groups the probationer is directed variously to "support," "contribute" to, or to "involve" herself with are for the most part ill-defined.

The lack of precision in determining who the subjects of support or involvement are could be sharpened once the purpose of the mandate is considered; that is, setting out the purpose may so color the means of achieving it as to give more express guidance in determining the subjects—the persons or groups—the probationer is required to support, to contribute to, to involve herself with.

*Purpose.* Credited service must "contribute to" or be "aimed to support" DEI. The *Guide* tells the probationer that that means assuming a leadership or at least an

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<sup>56</sup> Lurking in the background is the possibility of a suggestion that as professors in public institutions are public employees they can be governed by the public employer in job-related speech and activities. The argument was made by the state of Florida in support of its law governing what faculty say in the classroom about race. The argument was rejected with the scorn it deserves. *Pernell v. Fla. Bd. of Governors of the State University System*, \_\_\_ F. Supp. 3d \_\_\_ (N.D. Fla. 2022), *appeal pending*. It will not be rehearsed here.

active role in DEI supportive organizations or projects or, failing that, establishing a record of attendance at conferences, workshops, or interest group meetings geared to DEI. Thus the whole thrust of the mandate is that some purposes are so within its compass that probationers must adequately support them on pain of job loss whilst support of or aid to or involvement in groups or collaborative efforts not so purposed are not encompassed and are not to be credited. In other words, it would seem to be the case that support of or involvement in groups on issues of race, gender, ethnicity, religion alone do not qualify for DEI credit; only involvement geared to the goals of diversity, equity, and inclusion regarding them does.

Assume, for example, that a non-tenured professor of, say, geophysics, unable to compile a satisfactory DEI dossier in research or teaching for want of disciplinary relevance, believes the goals of Marcus Garvey's Universal Negro Improvement Association would have solved the American Dilemma had it been more actively pursued and seeks to establish a campus chapter. Assume that another non-tenured professor, of, say, medieval German literature, unable to complete a satisfactory DEI dossier in researching and teaching for want of disciplinary relevance, believes out of sincere religious conviction that abortion is morally wrong under all and any circumstances and assumes a leadership role in an organization devoted to the passage of a state constitutional amendment toward that end. Would these efforts satisfy these instructors' DEI obligations? As they support the aspirations of a racial and a religious group these efforts would seem to come within the plain text of the DEI policy *Guide*, but not so the explanatory purpose. The geophysicist's effort would be on behalf of a racial group, but would be hard to defend on grounds of "inclusion" as it seeks to exclude African Americans by repatriating them back to Africa, albeit voluntarily. The Germanist's seeking to organize around an expression of "religious commitment" would be on behalf of a religious group, but as it would eliminate any power women might have over their reproductive choice it could not be in accord with the achievement of the "equality" the policy seeks.

*Extent.* The candidate is required to compile a personal statement "detailing" her DEI efforts which is to include "a discussion of the context, importance, and impact of their contributions along with their future plans for contributions." But the candidate is given no sense of how much time and effort is expected to be expended save that for want of DEI in research and teaching more would be expected in service. This vagueness extends to each of the faculty members serving

on the series of collective bodies involved in the tenure and promotion process who are to decide whether what the candidate has done satisfies the obligation.

#### CONCLUSION

The DEI mandate places research and teaching under the impress of an ideological end. Thus it compromises the exercise of academic freedom which, if encompassed within the first amendment, as it might, would be violative of it. However, the mandate allows the faculty member to avoid that consequence by more active engagement in expressive and associational activity in support the policy's preferred social ends. Thus the policy puts the faculty member to a Hobson's choice: either to accept an ideological constraint on research or teaching, or engage in officially approved political or ideological expression and association. It is difficult to conceive how this scheme could withstand constitutional muster.<sup>57</sup>

There may be something to be said for the aspirations that animate the DEI policy. But a university, of the sort envisaged by the 1915 *Declaration*, acts contrary to its' nature when it conditions its faculty's continuance on the compromise of academic freedom or the loss of civil liberties.<sup>58</sup> That much should have been at least intuitively obvious to those who pressed for, fashioned, and adopted the policy. A question worth pursuing is why it was not.

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<sup>57</sup> Mandated expression and expressional association is compassed as much by the First Amendment as forbidden expression and expressional association. *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 68 (2006). The constitutional reach is clear despite the relative paucity of law on favored speech and favored expressive association. That terrain is traversed in *Janus v. AFSCME*, 138 S. Ct. 2448, 2463–64 (2018) (references omitted):

We have held time and again that freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” . . . The right to eschew association for expressive purposes is likewise protected. . . .

Perhaps because such compulsion so plainly violates the Constitution, most of our free speech cases have involved restrictions on what can be said, rather than laws compelling speech. But measures compelling speech are at least as threatening.

<sup>58</sup> To paraphrase Robespierre, if liberty, equality, and fraternity are not likely to be welcomed when brought at the point of a bayonet, neither would it be by those so bewepioned.

## APPENDIX

[*Excerpt from* Guide to Diversity, Equity and Inclusion (DEI) Work in the Promotion and Tenure Process (UIUC Provost Communication 9) (Mar. 28, 2022):]

The University System’s *Guiding Principles* recognize that DEI are fundamental to our institution: “The University of Illinois System has the privilege and responsibility to cultivate the immense talents of diverse students, faculty, staff, and leaders. Healthy relationships—defined by mutual respect, trust, and an expectation of transparency and fair treatment—are the collective responsibility of all our members; no one can afford to be a bystander when it comes to ensuring full participation of everyone in every sphere of our campus communities. . . . Diversity of backgrounds, perspectives, and experiences enriches campus conversations in and out of the classroom, inspires our creative endeavors, and drives innovative solutions to the world’s problems.”

Our campus strategic plan, *The Next 150*, puts DEI at the center of our shared vision: “We will be leaders in advancing diversity and equity that will contribute to creating an institution committed to excellence in discovery, teaching, and research, and a climate where all can achieve their highest aspirations in a safe and welcoming environment.”

A faculty member’s DEI contributions will be related to their scholarly expertise and/or role as an instructor or administrator at the University. Regardless of their area of scholarship, *all* faculty can make efforts toward enhancing DEI. How an individual faculty member decides to do so will vary, as will the extent of their efforts. The University recognizes that DEI contributions will be more central for some faculty than others.

Examples of DEI activities in the research, teaching, and service domains are provided in the tables in the following pages. Within each domain, activities can be at the individual, programmatic, or institutional level. Some activities may cut across domains or levels. The examples provided in the tables are not normative or prescriptive but rather illustrative of the type of work that may contribute to the DEI mission within the broader context of a faculty member’s research, teaching, and service. It is *not* expected that any individual faculty member will perform DEI activities in all domains or at all levels.

Research Examples	Individual Activities	Programmatic Activities	Institutional Activities
Addressing equity and inclusion in research	<p>A law professor studies how bankruptcy law is applied differently to Blacks and whites</p> <p>A history professor studies the history of discrimination against Evangelical Christians</p>	<p>An engineer develops a large-scale collaboration to identify the best way to deliver efficient, inexpensive WIFI to rural areas</p> <p>A Psychology professor leads a research team of faculty and community members that develops and evaluates a STEM education program for Black and Latinx youth</p>	<p>A campus institute director establishes a research initiative addressing issues of racial inequity in the local community</p> <p>Faculty from across campus begin a new interdisciplinary initiative to understand how factors, such as socioeconomic status, religious affiliation, and age, shape perspectives on misinformation in the media</p>
Studying individuals from groups historically marginalized and/or underrepresented in an area	<p>An agricultural faculty member studies mental health among members of farming communities in the Quad cities area.</p> <p>An education professor studies first generation college students' feelings of exclusion at an elite university</p>	<p>An English professor organizes an annual summer workshop on the work of transgender authors</p> <p>An anthropologist brings together scholars studying the storytelling practices of indigenous people</p>	<p>A labor and employment relations professor establishes a campus-wide gender in higher education research initiative</p> <p>Faculty studying children's development work with the local park district to set up a research site in a facility serving families impacted by trauma and violence in their home and community</p>

<p>Examining perspectives of people from groups historically marginalized and/or underrepresented in research; addressing questions of interest to communities historically marginalized and/or underrepresented in academia</p>	<p>A biology professor creates a system within their lab to ensure that perspectives of students from groups historically marginalized and/or underrepresented shape research questions, design, and interpretation</p> <p>A sociologist includes citizen scientists from an inner-city neighborhood in every stage of research on understanding violence in affecting the citizens in the community</p>	<p>An environmental studies faculty engages with council members of tribal groups in the Southwest to co-develop multiple environmental impact studies</p> <p>A dance professor assembles a company to conduct performances that bring together perspectives and voices of community members from groups historically marginalized and/or underrepresented in the arts</p>	<p>A communications professor forms an advisory panel that includes individuals from various backgrounds to provide University-wide guidance on social media practices</p> <p>Science faculty develop a program around best practices in mentoring to support all team members, particularly members of historically marginalized and/or underrepresented in the discipline</p>
<p>Enhancing one's own and colleagues' knowledge and skills through various professional development opportunities on any of the above types of research or other types of research related to DEI</p>	<p>A medical school professor attends a workshop on culturally responsive approaches to recruit groups underrepresented in medical research</p> <p>An economics professor attends a workshop on how environmental policies create health issues in underdeveloped countries</p>	<p>A political scientist facilitates a workshop on how to study governments in underdeveloped countries underrepresented in research</p> <p>A computer scientist develops and leads a workshop to help the field better study fairness and transparency in machine learning</p>	<p>An engineering faculty member develops and delivers a workshop for assistant professors on campus that focuses on enhancing intergroup communication skills as they lead lab groups</p>

Teaching Examples	Individual Activities	Programmatic Activities	Institutional Activities
Inclusion of diverse perspectives and scholars in instruction	<p>DEI efforts of individual faculty in the context of their specific research programs or classes</p> <p>A physicist revises an undergraduate course to develop students' awareness and understanding of the work of scholars from groups historically marginalized and/or underrepresented in physics</p> <p>An information science professor invites guest speakers in a graduate course to share perspectives from different religious and nonreligious groups on how they conceive "truth"</p>	<p>DEI work establishing or providing significant leadership through formalized programs</p> <p>A history professor creates a student advisory panel to provide input into the representation of diverse perspectives in courses department wide</p>	<p>DEI work contributing to strengthening institutional policy or practice</p> <p>Faculty from across campus create University-wide guidelines to help instructors create an inclusive and equitable classroom environment</p>
Incorporation of equity and inclusion elements in teaching	<p>An agriculture professor integrates readings and discussion on themes of equity and inclusion within a course on mental health</p> <p>A chemistry professor uses practices to ensure all class members feel included during group work</p>	<p>A speech and hearing professor makes pedagogical innovations to a course taught by multiple instructors to increase educational access for disabled students</p> <p>Several mathematics professors analyze historical grade data and run focus groups with women students to investigate gender equity concerns</p>	<p>A library professor leads a task force identifying and communicating key practices for STEM instructors across campus to promote equity and inclusion</p> <p>A special education professor develops a guide for campus on strategies to support autistic students enrolled in their courses</p>

<p>Recruitment, mentoring, and/or support of undergraduate and/or graduate students from groups historically marginalized and/or underrepresented in academia</p>	<p>An astronomy professor sponsors a McNair Scholar Program student</p> <p>A business faculty organizes events or mentors a registered student organization (RSO) to build community for students from groups historically marginalized and/or underrepresented</p>	<p>An English professor facilitates a workshop in their department on how to support first-generation college students</p> <p>A Linguistics professor establishes alternative strategies to recruit people of color as graduate students in the department</p>	<p>Several faculty write a grant for campus-wide professional development, community building, and financial support for graduate students from groups historically marginalized and/or underrepresented in STEM</p> <p>A social work faculty establishes a summer pipeline program for high school students from households with low income</p>
<p>Professional development about culturally responsive and inclusive learning environments</p>	<p>A classics professor participates in an anti-racist curriculum discussion group</p> <p>A media professor includes a module in their course on the history of media coverage of issues that impact LGBTQ+ communities in the Midwest</p>	<p>An anthropology professor organizes a monthly discussion for faculty across campus on effectively teaching a U.S. Minorities Cultures (USMC) course.</p> <p>A kinesiology professor leads a session for their colleagues on understanding and implementing Disability Resource and Educational Services (DRES) accommodations and supports in their courses</p>	<p>Several master instructors design a workshop for faculty from across campus to enhance their teaching practices around DEI</p> <p>An education faculty serves on a task force to identify how to evaluate instructors' culturally responsive and inclusive teaching practices</p>

<b>Service Examples</b>	<b>Individual Activities</b>	<b>Programmatic Activities</b>	<b>Institutional Activities</b>
Recruiting, advocating for, and/or supporting students and/or faculty from groups historically marginalized and/or underrepresented	<p>A crop sciences professor serves a diversity advocate on a staff or faculty search</p> <p>A woman electrical engineering professor mentors women graduate students not in her lab around professional development issues</p>	<p>A philosophy professor chairs a committee to examine departmental policies and practices that may create bias in mentoring graduate students</p> <p>An economics faculty leads a workshop for their colleagues on diversity and equity in the promotion and tenure process</p>	A group of biology professors applies for and implements a grant for hiring and supporting STEM faculty from groups historically marginalized and/or underrepresented in STEM
Outside of the instructional context, working with students and/or community members from groups historically marginalized and/or underrepresented in academia	<p>A business faculty helps students by sponsoring a newly-formed Latinx business group</p> <p>A computer scientist helps a local high school establish a Girls Who Code club</p>	<p>A fine arts faculty partners with a local community organization to bring the arts into small urban communities</p> <p>A vet med professor works with Extension to develop strategies to communicate with hard-to-reach communities on domestic animal care</p> <p>A business professor catalyzes expansion of accounting and leadership education for incarcerated individuals by collaborating with an ongoing</p>	<p>An interdisciplinary team or faculty sets up a grant program to which residents of local neighborhoods facing economic challenges can apply for funding for novel solutions to address issues in their communities</p> <p>A group of faculty works with the local refugee welcome center to establish a project with an effort to support recently arrived refugees learn to start businesses in the community</p>

		education justice initiative project	
Other efforts to foster DEI on campus and/or in one's field	<p>A chemistry professor organizes seminars, workshops, or informal discussions about supporting the growing number of non-traditional students who are enrolling in the undergraduate courses in the department</p> <p>An East Asian studies faculty member leads a mentoring group for junior faculty underrepresented in SLCL [School of Literatures, Cultures, and Linguistics—ed.]</p>	Computer science and education professors serve as guest co-editors for a special issue of a professional journal focused on equity in computer science in middle and high schools	<p>A political scientist embeds DEI in their professional organization's mission, programming, and fundraising</p> <p>Several faculty develop a program to work with the University financial aid office to analyze data to identify the financial aid packages most effective in ensuring students obtain their degrees in four years</p>